NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 33

20 APRIL 1977

---

3 AUGUST 1977

RALEIGH
1978

CITE THIS VOLUME

33 N.C. App.

TABLE OF CONTENTS

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge
WALTER E. BROCK

Judges

DAVID M. BRITT
NAOMI E. MORRIS
FRANK M. PARKER
R. A. HEDRICK
EARL W. VAUGHN
ROBERT M. MARTIN
EDWARD B. CLARK
GERALD ARNOLD

Retired Chief Judge
RAYMOND B. MALLARD

Retired Judge
HUGH B. CAMPBELL

Clerk
FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

Director
BERT M. MONTAGUE

Assistant Director
FRANKLIN FREEMAN, JR.

APPELLATE DIVISION REPORTER
RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER
SHERRY M. COCHRAN

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
3	ROBERT D. ROUSE, JR.	Farmville
4	Vacant	
5	BRADFORD TILLERY	Wilmington
	JOSHUA S. JAMES	Wilmington
6	PERRY MARTIN[1]	Rich Square
7	GEORGE M. FOUNTAIN	Tarboro
	JOHN WEBB	Wilson
8	ALBERT W. COWPER	Kinston

Second Division

9	HAMILTON H. HOBGOOD	Louisburg
10	JAMES H. POU BAILEY	Raleigh
	A. PILSTON GODWIN, JR.	Raleigh
	EDWIN S. PRESTON, JR.	Raleigh
11	HARRY E. CANADAY	Smithfield
12	E. MAURICE BRASWELL	Fayetteville
	D. B. HERRING, JR.	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	Vacant	
	THOMAS H. LEE	Durham
15	D. MARSH MCLELLAND	Burlington
16	HENRY A. MCKINNON, JR.	Lumberton

Third Division

17	JAMES M. LONG	Yanceyville
18	WALTER E. CRISSMAN	High Point
	CHARLES T. KIVETT	Greensboro
	W. DOUGLAS ALBRIGHT	Greensboro
19	THOMAS W. SEAY, JR.	Spencer
	HAL HAMMER WALKER	Asheboro
20	JOHN D. MCCONNELL	Southern Pines
21	WILLIAM Z. WOOD	Winston-Salem
	HARVEY A. LUPTON	Winston-Salem
22	ROBERT A. COLLIER, JR.	Statesville
23	JULIUS A. ROUSSEAU	North Wilkesboro

Fourth Division

DISTRICT	JUDGES	ADDRESS
24	RONALD W. HOWELL	Marshall
25	SAM J. ERVIN III	Morganton
	FORREST A. FERRELL	Hickory
26	FRED H. HASTY	Charlotte
	WILLIAM T. GRIST	Charlotte
	FRANK W. SNEPP, JR.	Charlotte
	KENNETH A. GRIFFIN	Charlotte
27	JOHN R. FRIDAY	Lincolnton
	ROBERT W. KIRBY	Cherryville
	ROBERT E. GAINES	Gastonia
28	HARRY C. MARTIN	Asheville
	ROBERT D. LEWIS	Asheville
29	J. W. JACKSON	Hendersonville
30	LACY H. THORNBURG	Webster

SPECIAL JUDGES

ROBERT R. BROWNING	Greenville
RALPH A. WALKER	Greensboro
ROBERT L. GAVIN	Pinehurst
JAMES M. BALEY, JR.	Asheville
DONALD L. SMITH	Raleigh
RONALD BARBEE	Greensboro
WILLIAM THOMAS GRAHAM	Winston-Salem
DAVID I. SMITH	Burlington

EMERGENCY JUDGE

WALTER W. COHOON	Elizabeth City

[1] Resigned 13 November 1977.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
	GRAFTON G. BEAMAN	Elizabeth City
2	HALLETT S. WARD (Chief)	Washington
	CHARLES H. MANNING	Williamston
3	CHARLES H. WHEDBEE (Chief)	Greenville
	HERBERT O. PHILLIPS III	Morehead City
	ROBERT D. WHEELER	Grifton
	E. BURT AYCOCK, JR.	Greenville
	NORRIS C. REED, JR.	New Bern
4	KENNETH W. TURNER (Chief)	Rose Hill
	WALTER P. HENDERSON	Trenton
	STEPHEN W. WILLIAMSON	Kenansville
	E. ALEX ERWIN III	Jacksonville
5	GILBERT H. BURNETT (Chief)	Wilmington
	N. B. BAREFOOT	Wilmington
	JOHN M. WALKER	Wilmington
6	JOSEPH D. BLYTHE (Chief)	Harrellsville
	NICHOLAS LONG	Roanoke Rapids
	ROBERT E. WILLIFORD	Lewiston
7	GEORGE BRITT (Chief)	Tarboro
	ALLEN W. HARRELL	Wilson
	TOM H. MATTHEWS	Rocky Mount
	BEN H. NEVILLE	Whitakers
8	JOHN PATRICK EXUM (Chief)	Kinston
	W. MILTON NOWELL	Goldsboro
	HERBERT W. HARDY	Maury
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Fremont
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	LINWOOD T. PEOPLES	Henderson
	BEN U. ALLEN	Henderson
	CHARLES W. WILKINSON	Oxford

DISTRICT	JUDGES	ADDRESS
10	GEORGE F. BASON (Chief)	Raleigh
	S. PRETLOW WINBORNE	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	STAFFORD G. BULLOCK	Raleigh
	GEORGE R. GREENE	Raleigh
	JOHN HILL PARKER	Raleigh
11	ROBERT B. MORGAN, SR. (Chief)	Lillington
	W. POPE LYON	Smithfield
	WOODROW HILL	Dunn
	ELTON C. PRIDGEN	Smithfield
12	DERB S. CARTER (Chief)	Fayetteville
	JOSEPH E. DUPREE	Raeford
	COY E. BREWER, JR.	Fayetteville
	GEORGE STUHL	Fayetteville
	CHARLES LEE GUY	Fayetteville
13	FRANK T. GRADY (Chief)	Elizabethtown
	J. WILTON HUNT, SR.	Whiteville
	WILLIAM E. WOOD	Whiteville
14	E. LAWSON MOORE (Chief)[1]	Durham
	J. MILTON READ, JR.[2]	Durham
	SAMUEL F. GANTT	Durham
	WILLIAM G. PEARSON[3]	Durham
15A	JASPER B. ALLEN, JR. (Chief)	Burlington
	THOMAS D. COOPER, JR.	Burlington
	WILLIAM S. HARRIS	Graham
15B	STANLEY PEELE (Chief)[4]	Chapel Hill
	DONALD LEE PASCHAL	Siler City
16	SAMUEL E. BRITT (Chief)	Lumberton
	JOHN S. GARDNER	Lumberton
	CHARLES G. McLEAN	Lumberton
	B. CRAIG ELLIS	Laurinburg
17	LEONARD H. VAN NOPPEN (Chief)	Danbury
	FOY CLARK	Mount Airy
	GEORGE M. HARRIS[5]	Yanceyville
	FRANK FREEMAN	Dobson
18	EDWARD K. WASHINGTON (Chief)	Jamestown
	ELRETA M. ALEXANDER	Greensboro
	B. GORDON GENTRY	Greensboro
	JAMES SAMUEL PFAFF	Greensboro

DISTRICT	JUDGES	ADDRESS
	JOHN B. HATFIELD, JR.	Greensboro
	JOHN F. YEATTES	Greensboro
	ROBERT L. CECIL	High Point
	JOSEPH ANDREW WILLIAMS	Greensboro
19	ROBERT L. WARREN (Chief)	Concord
	L. T. HAMMOND, JR.	Asheboro
	FRANK M. MONTGOMERY	Salisbury
	ADAM C. GRANT, JR.	Concord
	L. FRANK FAGGART	Kannapolis
20	F. FETZER MILLS (Chief)	Wadesboro
	EDWARD E. CRUTCHFIELD	Albemarle
	WALTER M. LAMPLEY	Rockingham
	DONALD R. HUFFMAN	Wadesboro
21	ABNER ALEXANDER (Chief)	Winston-Salem
	GARY B. TASH	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. HARRILL, JR.	Winston-Salem
	R. KASON KEIGER	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
	HUBERT E. OLIVE, JR.	Lexington
	PRESTON CORNELIUS	Troutman
	ROBERT W. JOHNSON	Statesville
23	RALPH DAVIS (Chief)	North Wilkesboro
	SAMUEL L. OSBORNE	Wilkesboro
24	J. RAY BRASWELL (Chief)	Newland
	ROBERT HOWARD LACEY	Newland
25	LIVINGSTON VERNON (Chief)	Morganton
	JOSEPH P. EDENS, JR.	Hickory
	BILL J. MARTIN	Hickory
	SAMUEL McD. TATE	Morganton
	L. OLIVER NOBLE, JR.	Hickory
26	CLIFTON E. JOHNSON (Chief)	Charlotte
	P. B. BEACHUM, JR.	Charlotte
	L. STANLEY BROWN	Charlotte
	LARRY THOMAS BLACK	Charlotte
	DAVID B. SENTELLE[6]	Matthews
	JAMES E. LANNING	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	WILLIAM G. JONES	Charlotte

DISTRICT	JUDGES	ADDRESS
27	LEWIS BULWINKLE (Chief)	Gastonia
	J. RALPH PHILLIPS	Gastonia
	ARNOLD MAX HARRIS	Ellenboro
	DONALD E. RAMSEUR	Gastonia
	BERLIN H. CARPENTER, JR.	Gastonia
28	CARY WALTER ALLEN (Chief)	Asheville
	JAMES O. ISRAEL, JR.	Candler
	WILLIAM MARION STYLES	Black Mountain
	GARY A. SLUDER	Asheville
29	ROBERT T. GASH (Chief)	Brevard
	HOLLIS M. OWENS, JR.	Rutherfordton
	ZORO J. GUICE, JR.	Hendersonville
30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES McDARRIS	Waynesville
	JOHN J. SNOW, JR.	Murphy

[1] Retired 31 August 1977.
[2] Appointed Chief Judge 5 September 1977.
[3] Appointed 30 September 1977.
[4] Appointed Chief Judge 15 July 1977.
[5] Retired 31 October 1977.
[6] Resigned 6 November 1977.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

RUFUS L. EDMISTEN

Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

HOWARD A. KRAMER

Special Assistant to the Attorney General

JOHN A. ELMORE

Senior Deputy Attorneys General

JAMES F. BULLOCK
ANDREW A. VANORE, JR.
ROBERT BRUCE WHITE, JR.

Deputy Attorneys General

JEAN A. BENOY
MILLARD R. RICH, JR.
WILLIAM W. MELVIN

Special Deputy Attorneys General

MYRON C. BANKS
T. BUIE COSTEN
JACOB L. SAFRON
EUGENE A. SMITH
JAMES B. RICHMOND
HERBERT LAMSON, JR.
WILLIAM F. O'CONNELL
JOHN R. B. MATTHIS
EDWIN M. SPEAS, JR.
WILLIAM A. RANEY, JR.
LESTER V. CHALMERS, JR.
ANN REED
ROBERT P. GRUBER

Assistant Attorneys General

CLAUDE W. HARRIS
WILLIAM B. RAY
WILLIAM F. BRILEY
THOMAS B. WOOD
CHARLES M. HENSEY
ROBERT G. WEBB
RICHARD N. LEAGUE
ROY A. GILES, JR.
JAMES E. MAGNER, JR.
H. AL COLE, JR.
Guy A. HAMLIN
ALFRED N. SALLEY
GEORGE W. BOYLAN
RALF F. HASKELL
CHARLES J. MURRAY
WILLIAM W. WEBB
I. B. HUDSON, JR.
ROBERT R. REILLY, JR.
RICHARD L. GRIFFIN
JAMES M. WALLACE, JR.
ARCHIE W. ANDERS
JESSE C. BRAKE
DAVID S. CRUMP
DANIEL C. OAKLEY
GEORGE J. OLIVER
ELIZABETH C. BUNTING
HARRY E. BUNTING
ALAN S. HIRSH
SANDRA KING
ACIE L. WARD

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	THOMAS S. WATTS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3	ELI BLOOM	Greenville
4	WILLIAM H. ANDREWS	Jacksonville
5	WILLIAM ALLEN COBB	Wilmington
6	W. H. S. BURGWYN, JR.	Woodland
7	FRANKLIN R. BROWN	Tarboro
8	DONALD JACOBS	Goldsboro
9	CHARLES M. WHITE III	Warrenton
10	BURLEY B. MITCHELL, JR.	Raleigh
11	JOHN W. TWISDALE	Smithfield
12	EDWARD W. GRANNIS, JR.	Fayetteville
13	LEE J. GREER	Whiteville
14	ANTHONY BRANNON	Durham
15A	HERBERT F. PIERCE	Graham
15B	WADE BARBER, JR.	Pittsboro
16	JOE FREEMAN BRITT	Lumberton
17	ALLEN D. IVIE, JR.	Eden
18	E. RAYMOND ALEXANDER, JR.	Greensboro
19	JAMES E. ROBERTS	Kannapolis
20	CARROLL R. LOWDER	Monroe
21	DONALD K. TISDALE	Clemmons
22	H. W. ZIMMERMAN, JR.	Lexington
23	MICHAEL A. ASHBURN	Wilkesboro
24	CLYDE M. ROBERTS	Marshall
25	DONALD E. GREENE	Hickory
26	PETER S. GILCHRIST	Charlotte
27A	JOSEPH G. BROWN	Gastonia
27B	W. HAMPTON CHILDS, JR.	Lincolnton
28	ROBERT W. FISHER	Asheville
29	M. LEONARD LOWE	Caroleen
30	MARCELLUS BUCHANAN III	Sylva

CASES REPORTED WITHOUT PUBLISHED OPINION

CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

Case	*Reported*	*Disposition in Supreme Court*
Acker v. Barnes	33 N.C. App. 750	Denied, 293 N.C. 360
Big Bear v. City of High Point	33 N.C. App. 563	Allowed, 293 N.C. 360
Booker v. Everhart	33 N.C. App. 1	Allowed, 293 N.C. 159
Brokers, Inc. v. Board of Education	33 N.C. App. 24	Denied, 293 N.C. 159
Clark v. Clark	33 N.C. App. 404	Allowed, 293 N.C. 159
Coca-Cola Co. v. Coble, Sec. of Revenue	33 N.C. App. 124	Allowed, 293 N.C. 159
Drummond v. Drummond	33 N.C. App. 240	Denied, 292 N.C. 728
Food Marketing Corp. v. Insurance Co.	33 N.C. App. 297	Denied, 293 N.C. 253
Hall v. Piedmont and Crawley v. Piedmont	33 N.C. App. 637	Denied, 293 N.C. 360
Higher Ed. Assistance Corp. v. Andrews	33 N.C. App. 240	Denied, 292 N.C. 729
Hoover v. Kleer-Pak	33 N.C. App. 661	Denied, 293 N.C. 360
Indian Trace Co. v. Sanders	33 N.C. App. 386	Denied, 293 N.C. 253
In re Etheridge	33 N.C. App. 585	Denied, 293 N.C. 253
Insurance Co. v. Walker	33 N.C. App. 15	Denied, 293 N.C. 159
McDowell v. Davis	33 N.C. App. 529	Denied, 293 N.C. 360 Appeal Dismissed
McRae v. Moore	33 N.C. App. 116	Denied, 293 N.C. 160
Maness v. Bullins	33 N.C. App. 208	Denied, 293 N.C. 160
Oil Co. v. Cleary	33 N.C. App. 212	Allowed, 293 N.C. 160
Perry v. Perry	33 N.C. App. 139	Denied, 292 N.C. 730
Pipkin v. Thomas & Hill, Inc.	33 N.C. App. 710	Allowed re Damages, 293 N.C. 361
State v. Adams	33 N.C. App. 637	Denied, 293 N.C. 361
State v. Agnew	33 N.C. App. 496	Allowed, 293 N.C. 361
State v. Atkinson	33 N.C. App. 247	Denied, 292 N.C. 730 Appeal Dismissed

Case	*Reported*	*Disposition in Supreme Court*
State v. Bailey	33 N.C. App. 756	Denied, 293 N.C. 361
State v. Baldwin	32 N.C. App. 599	Denied, 293 N.C. 253
State v. Banks	33 N.C. App. 637	Denied, 293 N.C. 361
State v. Bass	33 N.C. App. 240	Denied, 292 N.C. 730 Appeal Dismissed
State v. Baum	33 N.C. App. 633	Denied, 293 N.C. 253
State v. Becraft	33 N.C. App. 709	Denied, 293 N.C. 362
State v. Bell	33 N.C. App. 607	Denied, 293 N.C. 254 Appeal Dismissed
State v. Bembery	33 N.C. App. 31	Denied, 293 N.C. 160
State v. Boomer	33 N.C. App. 324	Denied, 293 N.C. 254
State v. Boone	33 N.C. App. 378	Denied, 293 N.C. 254
State v. Bost	33 N.C. App. 673	Denied, 293 N.C. 254
State v. Brothers	33 N.C. App. 233	Denied, 293 N.C. 160
State v. Brown	33 N.C. App. 84	Denied, 292 N.C. 731
State v. Camp	33 N.C. App. 404	Denied, 293 N.C. 161
State v. Cole	33 N.C. App. 48	Allowed, 292 N.C. 731
State v. Conrad	33 N.C. App. 638	Allowed, 293 N.C. 362 Appeal Dismissed
State v. Conyers	33 N.C. App. 654	Appeal Dismissed, 293 N.C. 362
State v. Dailey	33 N.C. App. 551	Denied, 293 N.C. 254
State v. Dailey	33 N.C. App. 600	Denied, 293 N.C. 362 Appeal Dismissed
State v. Dunlap	33 N.C. App. 638	Denied, 293 N.C. 362
State v. Earley	33 N.C. App. 636	Denied, 293 N.C. 161
State v. Ellis	33 N.C. App. 667	Denied, 293 N.C. 255
State v. Fleming	33 N.C. App. 216	Denied, 293 N.C. 161 Appeal Dismissed
State v. Flynn	33 N.C. App. 492	Denied, 293 N.C. 255
State v. Foster	33 N.C. App. 145	Denied, 293 N.C. 255
State v. Foster	33 N.C. App. 405	Denied, 293 N.C. 255
State v. Frazier	33 N.C. App. 757	Denied, 293 N.C. 363
State v. Freeman	33 N.C. App. 756	Denied, 293 N.C. 590

Case	*Reported*	*Disposition in Supreme Court*
State v. Green	33 N.C. App. 405	Denied, 293 N.C. 255
State v. Hardy	33 N.C. App. 722	Allowed, 293 N.C. 363
State v. Harris	33 N.C. App. 239	Denied, 292 N.C. 732
State v. Hart	33 N.C. App. 235	Denied, 293 N.C. 161
State v. Head	33 N.C. App. 494	Denied, 293 N.C. 363
State v. Hill	33 N.C. App. 636	Denied, 293 N.C. 256
State v. Hood	33 N.C. App. 404	Denied, 293 N.C. 162
State v. Huggins	33 N.C. App. 240	Denied, 293 N.C. 162
State v. Hyde	33 N.C. App. 636	Denied, 293 N.C. 162
State v. Lockett	33 N.C. App. 401	Denied, 293 N.C. 256
State v. Locklear	33 N.C. App. 647	Denied, 293 N.C. 363
State v. McKoy	33 N.C. App. 304	Allowed, 293 N.C. 256
State v. Medlin	33 N.C. App. 636	Denied, 293 N.C. 256
State v. Middlebrooks	33 N.C. App. 239	Denied, 293 N.C. 162
State v. Montgomery	33 N.C. App. 693	Denied, 293 N.C. 256 Appeal Dismissed
State v. Moorefield	33 N.C. App. 37	Denied, 292 N.C. 733 Appeal Dismissed
State v. Mosley	33 N.C. App. 337	Denied, 293 N.C. 162
State v. Musumeci	33 N.C. App. 88	Denied, 292 N.C. 733
State v. Patterson	33 N.C. App. 240	Denied, 293 N.C. 163
State v. Peacock	33 N.C. App. 637	Denied, 293 N.C. 257 Appeal Dismissed
State v. Riddle	33 N.C. App. 239	Denied, 292 N.C. 733
State v. Rogers	33 N.C. App. 757	Denied, 293 N.C. 363 Appeal Dismissed
State v. Rowe	33 N.C. App. 611	Denied, 293 N.C. 364 Appeal Dismissed
State v. Sanders	33 N.C. App. 284	Denied, 293 N.C. 257
State v. Simmons	33 N.C. App. 705	Denied, 293 N.C. 592
State v. Smith	33 N.C. App. 511	Denied, 293 N.C. 364 Appeal Dismissed
State v. Sorrells	33 N.C. App. 374	Denied, 293 N.C. 257
State v. Springs	33 N.C. App. 61	Denied, 293 N.C. 163

Case	*Reported*	*Disposition in Supreme Court*
State v. Staton	33 N.C. App. 270	Denied, 293 N.C. 257
State v. Tolbers	33 N.C. App. 638	Denied, 293 N.C. 364
State v. Travis	33 N.C. App. 330	Denied, 293 N.C. 163
State v. Vawter	33 N.C. App. 131	Denied, 293 N.C. 257
State v. Vinson	33 N.C. App. 638	Denied, 293 N.C. 258 Appeal Dismissed
State v. Williams	33 N.C. App. 397	Denied, 293 N.C. 258
State v. Yancey	33 N.C. App. 637	Denied, 293 N.C. 258
Trust Co. v. Morgan-Schultheiss and Poston v. Morgan-Schultheiss	33 N.C. App. 406	Denied, 293 N.C. 258
Utilities Comm. v. Farmers Chemical Assoc.	33 N.C. App. 433	Denied, 293 N.C. 258
Waters v. Humphrey	33 N.C. App. 185	Denied, 293 N.C. 163 Appeal Dismissed

DISPOSITION OF APPEALS OF RIGHT TO THE SUPREME COURT

Case	*Reported*	*Disposition on Appeal*
Comr. of Insurance v. Automobile Rate Office	30 N.C. App. 596	293 N.C. 365
Electric Service, Inc. v. Sherrod	32 N.C. App. 338	293 N.C. 498
Sales Co. v. Board of Transportation	32 N.C. App. 97	292 N.C. 437
Smith v. Powell, Comr. of Motor Vehicles	32 N.C. App. 563	293 N.C. 342
State v. Marsh	33 N.C. App. 239	293 N.C. 353
State v. Walters	33 N.C. App. 521	Pending
Thomas v. Ix & Sons	33 N.C. App. 350	Pending

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JAMES J. BOOKER AND OREN W. McCLAIN v. KOYT W. EVERHART AND KOYT W. EVERHART, SR., AND WIFE, BEATRICE M. EVERHART

No. 7621SC808

(Filed 20 April 1977)

1. **Bills and Notes § 20— holder of negotiable promissory note — verified complaint — affidavit of payee — failure to show nonexistence of issues of material fact**

Where plaintiffs' verified complaint stated a claim by the holders of a negotiable promissory note against the maker of the note, alleged assignment of the note by the payee for good and valuable consideration and agency for collection purposes, and had appended thereto the signed note, guaranty, assignment and agency for collection purposes, defendant maker and guarantors of the note were not entitled to summary judgment where an affidavit of the payee presented in opposition to the verified complaint failed to show the nonexistence of issues of material fact but instead raised issues of fact concerning the validity and purported revocation of the assignment.

2. **Rules of Civil Procedure § 19— note executed by husband to wife — wife's assignment — husband's default — wife not necessary party to action**

Where plaintiff attorneys represented the wife in arriving at a property settlement with her estranged husband, the husband executed a promissory note to the wife which his parents guaranteed, the wife assigned one-third of the amount of the note to plaintiff attorneys, and the husband subsequently refused to make payments on the note, the wife was not a necessary party in plaintiffs' action on the note instituted against the husband and the parents.

3. Army and Navy § 1; Trial § 3— defendant in service — continuance denied — no error

The trial court did not err in denying defendants' motion for a stay or continuance made pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 because defendant husband was stationed in the Philippines, since defendant volunteered for the service 14 months after the present action was instituted; there was no showing that defendant requested leave or would not be able to obtain leave to be present at trial; there was no showing that defendant would be prejudiced or his rights would be materially impaired by his absence, particularly in view of the fact that his deposition was taken prior to his enlistment in the Navy, in the presence of counsel for both parties to the litigation.

4. Rules of Civil Procedure § 26— defendant in Philippines — motion for deposition — cost placed on movant — motion quashed

Where defendants sought to take the deposition two weeks before trial of one defendant who was stationed with the Navy in the Philippines, the trial court did not abuse its discretion in requiring defendants to advance plaintiffs' counsel's travel and living expenses to enable his presence at the deposition or in ordering, in the alternative, that should defendants fail to provide the expense money, their notice to take defendant's deposition be quashed, since the court determined that two weeks was insufficient time to allow plaintiffs to engage local counsel and acquaint such counsel with the case; the party to be deposed failed to notify the court of his impending military duty and overseas service; he failed to have his deposition taken prior to volunteering for the Navy and being shipped overseas; he had already given a deposition in the case; and the court found that taking defendant's deposition would constitute unreasonable annoyance and oppression while placing undue burden and expense on the plaintiffs.

5. Uniform Commercial Code § 27— action on note — rights of third person — claiming by defaulting party and guarantors improper

Where plaintiff attorneys represented the wife in arriving at a property settlement with her estranged husband, the husband executed a promissory note to the wife which his parents guaranteed, the wife assigned one-third of the amount of the note to plaintiff attorneys and designated them as agents for collection, the husband subsequently refused to make payments on the note, and plaintiffs instituted this action against the husband and his parents, the trial court properly excluded evidence of the attorney-client relationship between the wife and plaintiffs and its legality, since that issue involved a claim or defense held by the wife who was not a party to the action against plaintiffs, and defendants could not raise her possible claim as a defense against the holders of the note. G.S. 25-3-306.

6. Principal and Agent § 3— agency coupled with interest — agency irrevocable — evidence of revocation excluded

Where plaintiffs were given a one-third interest in the note sued upon as well as authority to collect the note, their agency was coupled with an interest and was therefore irrevocable; since evi-

dence of revocation of agency would have been of no effect, exclusion of such evidence was harmless in an action to recover on the note.

7. **Bills and Notes § 19— defenses of undue influence and duress — hearsay evidence — exclusion proper**

In an action to recover on a note the trial court did not err in refusing to allow into evidence testimony pertaining to the defenses of undue influence and duress where the only evidence of threats was hearsay and there was no evidence that the alleged threats came from plaintiffs.

8. **Bills and Notes § 19— promissory note — execution under duress — insufficiency of evidence**

Where defendant husband sold parcels of property jointly owned by him and his wife by forging his wife's name on the deeds, and defendant subsequently entered into a property settlement agreement with the wife whereby she quitclaimed her interest in the property in return for a promissory note executed to her for a named sum, defendants' contention that the husband was coerced into executing the note by threats and pressure from the plaintiffs, who were the wife's attorneys, to have him criminally prosecuted and disbarred for the forgeries is without merit, since the only competent evidence concerning that issue was that in negotiating the property settlement, plaintiffs informed the husband that they knew he had signed his wife's name on the deeds unknown to her; they intended to protect her interest; that to do so they had prepared a letter to be sent to savings and loan associations involved in the real estate transactions informing them of the wife's legal interests in the property; and such action did not amount to duress but merely demonstrated an intent to enforce rights believed, in good faith, to belong to plaintiffs' client.

9. **Rules of Civil Procedure § 50— party having burden of proof — recovery not dependent on credibility of witnesses — directed verdict proper**

A directed verdict for the party with the burden of proof is not improper where his right to recover does not depend on the credibility of his witnesses, and the pleadings, evidence and stipulations show that there is no genuine issue of fact for jury consideration.

10. **Bills and Notes § 20— action on promissory note — directed verdict proper**

Trial court in an action on a promissory note properly granted a directed verdict in plaintiffs' favor where defendants' own evidence established default on the note and indorsement of the note and delivery to plaintiffs; moreover, claims and defenses of a third person not a party to the action which defendants attempted to raise on their own behalf did not constitute genuine issues for jury determination, nor did defendants carry their burden of proof in showing the affirmative defenses of failure of consideration, duress and undue influence.

APPEAL by defendants from *Rousseau, Judge.* Judgment entered 29 April 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 March 1977.

This appeal stems from a complex series of proceedings and circumstances involving the divorce of defendant Koyt Everhart, Jr. (Koyt, Jr.), and Jane Crater Everhart (Jane). On 1 May 1972 Koyt, Jr., and Jane entered into a deed of separation and property settlement, with Jane being awarded custody of their minor son and $900.00 a month alimony and child support. Prior to the divorce, Koyt, Jr., who was a licensed attorney, and Jane, who was attending graduate school, engaged in the real estate development business. Koyt, Jr., purchased land in both their names, had houses built on the land, and then sold the houses and lots to homebuyers. Jane would oversee the interior decoration and finishing of the houses.

After the divorce and at some time prior to August, 1972, Koyt, Jr., obtained custody of the son through civil action and informed Jane of his intent to cease further alimony and child support payments. On or about 3 August 1972 Jane first met with plaintiff Booker, an attorney, seeking legal advice concerning the return of her son and continuation of support payments. At that time Jane had no income or funds with which to pay hourly attorney's fees. At the subsequent trial in this matter, plaintiffs' evidence tended to show that Booker agreed to represent Jane on a one-fourth contingency fee basis but that he would have to consult with his law partner, co-plaintiff McClain, before firming up the fee arrangement. After that consultation Booker informed Jane that a one-third contingency fee would be required because representation of her would likely cause a diminution of his partner's substantial real estate practice with Koyt, Jr.'s father, who was also in the real estate development and home building business. Jane agreed.

Plaintiffs discovered that Koyt, Jr., had sold twenty-two parcels of property jointly owned by Koyt, Jr., and Jane by forging her name on the deeds. Jane had been unaware of these transactions when the original separation agreement between her and Koyt, Jr., had been executed.

Plaintiffs instituted negotiations with Koyt, Jr., and his counsel. The results were twofold. First, custody of the child was restored to Jane, and support payments were resumed. Secondly, a supplemental property settlement was agreed to, whereby Jane quitclaimed her interest in the twenty-two parcels of property valued at approximately $500,000.00 in return for a promissory note executed on 30 October 1972 to Jane or

her order in the amount of $150,000.00 payable in eighteen yearly installments without interest. Plaintiffs required security on the note. To that end Koyt, Jr., obtained a guaranty from his parents, who are co-defendants in the present action. The guaranty, endorsed by the parents, was attached to the note.

On 6 December 1972 Jane signed a paper which was then attached to the note and which assigned to plaintiffs a one-third interest in the notes "[f]or services rendered and for future collection services that might be rendered . . ." and which also designated them as agents for the collection of the yearly installments. Jane also delivered the note into the possession of the plaintiffs. Koyt, Jr., made the first payment of $12,500.00 by its due date of 31 December 1972. Plaintiffs retained one-third of that amount and delivered the remainder to Jane.

By 31 December 1973 Jane apparently experienced a change of heart. She allegedly wrote plaintiffs informing them that she no longer desired their representation and no longer required them as agents for collection purposes. She also purportedly cancelled the debt on a copy of the note. Koyt, Jr., notified plaintiffs that he would make no further payments on the note. When the installment came due and was not paid, plaintiffs notified the guarantors that their principal had defaulted. No payment was forthcoming, whereupon plaintiffs declared the entire amount due as provided in the note and instituted suit against Koyt, Jr., and his parents.

In their verified complaint of 8 March 1974, plaintiffs alleged that defendants owed them $137,500.00 on the promissory note executed by Koyt, Jr., and guaranteed by the parents. One-third ($45,833.33) was due them as assignees of the note, and two-thirds ($91,666.67) was due them on behalf of Jane, who had authorized them to collect. Prior to answering, the defendants moved to dismiss on the grounds of failure to state a claim upon which relief could be granted and for failure to join a necessary party. In support of their motion, defendants submitted an affidavit by Jane which stated that plaintiffs undertook her representation without setting a fee, that later a one-fourth contingency fee was set, and that subsequently plaintiffs increased the fee to one-third of any property settlement reached with Koyt, Jr. Jane further stated that she thought the fee was too high, but she acquiesced. Prior to the suit she decided the promissory note was unfair and therefore cancelled

her copy of the note and allegedly terminated the plaintiffs' collection authority. Defendants' motion was denied.

The defendants filed their answer in May, 1974, admitting execution of the note and guaranty but alleging duress, failure of consideration, invalidity of the assignment, and illegality of the fee arrangement. Sometime after May, 1974, plaintiffs took Koyt, Jr.'s deposition. His counsel was present and asked questions. At sometime prior to May, 1975, Koyt, Jr., volunteered for military service in the Navy. On 26 May 1975 he was assigned to duty in the Philippines, where he remained through trial.

On 2 December 1975 plaintiffs moved for summary judgment. The trial court granted defendants a continuance until after 1 January 1976 as to hearing on plaintiffs' motion. In the latter part of January plaintiffs renewed their motion for summary judgment, to which defendants filed response on 26 January 1976. On 30 January 1976 defendants moved that the case be entirely removed from the trial calendar pursuant to 50 U.S.C. App., Section 521 (the Soldiers' and Sailors' Civil Relief Act of 1940), on the grounds that defendant Koyt, Jr., would be absent from trial. On 20 February 1976 the trial court denied plaintiffs' motion for summary judgment, denied defendants' motion to remove, and, on its own motion, set trial for 26 April 1976 because plaintiffs and defendants could not agree on a trial date.

On 1 April 1976, a month after the trial date had been set and one month prior to trial, defendants gave notice to take Koyt, Jr.'s deposition on 13 April 1976 at Subic Bay in the Philippines. Plaintiffs immediately sought a protective order requesting approximately a $9,000.00 payment from defendants to cover travel expenses and attorney's fees for attending Koyt, Jr.'s deposition. On 9 April 1976 the trial court granted a protective order, required defendants to advance $2,500.00 to plaintiffs for travel expenses, and, in the alternative, quashed the notice to take deposition should defendants fail to make the advance.

Defendants did not make the advance, and therefore Koyt, Jr.'s deposition was not taken. At trial evidence was presented by both plaintiffs and defendants. At the close of evidence the trial court granted plaintiffs' motion for a directed verdict and entered judgment for plaintiffs in the amount of $45,833.33 plus

interest. That award represented plaintiffs' interest in the note. The trial court dismissed the claim as to the amount due Jane. Defendants appealed.

Hudson, Petree, Stockton, Stockton & Robinson, by Norwood Robinson and Steven E. Philo, for plaintiffs.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William C. Raper, for defendants.

BROCK, Chief Judge.

Defendants bring forward seven assignments of error for argument on appeal. In the seventh assignment of error defendants contend that the trial court erred in denying their motions to dismiss the action. This argument is without merit.

Defendants made their motions under G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief could be granted and Rule 12(b)(7) for failure to join a necessary party. The motions were made prior to answer and were supported by an affidavit from Jane. Since matters outside the pleadings were presented to the trial court, the motion under Rule 12(b)(6) is treated as one for summary judgment under G.S. 1A-1, Rule 56, and the test then is whether there exists a genuine issue of material fact and whether movant is entitled to judgment as a matter of law. *Smith v. Smith,* 17 N.C. App. 416, 194 S.E. 2d 568 (1973).

[1] Plaintiffs' complaint was verified. On its face it stated a claim by the holder of a negotiable promissory note against the maker of said note. Appended to the complaint were the signed note, guarantee, assignment and indorsement to collect. The plaintiffs allege assignment from Jane for good and valuable consideration and agency for collection purposes. In counterpoint to the verified complaint is Jane's affidavit which stated that the assignment represented a fee arrangement entered into and increased after plaintiffs had undertaken to represent Jane, making such assignment, defendants argue, illegal. The affidavit also stated that Jane had revoked plaintiffs' agency.

Whether the defendants could raise a third party's defenses to the assignment is discussed *infra,* but at a minimum Jane's affidavit, when measured against plaintiffs' verified complaint, serves only to raise issues of fact concerning the assignment and revocation of agency rather than show the nonexistence of issues of material fact.

[2] Defendants' motion to dismiss for failure to join a necessary party, namely Jane, was also properly denied. Plaintiffs' complaint states a claim by the holder of a negotiable instrument against the maker and guarantor. There is no showing on the face of the complaint nor in defendants' motion and supporting affidavit that Jane is a necessary party under G.S. 1A-1, Rule 19(a), united in interest with either party to the action, or that the claim cannot be determined without prejudice to her rights under Rule 19(b).

[3] In their fifth assignment of error defendants contend that the trial court erred in denying a stay or a continuance in the proceedings after their motion made pursuant to 50 U.S.C. App., Section 521, the Soldiers' and Sailors' Civil Relief Act of 1940. While the Act mandates a continuance of a trial where military service would cause a party to be absent, it also empowers the trial judge to deny the continuance if, in his opinion, "the ability of the plaintiff to prosecute the action or defendant to conduct his defense is not materially affected by reason of his military service." The discretion lodged in the trial judge has been interpreted so as to prevent a party from using the provisions of the Act to shield his own wrongdoing or lack of diligence. *Boone v. Lightner,* 319 U.S. 561, 87 L.Ed. 1587, 63 S.Ct. 1223 (1943), *reh. denied* 320 U.S. 809, 88 L.Ed. 489, 64 S.Ct. 26 (1943); *Graves v. Bednar,* 167 Neb. 847, 95 N.W. 2d 123, 75 A.L.R. 2d 1056 (1959); *Glick Cleaning & Laundry Co. v. Wade,* 206 Ark. 8, 172 S.W. 2d 929 (1943).

The facts before the trial court on the motion to stay the proceedings indicate that Koyt, Jr., was not called to military service but volunteered. He was shipped to the Philippines on 26 May 1975, some fourteen months after the present suit was instituted against him on 8 March 1974. There is no showing in the affidavit Koyt, Jr., submitted in support of the motion that he requested leave or would not be able to obtain leave to be present at trial. Nor is there a showing in his affidavit, beyond a mere conclusory statement, of the ways his defense would be prejudiced or his rights materially impaired by his absence. Furthermore, his deposition had been taken in May, 1974, in the presence of counsel for both parties to the litigation. Koyt, Jr., was a licensed attorney in North Carolina at the time suit was brought and at the time he volunteered for military service, yet he took no steps to seek a speedy determination of the case prior to reporting for active duty.

The above-enumerated facts were incorporated in findings of fact by the trial court in its order denying the stay. The trial court also found that Koyt, Jr.'s absence would not materially prejudice his defense. The court's findings were substantially supported in the record. Koyt, Jr.'s attempted use of the Soldiers' and Sailors' Civil Relief Act was one of policy and strategy rather than one caused by the necessities of military service and, as such, was improper. *Boone v. Lightner, supra.* The trial court did not abuse its discretion in denying the stay.

[4] In their sixth assignment of error defendants argue that the trial court erred in quashing defendants' notice to take Koyt, Jr.'s deposition. On 24 February 1976 after denying defendants' motion for a stay, the trial court set 26 April 1976 as the trial day. Over a month later, on 1 April 1976, defendants gave notice that they intended to take Koyt, Jr.'s deposition on 13 April 1976 at Subic Bay in the Philippines. Upon plaintiffs' motion the trial court entered a protective order pursuant to G.S. 1A-1, Rule 26(c), requiring defendants to advance plaintiffs' counsel's travel and living expenses to enable his presence at the deposition. In the alternative, the court ordered that, should defendants fail to provide the expense money, their notice to take deposition be quashed.

The grounds stated by the trial court in rendering its order were that the two weeks between notice and deposition date were insufficient time for plaintiffs to engage local counsel and sufficiently acquaint such counsel with the case; that Koyt, Jr., failed to notify the court of his impending military duty and overseas service; that he failed to have his deposition taken prior to volunteering for the Navy and being shipped overseas; and that he had already given a deposition in the case. From these findings the trial court found that taking Koyt, Jr.'s deposition would constitute unreasonable annoyance and oppression while placing undue burden and expense on the plaintiffs. The trial judge's order under Rule 26(c) is discretionary and is reviewable only for abuse of that discretion.

Defendants argue that the judge abused his discretion in that his ruling denying a stay in the proceedings meant Koyt, Jr.'s absence at the trial. Therefore, the only way Koyt, Jr., could tell his side of the story was through a deposition. It is evident that Koyt, Jr.'s deposition was not for discovery pur-

poses but was for the purpose of recording his testimony solely for his benefit at the trial.

> "Without intending to state a rule upon the subject, it may be said that where one party proposes to take the deposition of a witness at a place far distant from the place of trial, not as discovery but to be offered as evidence in the case, the testimony being for his sole benefit and not sought by the other party, it would ordinarily seem fair that he should bear the cost of taking it. If it appears to the court that the testimony is of such nature that it warrants the presence at the taking of the deposition of the attorney who is to try the case it would seem also proper to include the traveling expenses of such attorney." 4 Moore's Federal Practice, ¶ 26.77, p. 548.

The trial judge, under Rule 26(c), may protect a party when justice requires, and that discretion is certainly exercisable in impelling and unusual circumstances. *Towe v. Sinclair Refining Company,* 188 F. Supp. 222 (D. Md. 1960). Here defendants seek to take the deposition of one of the defendants who is 10,000 miles away, who, as a lawyer, has an understanding of legal procedure, and who took no action to secure his own deposition from the time his answer was filed in May, 1974, until he was shipped abroad in May, 1975. We find no abuse of discretion in the trial court's protective order and the subsequent quashing of notice to depose when defendants chose not to comply.

[5] In defendants' assignments of error two through four, defendants argue that the court erred in excluding certain types of testimony. First, defendants attempted to introduce statements from Jane's affidavit and deposition pertaining to the attorney-client relationship between Jane and the plaintiffs. Defendants contend that the testimony would show the relationship to be illegal. That being so, the assignment to plaintiffs of a one-third interest in the note would be void, and the assignment would not serve as a basis for plaintiffs' action against defendants.

We need not here decide the legality *vel non* of the attorney-client relationship between Jane and the plaintiffs. That issue involves a claim or defense held by Jane, a third party, against the plaintiffs. The suit before this Court is between the maker of a negotiable note and the holder of same. Under G.S. 25-3-

306(d) "[t]he claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the person himself defends the action for such party." The Official Comment to G.S. 25-3-306 explains:

> "The contract of the obligor is to pay the holder of the instrument, and the claims of *other persons against the holder* are generally not his concern . . . The provision includes all claims for rescission of a negotiation, whether based on incapacity, fraud, duress, mistake, illegality, breach of trust or duty or any other reason." (Emphasis added.)

Jane has not intervened in this suit to allege her own claims or defenses against the plaintiffs. The defendants cannot raise her possible claim as defenses against the holder. Thus exclusion of her testimony pertaining to the illegality of the attorney-client relationship was not error.

The defendants next argue that the trial court erred in not allowing the introduction into evidence of testimony concerning Jane's grant of agency to the plaintiffs and her purported revocation of same. If there was error in excluding testimony concerning revocation, it was harmless error. The assignment and authority to collect were executed in the same document, signed by Jane, and physically attached to the note. In the document Jane assigned to the plaintiffs a one-third interest in the note itself. She stated that the assignment was made in return for services rendered and for future collection services that might be rendered by the plaintiffs. She also authorized all collections on the note to be made through them.

[6] When agency is coupled with an interest, it becomes irrevocable. Lee, N. C. Law of Agency and Partnership, § 93. The power to collect a debt is not ordinarily considered as a power coupled with an interest. However, the authority to collect a debt is coupled with an interest "where the agent acquires an actual interest in the subject matter itself, as distinguished from the proceeds thereof, and in such case the power is considered to be irrevocable." 3 Am. Jur. 2d, § 67, p. 469. Here the plaintiffs were given a one-third interest in the note itself, as well as the authority to collect it. Their agency is coupled with an interest and is therefore irrevocable. Since evidence of revocation would be of no effect, its exclusion would be harmless.

[7] In their third assignment of error concerning evidentiary rulings, defendants contend that the trial court erred in refusing to allow into evidence testimony pertaining to the defenses of undue influence and duress. The gist of defendants' argument is that Koyt, Jr., was coerced into executing the note to Jane by threats and pressure from the plaintiffs to have him criminally prosecuted and disbarred for forging his wife's name to certain deeds.

In *Link v. Link,* 278 N.C. 181, 194, 179 S.E. 2d 697, 704-05 (1971), the Supreme Court stated:

> " 'Duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under the circumstances which deprive him of the exercise of free will.' (Emphasis added.) (Citations omitted.) Unquestionably, an essential element of duress is a *wrongful* act or threat. (Citations omitted.) Ordinarily, it is not wrongful and, therefore, not duress for one to procure a transfer of property by stating in the negotiations therefor that, unless the transfer is made, he intends to institute or press legal proceedings to enforce a right which he believes, in good faith, that he has."

Where there is no coercion amounting to duress, undue influence may exist when the transfer, performance or other action results from the application of "moral, social or domestic" force such as to prevent free exercise of will or true consent. *Ibid.* at 196, 179 S.E. 2d at 706.

The only evidence pertaining to threats was elicited from the testimony of Koyt, Jr.'s mother and father and was to the effect that Koyt, Jr., told them, on one hand, that he would be disbarred and prosecuted and, on the other, that Koyt, Jr., told his parents that he had been told he would be disbarred and prosecuted if he did not make the note and they did not guarantee it. As evidence tending to show the truth of the assertion that the plaintiffs had threatened Koyt, Jr., his parents' testimony is clearly hearsay and was properly excluded. 1 Stansbury, N. C. Evidence, § 138, pp. 459-60. Furthermore, none of the testimony excluded by the trial court shows that it was the plaintiffs who threatened or even suggested disbarment proceedings or forgery prosecution.

[8] The only competent evidence concerning this issue was that in negotiating the supplemental property settlement, plaintiffs

informed Koyt, Jr., and his counsel that they knew Koyt, Jr., had signed his wife's name on the deeds, unknown to her; that they intended to protect her interest; and that to do so they had prepared a letter to be sent to savings and loan associations involved in the real estate transactions informing them of Jane's legal interests in the properties. Such action does not amount to duress but merely demonstrates an intent to enforce rights believed, in good faith, to belong to plaintiffs' client. *Link v. Link, supra.* Nor does such evidence establish undue influence in that at all times during the negotiations for the note and supplemental property settlement, Koyt, Jr., who was himself an attorney, was represented and advised by counsel.

In the last assignment of error to be considered, defendants contend that the trial court erred in granting a directed verdict in plaintiffs' favor at the close of all evidence. They argue that by denying material allegations in the plaintiffs' complaint, by raising affirmative defenses, and by presenting evidence thereon, they are entitled to go to the jury based on the reasoning in *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971). Defendants say that by denying material allegations in the complaint, issues of fact are raised upon which the plaintiffs have the burden of proof, and under *Cutts* the trial judge cannot direct a verdict in favor of a party with the burden of proof.

[9] While we adhere to the ruling in *Cutts,* we do not find defendants' arguments persuasive. In *Cutts* and the cases cited by defendants employing the *Cutts'* rationale, a party with the burden of proof on a genuine issue may not have a directed verdict, even if his evidence is uncontradicted, where his right to recover depends on the credibility of his own witnesses. *Id.* A directed verdict for the party with the burden of proof, however, is not improper where his right to recover does not depend on the credibility of his witnesses and the pleadings, evidence, and stipulations show that there is no "issue of genuine fact" for jury consideration. *Price v. Conley,* 21 N.C. App. 326, 204 S.E. 2d 178 (1974).

[10] The pleadings, evidence, and stipulations before the trial court estabish the following. Defendants denied plaintiffs' allegations that there had been an effective assignment of the note by Jane to plaintiffs and that plaintiffs were her agents. Defendants tried to show that the assignment was based on an illegal contract, thus voiding it, and that Jane had revoked the agency. As discussed *supra,* G.S. 25-3-306(d) prohibits the

maker of a note from asserting claims of a third person against the holder. These denials and proofs offered by defendants attempt to raise as matters of defense to their own liability on the note, defenses and claims of Jane that tend to show the rescission of her negotiation of the note to plaintiffs. We do not here comment on the validity of Jane's claims except to say that defendants were not entitled to raise them and that Jane did not, as she could have done, intervene. Since defendants could not raise Jane's defenses and claims, those claims do not constitute genuine issues for jury determination. As to the other material allegation denied, that defendants had defaulted, Koyt, Jr.'s own testimony in the form of statements made by him in his deposition establishes that he was notified by plaintiffs that payment was due in December, 1973, and that he would make no further payments. The plaintiffs' burden on the issue of default was met for them by defendants' own testimony. Where the moving party's burden on an issue is met by the testimony of the opposing party, directed verdict on that issue is permissible. *Price v. Conley, supra.*

The pleadings, stipulations, and evidence properly before the trial court showed a promissory note made by Koyt, Jr., payable to Jane or her order that was technically sufficient to constitute a negotiable instrument under G.S. 25-3-104. Physically attached to the note was a writing signed by Jane authorizing plaintiffs to collect the entire amount of the note. Since the writing purported to be "for collection purposes," it constituted a restrictive indorsement under G.S. 25-3-205. Defendants stipulated that the signatures on the note and guarantee were valid. They also stipulated that Jane signed the indorsement. Defendants' own testimony established that Jane had delivered the note into the possession of the plaintiffs. Delivery and indorsement make the plaintiffs holders of the note under G.S. 25-1-201(20). A holder has the right to enforce payment in his own name. G.S. 25-3-301. In a suit on a negotiable instrument, one who is a holder need only produce the instrument to recover on it, when the signatures are admitted. G.S. 25-3-307(2).

Up to this point plaintiffs have established their right to recover on the notes through documents and the stipulations and testimony of the defendants. The only bar to their recovery occurs if the defendants establish a defense. G.S. 25-3-307(2). Defendants have alleged failure of consideration, duress, and

undue influence. These defenses are affirmative defenses under G.S. 1A-1, Rule 8. Thus the burden of proof shifts to the defendants. With the right of the plaintiffs to recover established without recourse to the credibility of their own witnesses, a directed verdict under G.S. 1A-1, Rule 50, becomes proper against the defendants who have the burden on the affirmative defenses if their evidence is insufficient to carry those defenses to the jury. Sufficiency of evidence is a question of law to be determined by the court. *Prevatte v. Cabble,* 24 N.C. App. 524, 211 S.E. 2d 528 (1975).

Here defendants alleged failure of consideration for the making of the note but failed to introduce any evidence to establish that defense. Defendants did attempt to prove duress and undue influence. But for the reasons stated *supra,* the evidence offered to show unlawful or wrongful threats to Koyt, Jr., was inadmissible and properly excluded, while the remaining competent evidence was insufficient as a matter of law to establish either duress or undue influence. Since defendants' evidence was insufficient to create an issue of fact, directed verdict for the plaintiffs was proper.

For the reasons stated above, the judgment of the court below is

Affirmed.

Judges PARKER and ARNOLD concur.

RELIANCE INSURANCE COMPANY v. JAMES G. WALKER, KENNETH LEWIS, AND AETNA INSURANCE COMPANY

No. 767SC784

(Filed 20 April 1977)

1. **Appeal and Error § 44.1— failure to file brief — failure to bring exception forward**

The appeal of one defendant is dismissed for failure of such defendant to file a brief or to bring forward any exception by an assignment of error. Rules 10(a) and 14(d)(2) of the Rules of Appellate Procedure.

2. **Appeal and Error § 7— right to appeal — party not aggrieved**

A person injured when a gun in an insured's truck discharged was not a real party in interest and entitled to appeal a declaratory judg-

ment determining whether the insured's automobile liability policy and his homeowner's policy provided coverage for insured's liability for such injury where the injured person has not yet established insured's liability for the injury.

3. **Insurance § 90— automobile liability insurance — discharge of gun inside vehicle — use of vehicle**

An injury to a person standing outside the insured's truck when a rifle on a permanently mounted gun rack inside the truck cab discharged arose out of the use of the truck within the meaning of an automobile liability policy since the transportation of guns was one of the uses to which the truck had been put, and the shooting was a natural and reasonable incident or consequence of the use of the truck and was not the result of something wholly disassociated from, independent of and remote from the truck's normal use.

APPEAL by plaintiff and defendant Walker from *Webb, Judge.* Judgment entered out of session on 7 June 1976 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 9 March 1977.

This is a declaratory judgment action filed by plaintiff Reliance Insurance Company to determine liability for injuries sustained by defendant Walker while on the property of defendant Lewis. At the times herein involved, Lewis was insured by an automobile liability policy issued by plaintiff and by a homeowner's policy issued by Aetna. Plaintiff's policy provided in pertinent part:

"PART I—LIABILITY

Bodily Injury Liability Coverage; Property Damage Liability Coverage. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by any person;

. . .

arising out of the ownership, maintenance or use of the owned automobile . . .

. . .

Definitions. Under Part 1:

. . .

'*use*' of an automobile includes the loading and unloading thereof; . . ."

Aetna's homeowner's policy provided in pertinent part:

> *"This policy does not apply:*
>
> 1. *Under Coverage E—Personal Liability and Coverage F—Medical Payments to Others:*
>
> a. to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:
>
> . . .
>
> (2) any motor vehicle . . ."

On 28 October 1974, Lewis went hunting, driving his 1963 Dodge pickup which contained a gun rack permanently mounted inside the rear window of the truck's cab. After finishing his hunting, Lewis placed his loaded rifle in the gun rack, returned home, and parked the truck in his driveway. Walker assisted Lewis in loading trash in the rear of the truck for delivery to a nearby depository. The loaded gun remained in the truck's gun rack because Lewis and Walker intended to go hunting again after disposing of the trash.

After the trash was loaded onto the truck, Walker entered the cab on the passenger side and Lewis placed his three-year-old son on the seat in the driver's side. Walker stepped out of the truck briefly to allow another passenger to get in the cab. Lewis sat down in the driver's seat and, as he began to insert the keys into the ignition, his rifle, still in the gun rack, discharged and injured Walker as he stood beside the cab.

Walker filed an action against Lewis in Nash County Superior Court alleging damages of $150,000. Plaintiff subsequently filed the present action seeking a declaratory judgment as to whether Lewis or Walker is entitled to any coverage or protection under plaintiff's automobile policy and/or Aetna's homeowner's policy. On 7 June 1976, Webb, Judge, entered a judgment out of session which held that plaintiff's policy provided coverage but that Aetna's policy did not. Plaintiff and Walker appeal from that judgment.

Battle, Winslow, Scott and Wiley, P.A., by J. B. Scott, for plaintiff appellant.

Knox and Kornegay, by Howard A. Knox, Jr., for defendant Walker, appellant.

Young, Moore, Henderson and Alvis, by R. Michael Strickland, for defendant Aetna Insurance Company, appellee.

MORRIS, Judge.

APPEAL OF DEFENDANT KENNETH LEWIS

[1] After this case was docketed in the Court of Appeals but prior to oral arguments, Aetna moved to dismiss the appeal as to defendant Lewis. The record reveals that Lewis, along with plaintiff Reliance and defendant Walker, took exception to the judgment of 7 June and gave notice of appeal in open court. However, Lewis has failed to file a brief or to carry forward his exception by any assignment of error. Rule 10(a) of the North Carolina Rules of Appellate Procedure provides that ". . . the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal . . . and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. . . ." Rule 14(d)(2) of the Rules of Appellate Procedure provides that "[i]f an appellant fails to file and serve his brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative. . . ." For Lewis' failure to comply with the Rules of Appellate Procedure, Aetna's motion is granted, and Lewis' appeal is dismissed.

APPEAL OF DEFENDANT JAMES G. WALKER

[2] Defendant Walker has excepted to and assigned as error those portions of Judge Webb's judgment which hold that Aetna's homeowner's policy does not provide coverage for Walker's injuries. Aetna has moved to dismiss Walker's appeal, contending that he is not a real party in interest in the litigation and therefore may not appeal from the judgment. We agree.

G.S. 1A-1, Rule 17(a) of the North Carolina Rules of Civil Procedure provides that "[e]very claim shall be prosecuted in the name of the real party in interest . . . " Although Rule 17 by its terms applies only to parties plaintiff, the rule is applicable to parties defendant as well. 3A Moore's Federal Practice, § 17.07, pp. 226-27. *See also International Brotherhood of Teamsters v. Keystone Freight Lines, Inc.*, 123 F. 2d 326 (10th Cir. 1941); *Leppard v. Jordan's Truck Line*, 116 F. Supp. 130 (W.D.N.C. 1953). A real party in interest is ". . . a party who is benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in

the action involved merely, but *some interest in the subject matter of the litigation." Parnell v. Insurance Co.,* 263 N.C. 445, 448-49, 139 S.E. 2d 723, 726 (1965). (Emphasis supplied.) The real party in interest is the party who by substantive law has the legal right to enforce the claim in question. *White Hall Building Corp. v. Profexray Division of Litton, Industries, Inc.,* 387 F. Supp. 1202 (E.D. Penn. 1974).

Plaintiff, in its prayer for relief, asked the court to adjudge "[w]hether Kenneth Lewis or James G. Walker are (sic) entitled to any coverage or protection" under either the automobile liability or homeowner's policy. The clear purpose of the action is to determine which insurance company, if any, would be liable to indemnify Lewis and not to determine any possible liability to Walker. Since Walker has yet to establish any liability of Lewis for the shooting, this declaratory judgment action involves only Lewis, his automobile liability carrier, and his homeowner's liability carrier. At this point, Walker has no interest in the subject matter of the action nor does he have any substantive legal rights to enforce the court's determination of liability of either carrier. *See Merchants Mutual Casualty Co. v. Leone,* 298 Mass. 96, 9 N.E. 2d 552 (1937). Accordingly, he is not a real party in interest to this suit, and Aetna's motion to dismiss Walker's appeal is granted.

APPEAL OF PLAINTIFF RELIANCE INSURANCE COMPANY

After receiving the evidence, Judge Webb incorporated into his judgment the following:

"FINDINGS OF FACT:

(1) Kenneth Lewis was on October 28, 1974, the owner of a 1963 Dodge pickup truck.

(2) On that date there was in effect a policy of automobile liability insurance issued by the plaintiff, Reliance Insurance Company, insuring Kenneth Lewis against those liabilities described in the policy; and said automobile liability insurance policy provided in pertinent part as follows:

PART I—LIABILITY

BODILY INJURY LIABILITY COVERAGE; PROPERTY DAMAGE LIABILITY COVERAGE to pay on behalf of the In-

sured all sums which the Insured shall become legally obligated to pay as damages because of:

> A. bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury,' sustained by any person;
>
> . . .
>
> arising out of the ownership, maintenance or use of the owned automobile. . . .
>
> * * *
>
> DEFINITIONS. Under Part 1:
>
> 'USE' of an automobile includes the loading and unloading thereof.

(3) On October 28, 1974, there was in effect a policy of insurance, commonly referred to as a 'homeowners policy,' issued by the defendant Aetna Insurance Company insuring Kenneth Lewis against those liabilities described in and not excluded by the said policy; and said policy provided in pertinent part as follows:

> This policy does not apply:
>
> 1. Under coverage E—personal liability and coverage F—medical payments to others:
>
> > a. To bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of:
> >
> > . . .
> >
> > (2) Any motor vehicle. . . .

(4) The pickup truck owned by Kenneth Lewis was equipped with a gun rack permanently mounted inside the rear window of the truck cab for the purpose of transporting firearms.

(5) Early in the morning of October 28, 1974, Kenneth Lewis had placed his rifle in the truck gun rack for the purpose of taking it hunting. After hunting for several hours in the morning he replaced the rifle in the gun rack and drove to his home to pick up some trash to take to a nearby depository. James Walker assisted Kenneth Lewis in loading the trash onto the pickup truck. While the trash

was being loaded, Lewis' rifle remained in the gun rack because Lewis and Walker intended to go hunting again after the trash was dumped. Lewis and Walker had hunted together in the past and on such occasions both had transported their rifles in the truck gun rack.

(6) After the trash was loaded onto the pickup truck, James Walker entered the passenger side of the cab and Kenneth Lewis placed his three-year-old son in the driver's side.

(7) James Walker, desiring to ride next to the window, then stepped out of the truck briefly to allow another passenger to enter. Kenneth Lewis then sat down in the driver's seat with his keys in his hand and was in the process of inserting them into the ignition switch when the rifle mounted in the gun rack discharged and injured Walker who was then standing beside the cab and holding the door open for the other passenger to enter."

Although plaintiff excepted to certain findings of fact and entered assignments of error thereon, he failed to argue or cite any authority for these assignments in his brief. These assignments of error are therefore deemed abandoned. North Carolina Rules of Appellate Procedure, Rule 28(b)(3). Moreover, plaintiff concedes that there is evidence in the record to support the findings of fact in the judgment. Plaintiff contends, however, that the findings do not support the conclusions of law. More specifically, plaintiff excepts to the court's conclusion that Walker's injury "arose out of the 'operation and use' " of Lewis' truck on the ground that there was no finding of a causal connection between the discharge of the rifle and the operation or use of the truck.

In *Casualty Co. v. Insurance Co.*, 16 N.C. App. 194, 192 S.E. 2d 113, *cert. den.*, 282 N.C. 425, 192 S.E. 2d 840 (1972), this Court said:

" . . . The words 'arising out of' are not words of narrow and specific limitation but are broad, general, and comprehensive terms effecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. There are words of much broader significance than 'caused by'. They are

> ordinarily understood to mean 'originating from', 'having its origin in,' 'growing out of,' or 'flowing from,' or in short, 'incident to," or 'having connection with' the use of the automobile. . . .
>
> The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. (Citation omitted.)" 16 N.C. App. at 198-99, 192 S.E. 2d at 118.

See also 7 Am. Jur. 2d, Automobile Insurance, § 82, p. 387.

[3] In the present case, insured's truck contained a gun rack which insured installed at the time the truck was purchased. The gun rack was permanently mounted to the truck's cab and had frequently been used by insured to transport rifles on hunting trips. Clearly, the transportation of guns was one of the uses to which the truck had been put. Thus, the shooting was a "natural and reasonable incident or consequence of the use" of the truck and was not the result of something "wholly disassociated from, independent of, and remote from" the truck's normal use.

Moreover, we do not find *Raines v. Insurance Co.*, 9 N.C. App. 27, 175 S.E. 2d 299 (1970), cited by plaintiff, as controlling authority in this case. In *Raines*, plaintiff's intestate was shot and killed while he sat in the front seat of a car belonging to defendant's insured. At the time of the shooting, the car was stopped, the engine was off and one door was open. Foster Williams sat in the driver's seat and was playing with a pistol. There was a sudden movement and the gun discharged, killing Raines. Defendant's policy covering the automobile provided for payment for damages "caused by accident and arising out of the ownership, maintenance or use of the automobile." The sole issue of the case was whether Raines' death was caused by an accident arising out of the use of the automobile in which he sat. The trial judge, sitting without a jury, held that it was not, and this Court affirmed, stating that " . . . [n]o causal

connection between the discharge of the pistol and the 'ownership, maintenance or use' of the parked automobile was shown, and this is required to afford recovery under the policy." 9 N.C. App. at 30, 175 S.E. 2d at 301. There was nothing in *Raines* to indicate that the car was or ever had been used for transportation of guns. Although the shooting took place inside the parked car, the accident was not so related to the car as to "arise out of" its use. Thus, the shooting in *Raines,* unlike that in the present case, was the result of a "cause wholly disassociated" from the use of the vehicle.

We have examined the other authorities cited by plaintiff in its brief and likewise find them to be inappropriate in the case *sub judice.* Suffice it to say that those cases do not involve a permanently mounted fixture in the vehicle found by the trial court to have been installed "for the purpose of transporting firearms."

The better practice would have been to include a specific finding in the judgment as to the existence of a causal connection between the shooting and the use of the truck. However, we have reviewed the judgment's conclusions of law in light of the evidence presented and hold that they have sufficient support. Accordingly, plaintiff's assignments are overruled.

It should be noted that we do not, by this decision, attempt to determine defendant Walker's rights, if any, against Lewis or against Aetna. Nor are we adjudicating Aetna's liability, if any, on the homeowner's policy. Since Walker lacked standing to appeal and Reliance did not attack the judgment's exoneration of Aetna, these issues simply are not before us at the present time.

The judgment is affirmed.

Judges VAUGHN and MARTIN concur.

BROKERS, INC. v. HIGH POINT CITY BOARD OF EDUCATION

No. 7618SC700

(Filed 20 April 1977)

Highways and Cartways § 9.3— construction contract — extra work — no change order executed — no extra compensation

In an action to recover for work performed in excess of that specified under the terms of a written contract between the parties for the building of a road, which work plaintiff alleged was necessary in order to complete performance of the work called for in the contract, the trial court properly granted defendant's motion for judgment n.o.v. where the parties' contract specifically provided that all changes in the work must be authorized by a written change order, and authorization to perform the extra work for which plaintiff sought compensation was expressly denied by defendant's rejection of plaintiff's requests for change orders on two separate occasions; moreover, plaintiff was not entitled to recover on the basis of quantum meruit or an implied contract, since an express contract precludes an implied contract with reference to the same matter.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 2 April 1975 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 February 1977.

Plaintiff, a grading contractor, brought this action to recover $29,700.00 for work performed in excess of that specified under the terms of a written contract between the parties, which work plaintiff alleged was necessary in order to complete performance of the work called for in the contract. Defendant answered and denied liability for the extra work.

At trial before a jury, plaintiff presented evidence, largely through the testimony of Dolen Bowers, its president, to show the following: Broker's, Inc., plaintiff herein, is engaged in the grading and paving business. Bowers has been in this type of business for 25 years, the last 15 years having been in his present capacity at Brokers, Inc. In January 1973, Bowers acquired a copy of a document entitled "SPECIFICATIONS FOR ROUGH GRADING AND STORM DRAINAGE WORK FOR SCHOOL PARK DRIVE FOR THE HIGH POINT CITY BOARD OF EDUCATION." Basing his bid in part on this document, Bowers submitted on 16 January 1973 a bid of $41,203.00 for the job, in the name of Broker's, Inc., as contractor, which was accepted by defendant. On 19 January 1973, plaintiff and defendant executed a standard form contract which provided that the work was to begin 1 February

1973 and to end 31 May 1973. Plaintiff thereafter moved its men and equipment to the job site and began building the road by stripping off the topsoil and clearing the land of stumps and debris. After completing one section of the road, plaintiff began running into problems in June 1973 while working on the remaining section which was to be built across a field. After about one foot of topsoil had been stripped, the equipment began miring up when the undercut excavations specified by the contract were attempted. Plaintiff's employees discovered that "they had run into some very unusual soil and very unusual ground that evidently was full of springs that had been backfilled with mud or something." These subsoil conditions, which existed for some 1500 feet, were not apparent when the site had been examined by Bowers, as "it just looked like a field that somebody had farmed on and that it would be very, very good moving dirt; that it would be very easy to work. . . " ; however, the ground "was so wet you couldn't even walk through it," as people who tried "would mire up to their waist in some places." Upon discovering these subsoil conditions, Bowers met at the job site with Leon Schute, the architect in charge of the project, to discuss possible solutions to the problem encountered. At this meeting, Bowers asked Schute to "give him a change order to go ahead and take out an additional at least six foot deeper than his plans and specifications called for in order to be able to fulfill his contract and give him the compaction test that was specified and had to be met in the contract." Schute told Bowers that he had no authority to issue such a Change Order but that Bowers could request one from the Board of Education. On 11 July 1973 Bowers submitted for approval two requests for Change Orders: the requested Change Order # 1 would have provided for an average additional depth of six feet of undercut "from Station Number 1500 to Station Number 2100" at an additional cost of $17,934.00; the requested Change Order # 2 would have provided for an additional $5.90 per lineal foot be added to the contract price in order to install a French drain after the excavation in the requested Change Order # 1 had been completed. After being informed that both requested Change Orders had been rejected by the Board, Bowers told Schute that in his opinion the job could not be finished without this extra excavation and that a French drain would have to be installed to carry off the water in that area. Bowers then asked Schute if he could get a Change Order for a French drain, and again Schute told him to make a request. On 14 August 1973 Bowers re-

quested Change Order # 3 which would provide that the sum of $8.90 per lineal foot be added to the original contract in order to furnish and install a French drain. Getting no immediate response on this matter, plaintiff pulled off the job for "about a month or a month and a half" until Bowers received a call from Schute on 19 September 1973 in which Schute stated:

> "Well, I've got a change order for you on the French drain but they won't give me as much as you wanted, but they will let me go up to a thousand feet of French drain."

After receiving this oral confirmation for a Change Order covering the French drain, plaintiff began installation of the drain; however, according to Bowers, approximately 6 feet and in some places as much as 12 feet more than the undercut line shown on the plans was excavated "in order to get the equipment in even to install a French drain." On 10 October 1973, a written Change Order for the installation of the French drain at an added contract price of $10,502.00 was approved by defendant. On 27 November 1973, Bowers sent to Schute a "Request for Change Order # 2" seeking to recover an additional $29,700.00 for the removal of 5400 cubic yards of unsuitable soil and for the replacement of the same amount by suitable soil. By letter dated 4 December 1973, the request for compensation for the extra excavation was denied. On 29 January 1974 a meeting was held, attended by Bowers, Schute, and two members of defendant Board of Education, at which it was demanded that plaintiff finish the job. Bowers testified that he assented to this demand after "they agreed that if I would go ahead and finish the job, that this would not jeopardize my rights to come back to the court and ask for this money."

After plaintiff rested, defendant's motion for a directed verdict was denied. Defendant then presented evidence to show the following:

Plaintiff neither requested nor picked up the plans and specifications for the project, which had been available for inspection by all prospective bidders since 25 October 1972, until 15 January 1973, the deadline for submitting bids being 2:00 p.m. on 16 January 1973. Included in said plans and specifications was a sheet entitled "Instructions to Bidders" which recommended the following as to the examination of the site:

> "Before submitting a proposal, bidders should visit the site of the work, fully inform themselves as to all conditions

and limitations, and shall include in the proposal a sum to cover cost of all items included in the Contract."

Also contained in this package were drawings of the proposed project, including one of the area in controversy labeled S-2. At the bottom of this drawing appeared the following language:

"This area is new fill over old lake bottom. Excavate to limit of cut shown on plans and to depth shown on profile. Backfill to new street subgrade and compact in accordance with specification requirements."

Of the six bids received, plaintiff's bid of $41,203.00 was the lowest; the other five bids ranged from a high of more than $75,000.00 to a low of more than $57,000.00. Appearing before the defendant Board on 18 January 1973, Bowers sought to increase plaintiff's bid by $9,846.00 based on alleged miscalculation. The Board denied his request, giving him the option to forfeit his 5% bid bond of approximately $2,000.00 or to take the contract. Plaintiff elected to keep the contract. Although the contract required that the work be substantially completed within 120 days and contained a penalty clause specifying $25.00 per day liquidated damages for the failure to do so, the clause was not invoked, despite the fact that plaintiff took around 450 days to complete the project, because of bad weather at the beginning of the contract period and because of the water problems encountered at the site requiring the installation of the French drain. The Change Orders first requested were denied because defendant felt that the installation of the French drain would sufficiently dry out the area to enable plaintiff to fulfill its contract obligations, and that procedure was the only additional work which was necessary. After the French drain was installed, the problem seemed to clear up. Plaintiff was never authorized to do the extra undercutting below the excavation line set forth in the plans and specifications, and in Schute's opinion, it was not necessary to cut below the excavation line to install the French drain.

At the conclusion of defendant's evidence, defendant renewed its motion for directed verdict, which the court again denied. The case was submitted to the jury, which answered issues in favor of plaintiff. Defendant's motion for judgment notwithstanding the verdict was allowed, and plaintiff appealed.

Stephen E. Lawing for plaintiff appellant.

D. P. Whitley, Jr., and Hugh C. Bennett, Jr., for defendant appellee.

PARKER, Judge.

The only question presented is whether the trial court erred in granting judgment for defendant notwithstanding the verdict returned by the jury for plaintiff. We find no error.

When passing on a motion for judgment notwithstanding the verdict, the same standards applicable to a motion for directed verdict are to be applied. Thus, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to support a verdict for plaintiff. *Hargett v. Air Service* and *Lewis v. Air Service,* 23 N.C. App. 636, 209 S.E. 2d 518 (1974).

The evidence in the present case, when viewed in the light most favorable to the plaintiff, shows the following: Pursuant to a set of plans and specifications prepared by defendant's architect, plaintiff submitted the low bid on 16 January 1973 on a grading and storm drainage project for a new road to be built in Hight Point. Three days thereafter the parties executed a standard form contract for this job. While performing the undercut excavations specified by the contract, plaintiff began experiencing extremely miry subsoil conditions not apparent on the surface of the land. Because plaintiff's heavy equipment could not move over such terrain, plaintiff submitted two requests for Change Orders for defendant's consideration pursuant to Article 22 of the contract which provides:

"ARTICLE 22
CHANGES IN THE WORK

22.1 The Owner without invalidating the Contract may order Changes in the Work consisting of additions, deletions, or modifications, the Contract Sum and the Contract Time being adjusted accordingly. All such Changes in the Work shall be authorized by written Change Order signed by the Owner or the Architect as his duly authorized agent.

22.2 The Contract Sum and the Contract Time may be changed only by Change Order."

By these requests, plaintiff sought permission to undercut an additional six feet and to install a French drain after making the additional excavation; both requests for Change Orders were denied by defendant. Finding that the job could not be finished unless the water was drained from the area, plaintiff proposed another Change Order for the installation of a French drain. Plaintiff was notified verbally by defendant's architect to proceed on the work requested, which plaintiff did. However, in installing the French drain plaintiff excavated from 6 feet to 12 feet more than the specifications called for. After most of this portion of the work was completed, defendant sent plaintiff written approval of its Change Order request to install the French drain at an addition of $10,502.00 to the contract price. A little over a month later, plaintiff requested an additional $29,700.00 for the extra excavation work, which request defendant denied. After the parties agreed to waive Article 15 of the Contract, which provides that "[a]ll claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration," plaintiff finished the project and then brought this action seeking compensation for the extra work.

We affirm the trial court's action in granting defendant's motion for judgment n.o.v. Where the language of a contract is plain and unambiguous the court rather than the jury will declare its meaning. *Yates v. Brown*, 275 N.C. 634, 170 S.E. 2d 477 (1969). Article 22 of the written contract specifically states that all "Changes in the Work shall be authorized by a written Change Order signed by the Owner or the Architect as his duly authorized agent," and that "[t]he Contract Sum and the Contract Time may be changed only by Change Order." All of the evidence shows that the only written Change Order issued in this case was the one which authorized installation of the French drain and which increased the contract price by $10,502.00. Plaintiff's contention that the owner should be bound to pay the contractor the additional cost for the excavation in excess of the contract specifications, absent a Change Order issued in the manner and as authorized in the contract between owner and contractor, is untenable. *See Electric Co. v. Newspapers, Inc.*, 22 N.C. App. 519, 207 S.E. 2d 323 (1974). Neither can we agree with plaintiff's argument that "[s]uch extra work was performed at the 'expressed or implied request' of the defendant," and therefore plaintiff should be entitled to recover on the basis of quantum meruit or an implied contract.

"It is a well established principle that an express contract precludes an implied contract with reference to the same matter." *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 713, 124 S.E. 2d 905, 908 (1962). "There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing." 66 Am. Jur. 2nd, Restitution and Implied Contracts, § 6, pp. 948, 949. *Campbell v. Blount*, 24 N.C. App. 368, 210 S.E. 2d 513 (1975), is distinguishable. In *Campbell* there was evidence that, while the work was in progress, the parties failed to adhere to the provisions in their written contract relative to desired changes in construction, thereby abandoning those provisions. Here, not only were the provisions relative to the changes in the construction project adhered to while work was in progress, but authorization to perform the very work for which plaintiff now seeks recovery was expressly denied to plaintiff by defendant's rejection of plaintiff's requests for Change Orders on two separate occasions.

That plaintiff encountered difficulties which it failed to anticipate when making its bid did not entitle it to the increased compensation it now seeks to recover. All bidders were notified that the area involved was "new fill over old lake bottom," and all were instructed to inspect the site before submitting their bids. The hazard encountered, subsurface soil conditions on which it was difficult to employ heavy equipment, was the type of risk which any bidder should have known he would be called upon to assume if his bid should be accepted. Moreover, that in plaintiff's judgment it was necessary for plaintiff to excavate deeper than called for in the specifications in order to complete its contract did not justify plaintiff in performing the excess excavation at defendant's expense. The proper depth of the cut to be made was an engineering decision, which defendant employed the architect to make. In excavating deeper than the architect's specifications provided, plaintiff simply performed work in excess of that called for in its written contract and which defendant not only did not request plaintiff to perform but which it twice notified plaintiff it would not authorize plaintiff to perform. Defendant is not liable for the unauthorized extra work for which plaintiff seeks to be compensated.

The judgment appealed from is

Affirmed.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. DAN JUNIOR BEMBERY

No. 761SC797

(Filed 20 April 1977)

1. **Searches and Seizures § 1— items in plain view — necessity for warrant**

Where contraband is discovered in plain view, it may not be necessary to obtain a warrant in order to seize the item since the discovery of the item, the possession of which is illegal, furnishes reasonable grounds for seizure within the intendment of the Fourth Amendment.

2. **Searches and Seizures § 1— items in plain view — applicability of Fourth Amendment — reasonableness**

The Fourth Amendment does apply to the seizure of items in plain view, and the standard by which the constitutionality of a warrantless seizure is judged is the same standard of reasonableness by which the constitutionality of a warrantless search is judged.

3. **Searches and Seizures § 1— tires in plain view — reasonableness of seizure**

The warrantless seizure of allegedly stolen tires for the purpose of taking them to the owner for identification was reasonable where officers received information from a reliable informant that two tires stolen from a car dealership were in the possession of defendant and that defendant was in the process of putting them on his car; some 35 to 40 minutes later officers saw defendant preparing to put the tires on his car; and the tires were in plain view and matched the description of the stolen tires.

4. **Larceny § 7— tires seized from defendant — identity as stolen tires**

There was sufficient evidence to identify tires found in defendant's possession as tires stolen from a truck on a car dealership lot where the owner identified the tires as the ones stolen and there was testimony that the tires seized from defendant were the same size and type as those stolen, their serial numbers matched the one of the spare tire left on the vehicle from which the tires were stolen, the tires seized and those stolen had never been driven on a highway, and there were indentations, scratches and markings on the rims of the seized tires which indicated they had previously been mounted.

State v. Bembery

APPEAL by defendant from *Cohoon, Judge.* Judgment entered 27 May 1976 in Superior Court, PERQUIMANS County. Heard in the Court of Appeals 10 March 1977.

Defendant pled not guilty to a charge of felonious larceny.

The State's evidence tended to show that on the morning of 21 March 1975, Cecil Winslow, the only Ford dealer in Perquimans County, discovered that someone had removed from a Ranchero GT truck on his lot four Goodyear H 70-14, wide tires, together with hubcaps, rims, trim rings, and lug nuts. The items had been on the truck when Winslow had left the night before. Winslow notified Sheriff Broughton of the theft and the type of tires and rims stolen. This information was relayed to Sheriff Toppin of Chowan County. On 25 March 1975 Sheriff Toppin received a phone call from an informant, who stated that two of the tires that had been taken from Mr. Winslow's lot were in the possession of the defendant and that he was putting them on his automobile at one Bond's house. Sheriff Toppin and SBI Agent William Godley drove to the house of one Bond about 35 to 40 minutes later where they found the defendant and his car. A tire was lying on the ground beside the car and another was in the open trunk. The tires matched the description given to Sheriff Toppin. The tires were taken to Mr. Winslow who identified them as the ones stolen. Testimony identifying the tires seized as those stolen will be related in the opinion. Defendant was then arrested.

The tires were introduced in evidence at trial. Defendant moved to suppress the evidence on the ground that it was illegally seized. Sheriff Toppin and Agent Godley testified on *voir dire;* the motion was then denied.

Defendant was found guilty of misdemeanor larceny, and appeals from judgment imposing imprisonment.

Attorney General Edmisten by Associate Attorney Catharine Biggs Arrowood for the State.

John V. Matthews, Jr., for defendant appellant.

CLARK, Judge.

The first issue on appeal is whether the seizure of the tires in plain view was in violation of the provision of the Fourth Amendment of the Constitution of the United States

prohibiting "unreasonable searches and seizures." (Defendant has not questioned that exigent circumstances existed to seize the tires without warrant.)

The brief for the State cites case law for the proposition that the Fourth Amendment does not apply where no search is made, but that the limits of reasonableness apply to a seizure without a search. Since the proscription that searches and seizures not be unreasonable is found in the Fourth Amendment, it is clear that the cases relied upon by the State cannot have so broad a meaning as some of their language would seem to allow. The implication that police officers have the right to seize any item which comes into their plain view at a place they have a right to be is fraught with danger and would sanction the very intrusions into the lives of private citizens against which the Fourth Amendment was intended to protect. The Fourth Amendment applies to seizures as well as to searches.

Warrantless seizures of contraband found in plain view have been approved by the United States Supreme Court. *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963); *United States v. Lee,* 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927). This principle was applied to the seizure of "mere evidence" in *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782 (1967), where clothing which matched the description of that worn by a robber was found in plain view while police were searching his home to arrest him. Although the court's main holding of the case is that "mere evidence" is not exempt from *search and seizure* under the Fourth Amendment, the court clearly was applying the Fourth Amendment to *seizure* of items discovered in plain view.

> ". . . The requirements of the Fourth Amendment can secure the same protection of privacy whether the search is for 'mere evidence' or for fruits, instrumentalities or contraband. There must, of course, be a nexus—automatically provided in the cases of fruits, instrumentalities or contraband—between the item to be *seized* and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. . . ." (Emphasis added.) 387 U.S. at 306-7, 87 S.Ct. at 1650, 18 L.Ed. 2d at 792.

See *Cardwell v. Lewis,* 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed. 2d 325 (1974), (plurality opinion found not unreasonable the seizure of paint scrapings from exterior of car and observation of tire tread design). The applicability of the Fourth Amendment to seizure of items found in plain view was forcefully enunciated in *Stanley v. Georgia,* 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed. 2d 542 (1969) (concurring opinion), wherein Justice Stewart wrote that the seizure, not the search, was unconstitutional, and that it was the particular purpose of the Fourth Amendment to protect the American people from "the general searches and unrestrained seizures that had been a hated hallmark of colonial rule. . . ." 394 U.S. at 569, 89 S.Ct. at 1250, 22 L.Ed. 2d at 552. See also *G. M. Leasing Corp. v. United States,* ____ U.S. ____, 97 S.Ct. ____, 50 L.Ed. 2d 530 (1977), (probable cause existed to seize automobiles in plain view); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), (plurality opinion limiting seizure of items in plain view to "incriminating objects"); *Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 2d 684 (1969); *Harris v. United States,* 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 (1968); *United States v. Story,* 463 F. 2d 326 (8th Cir. 1972), *cert. denied,* 409 U.S. 988, 93 S.Ct. 343, 34 L.Ed. 2d 254 (1972).

[1] The earliest North Carolina case which would allow the inference that the Fourth Amendment does not apply where there is a seizure without search is *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394 (1961), (seizure of contraband liquor discovered in plain view). The court quoted the following passage from 47 Am. Jur., Searches and Seizures § 20:

> " 'Where no search is required, the constitutional guaranty is not applicable. The guaranty applies only in those instances where the seizure is assisted by a necessary search. It does not prohibit a seizure *without a warrant* where there is no need of a search, *and* where the *contraband subject matter* is fully disclosed and open to the eye and hand.' " (Emphasis added.) 254 N.C. at 502, 119 S.E. 2d at 397.

However accurate this passage may have been at the time of its writing, in the light of the most recent Supreme Court decisions it can mean no more than this: Where *contraband* is discovered in plain view, it may not be necessary to obtain *a warrant* in order to seize the item since the discovery of the

item, the possession of which is illegal, furnishes reasonable grounds for seizure within the intendment of the Fourth Amendment. See Annot., 29 L.Ed. 2d 1067 (1972). The quoted passage seems to have confused the scope of the warrant requirement of the Fourth Amendment with the scope of the Amendment itself. It would be erroneous to reason, as the quoted passage did, that because seizure *without warrant* of some items discovered in plain view is constitutional, therefore no warrantless seizure of an item discovered in plain view is unconstitutional by reason of the Fourth Amendment. We note that the quoted passage is not contained in the sections devoted to the plain view doctrine in the current edition. See 68 Am. Jur. 2d, Searches and Seizures, §§ 23, 88 (1973).

The principle of *Giles* has been applied to contraband in other cases. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972), (principle confined to seizure of contraband discovered in plain view); *State v. Simmons,* 278 N.C. 468, 180 S.E. 2d 97 (1971), (seizure must be reasonable); *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970), (principle confined to seizure of contraband discovered in plain view); *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967). Subsequent cases have also applied this principle to evidence other than contraband for which reasonable grounds to seize existed: (1) weapons and instrumentalities, *State v. Legette,* 292 N.C. 44, 231 S.E. 2d 896 (1977); *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972), (principle confined to seizure of "suspicious objects" discovered in plain view); *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969); *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95 (1967); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Parks,* 14 N.C. App. 97, 187 S.E. 2d 462 (1972); (2) fruits or evidence, *State v. Riddick,* 291 N.C. 399, 230 S.E. 2d 506 (1976); *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Newsom,* 284 N.C. 412, 200 S.E. 2d 617 (1973), (seizure must be reasonable); *State v. Sharpe,* 284 N.C. 157, 200 S.E. 2d 44 (1973); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968), (seizure must be reasonable); *State v. Shue,* 16 N.C. App. 696, 193 S.E. 2d 481 (1972); *State v. Thompson,* 15 N.C. App. 416, 190 S.E. 2d 355 (1972).

[2] We conclude that the Fourth Amendment does apply to the seizure of items discovered in plain view and that the standard by which the constitutionality of a warrantless seizure is judged is the same standard of reasonableness by which the constitutionality of a warrantless search is judged. *State v. Hoffman, supra.*

[3] In the present case the theft of the tires was discovered on 22 March 1975. Sheriff Broughton notified Sheriff Toppin of the theft and the type and size of tires. On 25 March 1975 Sheriff Toppin received a phone call from an informant who previously had furnished reliable information. The informant stated that two of the tires that had been taken from the Winston-Blanchard car lot were in the possession of the defendant and that he was in the process of putting them on his automobile at that time at one Bond's house. Approximately 35 to 40 minutes later Sheriff Toppin and Agent Godley arrived at the house of one Bond and saw the defendant apparently preparing to put the tires on his car. The tires were in plain view. The tires matched the description Sheriff Toppin received from Sheriff Broughton. In these circumstances, the seizure of the tires for the purpose of taking them to Mr. Winslow for identification was reasonable. *State v. Alford, supra; State v. Newsom, supra; State v. Howard, supra; State v. Shue, supra; State v. Thompson, supra.* Defendant's first assignment of error is without merit.

[4] The second issue is whether there was sufficient evidence to identify the property seized from the defendant as the property stolen from the Winslow-Blanchard Motor Company. Possession of stolen property shortly after the time of theft raises a presumption of the possessor's guilt of larceny of such property. *State v. Allison,* 265 N.C. 512, 144 S.E. 2d 578 (1965). The presumption does not apply until the identity of the property is established. *State v. Jones,* 227 N.C. 47, 40 S.E. 2d 458 (1946). The tires seized from defendant were the same size and type as those stolen; their serial numbers matched the one of the spare tire left on the vehicle from which the tires were stolen; the tires seized and those stolen had never been driven on a highway; there were indentations, scratches, and markings on the rims of the tires seized which indicated they had been mounted; the color of the wheels seized was the same as the color allotted for wheels of a Ranchero GT. Mr. Winslow identified the tires and rims as the ones that were on his

vehicle when he left the car lot on 21 March 1975. We conclude that there was sufficient evidence to establish that the tires seized from defendant were those stolen from Winslow-Blanchard.

Defendant relies on *State v. Foster*, 268 N.C. 480, 151 S.E. 2d 62 (1966), but that case is distinguishable from the present one. There the owner of the stolen property could not identify the property introduced in evidence as his. In the present case Mr. Winslow identified the property as his and enumerated several recognizable features of the tires, which the owner in *Foster* did not do. Stolen property often consists of brand name products with few unique features. The presence of several shared identifying features may provide a sufficient basis to determine that the property possessed by the accused is that which was stolen. *State v. Hales*, 32 N.C. App. 729, 233 S.E. 2d 601 (1977); *State v. Crawford*, 27 N.C. App. 414, 219 S.E. 2d 248 (1975). Defendant's second assignment of error is without merit.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE HENRY MOOREFIELD

No. 7630SC828

(Filed 20 April 1977)

1. **Constitutional Law § 45— defendant conducting own defense — attorney as advisor**

In a prosecution for feloniously burning a building, defendant's contention that the trial court erred in assigning counsel to assist him and then failing to inform him adequately of the limitations under which counsel would have to operate is without merit where the record revealed that defendant requested and was given the right to employ counsel in an advisory capacity, and that he not only agreed to but insisted upon the limited participation by the attorney.

2. **Constitutional Law § 45— appearance in propria persona — representation by counsel — alternative right**

A party has the right to appear in *propria persona* or by counsel, but the right is alternative, and one has no right to appear both by himself and by counsel; however, the trial court in its discretion also

may permit the defendant to conduct the defense and at the same time be furnished with the advice of a court-appointed attorney.

3. **Indictment and Warrant § 1— defendant tried upon indictment — probable cause for arrest warrant — effect**

Where defendant was tried upon an indictment, the question of probable cause to issue the warrant under which he was initially arrested had no effect on the jurisdiction of the trial court.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 30 January 1976, in Superior Court, HAYWOOD County. Heard in the Court of Appeals 16 March 1977.

Defendant pled not guilty to the charge of feloniously burning a building known as G's No. 3 Adult Book Shop in the Town of Maggie Valley on 1 August 1975, a violation of G.S. 14-62.

In a hearing before Judge Thornburg on 13 November 1975, defendant stated, "I am going to defend myself." He further told the court that he would accept an attorney selected by the court with the understanding that he could "set up my own defense" and that the court would determine a reasonable fee. After recess the court notified defendant that Attorney John Jay had been requested to assist him. On 17 November the defendant, with Mr. Jay present, was heard on his motion that Judge Thornburg disqualify himself and his motion for change of venue or special venire on the ground of substantial publicity in the Thirtieth Judicial District. In an order denying both motions Judge Thornburg made findings in which he traced the proceedings from the inception of the case, including the finding that defendant requested that counsel be assigned, at defendant's expense, "to assist him in the preparation and trial of the case with the understanding that he (defendant) assumed the full, primary responsibility for his defense of the case."

At trial the evidence for the State tended to show that in April 1975, Irma Ring rented to defendant a building in the Town of Maggie Valley for a gift shop; defendant proceeded to operate an adult book store in the building; in July she started ejectment proceedings, and after hearing, defendant was ejected at the end of July. On 1 August 1975 sometime after 5:00 p.m. Burton Edwards, age 11, and Herbie Savage, age 13, were outside a restaurant across the street from the bookstore. They saw defendant and another man drive up in a reddish-brown car with a white top and park in front of the

bookstore. They saw defendant unlock the door, remove a box from the trunk, and carry it inside. Defendant returned a few minutes later with the box and placed it in the trunk. The other man then came out, defendant locked the door, and they drove off. About three to five minutes later, the boys saw smoke coming out of the store. Clyde Rich drove by the store about 8:30 p.m., saw a maroon car with a white top parked in front of the store, and 20 to 30 minutes later heard the fire siren. Notice of the fire was received by the fire department at 8:45 p.m., and the fire truck arrived at the scene at 8:50 p.m. It took several hours to extinguish the fire. An examination of the building revealed that the doors were locked, that there were 19 charred holes in the floor and that the electrical wiring beneath the floor was insulated and intact. A jug containing gasoline was found on an unburned part of the floor. On cross-examination the town fire chief testified that a black, dense smoke came from the building "which would make me have the opinion that it was started with an oil-base type of material or something of this nature." An investigating officer testified that when he went to the defendant's house some time after the fire, a red car with a white top was parked on the premises.

Defendant called as his witnesses town aldermen, police officers, district attorneys, news reporters, and others, and attempted to show by them a conspiracy to run him out of the state, but none of the witnesses called admitted that they entered into a conspiracy.

The jury found defendant guilty as charged. From judgment imposing imprisonment, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General T. Buie Costen and Associate Attorney Nonnie F. Midgette for the State.

Wesley F. Talman, Jr., for defendant appellant.

CLARK, Judge.

Upon his arrest on 6 August 1975, the defendant delivered to the arresting officer a petition for habeas corpus. Thereafter, defendant made numerous motions before, during, and after trial. Further, he filed a civil action in the federal court against Superior Court Judge Harry C. Martin, the Sheriffs of Buncombe and Catawba Counties, and various local officials alleg-

ing violations of his constitutional rights and praying for damages in the sum of $1,200,000.00. He also petitioned the federal court to stay all proceedings in the state court. Many of his motions and petitions were based on his claim that there was a conspiracy among state and local officials to run him out of the state. The adverse rulings of the court were not the result of any lack of vociferous determination on his part. The defendant attempted to show violation of various constitutional rights and a conspiracy against him by judges, law enforcement officers, and other government officials. Throughout the trial the trial judge exhibited admirable patience and judicious restraint. The trial lasted three days. Only once was defendant found in contempt of court. The record on appeal exceeds 400 pages. Defendant offered the testimony of 23 witnesses, including the district attorney, and the court allowed him to recall 14 of them for further examination. Despite this effort, the defendant was unable to elicit any evidence of a conspiracy or any other evidence which tended to show his innocence of the crime charged.

[1] The defendant contends that the court erred in assigning counsel to assist him and then failing to adequately inform him of the limitations under which counsel would have to operate. Since defendant at no time claimed indigency, we do not have here an issue concerning the right of an indigent defendant as a matter of due process to court-appointed counsel. See *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). The defendant insisted that he wanted to defend himself. He informed the court that he had been to college for three years, that he had some experience in court, and that he was competent to defend himself except for "the formalities." Judge Thornburg, obviously concerned about defendant's lack of skill and experience, offered to find an attorney to assist him, with the understanding that defendant retain the responsibility for the defense of the case and with the understanding that the court would determine a reasonable fee which defendant would pay. The attorney was not appointed by the court but was recommended to the defendant, who conferred privately with counsel after his appearance, and then both returned to the courtroom. The record on appeal reveals that thereafter counsel assisted in making motions, and was present with defendant for consultation though the defendant examined all witnesses. We think it is clear that defendant requested and

was given the right to conduct his own defense, and that he requested and was given the right to employ counsel in an advisory capacity. He not only agreed to but insisted upon the limited participation by the attorney. *State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174 (1976), does not support defendant's contention that this arrangement deprived him of his right to a fair trial. In that case the court held that, where, after discord between defendant and his court-appointed counsel, counsel began questioning the defendant's only witness, then fell silent, and left defendant to take over the direct examination, it was prejudicial error since this procedure must have conveyed to the jury the impression that counsel attached little significance or credibility to the testimony of the witness or that the defendant and his counsel were at odds. No such impression could have been conveyed here since defendant conducted all defense matters in the presence of the jury.

[2] A party has the right to appear in *propria persona* or by counsel, but the right is alternative, and one has no right to appear both by himself and by counsel. *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964). However, the trial court in its discretion may permit a defendant himself to cross-examine a witness. *State v. Rogers,* 12 N.C. App. 160, 182 S.E. 2d 660 (1971). The trial court in its discretion also may permit the defendant to conduct the defense and at the same time be furnished with the advice of a court-appointed attorney. *People v. Pilgram,* 160 Cal. App. 2d 528, 325 P. 2d 143 (1958); see Annot., 77 A.L.R. 2d 1233 (1961). In the case before us the defendant elected to conduct his defense and to have counsel present in an advisory capacity. It is apparent from the record on appeal that the defendant represented himself with remarkable redundancy and little skill or judgment, eliciting on cross-examination evidence prejudicial to his cause and failing to elicit from his own witnesses any evidence favorable to him. But the defendant, having insisted upon conducting his own defense, must endure the trial results in the absence of a showing of reversible error.

[3] The remaining assignments of error raise routine questions. By one assignment defendant contends the trial court should have declared a mistrial *ex mero motu* due to the carnival atmosphere of the trial. The record on appeal discloses the possibility that the defendant could have created a carnival atmosphere but for the patience and restraint of the presiding

judge. Another assignment raises the question of whether probable cause existed to issue the warrant under which defendant was arrested. Defendant was tried upon an indictment. Therefore, the question of probable cause to issue the warrant under which he was initially arrested has no effect on the jurisdiction of the trial court. *State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961). We have carefully considered all other assignments of error and find them to be without merit.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOE ROBINETTE

No. 7629SC855

(Filed 20 April 1977)

1. **Criminal Law § 26.2— indictment for felony-murder — motion to dismiss underlying felony charges**

The trial court properly denied defendant's motion to dismiss charges of felonious breaking and entering and felonious larceny on the ground that he has been indicted for murder committed in the perpetration of those felonies where defendant has not been brought to trial on the murder charge, since no problem of double jeopardy can arise until defendant has been arraigned on the murder charge.

2. **Burglary and Unlawful Breakings § 5.3; Larceny § 7— aiding and abetting in breaking and entering and larceny**

The State's evidence was sufficient to support defendant's conviction of felonious breaking and entering and felonious larceny as an aider and abettor where it tended to show that defendant drove in an automobile to the scene of the crimes with the three men who actually committed the offenses; while these men were actively engaged in breaking and entering a house and stealing property therefrom, defendant remained close by in an automobile, driving up and down the road in front of the house and keeping the automobile's motor running; and as the three men left the house, one carrying a stolen money box, defendant drove the automobile to a point near the front of the house, where he was stopped by police officers.

3. **Larceny § 7— ownership alleged in parent — property owned by minor child — no fatal variance**

There was no fatal variance between indictment and proof in a larceny case where the indictment alleged ownership of the stolen property in a specified person and the evidence showed that, although

the property belonged to his minor child, it was kept in the specified person's residence, and he had custody and control of the property of his minor children kept therein, since the unlawful taking from the person in lawful custody and control of the property is sufficient to support the charge of larceny.

4. Criminal Law §§ 9.4, 113.7— aiding and abetting — necessity for instruction

The trial court in a prosecution for felonious breaking and entering and larceny erred in failing to instruct the jury on the law applicable to one who aids and abets another in the commission of a felony where all the evidence disclosed that defendant remained in an automobile during the entire time the crimes were being committed by others, and the State's case was based entirely on the theory that defendant aided and abetted in the perpetration of the crimes.

APPEAL by defendant from *Kirby, Judge.* Judgments entered 17 June 1976 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 5 April 1977.

Defendant was indicted for (1) felonious breaking and entering and (2) felonious larceny. Charles Hall and Mark Rice were indicted for the same offenses. A fourth participant, Billy Hughes, was killed by a sheriff's deputy during commission of the crimes. Defendant was tried separately and pled not guilty to both charges.

The State's evidence showed: In September 1975 Dr. James Johnson lived on Airport Road, which runs north and south near Marion in McDowell County. On 9, 10, and 11 September 1975 the Johnson residence was kept under surveillance by members of the McDowell County Sheriff's Department, who stationed themselves in the woods at the edge of the yard. On 9 September 1975 a 1970 black-over-red Chevrolet automobile with a loud muffler, carrying four or five people, drove up and down the road in front of the Johnson residence three times. On 10 September 1975 the same vehicle again drove up and down Airport Road several times and at one time pulled into Dr. Johnson's driveway. Billy Hughes was the driver. One of the occupants of the vehicle got out, went to the house, and knocked on the door. He and the vehicle then left. Shortly thereafter Mark Rice knocked on the door. He then left the house and walked south on Airport Road. A few minutes later the Chevrolet also traveled south on Airport Road.

On 11 September 1975 the Chevrolet, carrying at least four people, again drove by the Johnson residence. It traveled

north of the residence approximately 150 yards and stopped. A door slammed on the vehicle. A few minutes later Hughes, Hall, and Rice walked up to the back door of the residence and entered it. Twelve to fifteen minutes later they came out. In the meantime, while the three men were still in the residence, the Chevrolet traveled back south on Airport Road past the residence, returning three to five minutes later traveling north. Defendant was the driver. After the car passed north of the residence, one of the officers heard it idling for some time. When the three men came out of the residence, Hughes was carrying a money box. One of the officers stepped into the yard and called on the three men to halt. Instead, they ran in different directions. Hughes fired a small pistol at the officers and ran out onto the road. In an exchange of gun fire, Hughes fell fatally wounded. As Hughes ran out onto the road pursued by the officers, the Chevrolet driven by the defendant came up the road toward him. The officers stopped it and arrested the defendant. The metal box which Hughes had carried from the house was found between the house and the road. It contained old coins and some currency. Dr. Johnson testified that it contained his seventeen year old son's coin collection, that it was kept in his son's room, and that he had not authorized anyone to enter his residence or to remove the box.

Defendant offered evidence to show that he worked in Burke County on 9 and 10 September, but that he did not go to work on 11 September because of the weather. Defendant's wife testified that on the morning of 11 September 1975 defendant had breakfast with her at a restaurant, that Hall was at the restaurant and was drinking, that defendant had a conversation with Hall, and that defendant left in a red and black car.

The jury found defendant guilty as charged in both cases. From judgments imposing prison sentences, defendant appealed.

Attorney General Edmisten by Assistant Attorney General Thomas B. Wood for the State.

Story, Hunter & Goldsmith, P.A., by C. Frank Goldsmith, Jr., for defendant appellant.

PARKER, Judge.

[1] In apt time defendant moved to dismiss the charges in this case on the ground that he had also been indicted for the

first degree murder of Billy Hughes. He contends that since the State's theory in obtaining the first degree murder indictment was the so-called "felony-murder rule," i.e., a murder committed in perpetration of another felony, the lesser felonies for which defendant was tried in these cases became merged in the murder charge, and that for that reason it was error for the trial court to refuse to dismiss them so long as the defendant was still under indictment for murder. We do not agree. Defendant has not been brought to trial on the murder charge. Until that shall occur, the State remains free to proceed against him in the present cases. Until he is arraigned on the murder charge, no problem of double jeopardy can arise.

[2] We also find no error in denial of defendant's motions for nonsuit. There was ample evidence from which the jury could find that on the day the crimes were committed defendant drove in an automobile to the scene of the crime with the three men who actually committed the offenses; that while these men were actively engaged in breaking and entering the house and stealing property therefrom, defendant remained close by in the automobile, driving up and down the road in front of the house and keeping the automobile's motor running; and that as the three men left the house, one carrying the stolen money box, the defendant drove the automobile back on the road to a point near the front of the house, where he was stopped by the officers. These findings would support verdicts finding defendant guilty of both charges as an aider and abettor. *State v. Curry,* 25 N.C. App. 101, 212 S.E. 2d 509 (1975).

[3] Nor do we agree with defendant's contention that the larceny count should have been dismissed for fatal variance between the indictment and the proof. It is true that the indictment alleges ownership of the stolen property in Dr. James Johnson, while the evidence is that it belonged to his minor child. The evidence also shows, however, that it was kept in Dr. Johnson's residence, and he had custody and control of the property of his minor children kept therein. He, therefore, had possession, "which was equivalent to a special property therein." *State v. Hauser,* 183 N.C. 769, 770, 111 S.E. 349, 350 (1922). "The fact that an indictment charges a defendant with larceny of property from a specified person and the evidence discloses that such person is not the owner but is in lawful possession at the time of the offense, does not render the indictment invalid. There is no fatal variance, since the unlawful taking from

the person in lawful custody and control of the property is sufficient to support the charge of larceny." *State v. Cotten,* 2 N.C. App. 305, 308, 163 S.E. 2d 100, 102 (1968); *accord, State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165 (1966). The case of *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972), cited by defendant, is distinguishable and does not control on the facts of the present case. In that case the indictment alleged ownership of the stolen property in one Carriker, while the evidence disclosed Carriker's father was the owner. That case did not involve, as the case before us does, the special custodial interest which a parent has in the property of his minor child kept in the parent's residence. We hold that defendant's motion for nonsuit in both the breaking and entering and in the larceny cases were properly denied.

[4] For error in the charge, however, there must be a new trial. In apt time the defendant made written request that the court instruct the jury on the law concerning aiding and abetting. The court did not do so, but instructed the jury as follows:

> "Now, members of the jury, for a person to be guilty of a crime, it is not necessary that he, himself, do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit breaking and entering and larceny, each of them is held responsible for the acts of the other done in the commission of the crime of breaking or entering and larceny."

At no place in the charge did the court instruct the jury on the law applicable to one who aids or abets another in the commission of a felony. The court's instruction concerning "acting in concert," which appears to have been taken practically verbatim from the pattern jury instructions, had no application under the evidence in this case.

In *State v. Mitchell,* 24 N.C. App. 484, 486, 211 S.E. 2d 645, 646-47 (1975), Clark, J., speaking for this Court said:

> "A participant in the commission of a felony may be a principal in the first degree or a principal in the second degree. A person who actually commits the offense or is present with another and does some act which forms a part thereof, although not doing all of the acts necessary to constitute the crime, is a principal in the first degree. One

who is actually or constructively present when the crime is committed and aids or abets the other in its commission is a princpal in the second degree. Both are equally guilty. *State v. Minton,* 234 N.C. 716, 68 S.E. 2d 844 (1952) ; *State v. Keller,* 268 N.C. 522, 151 S.E. 2d 56 (1966). In *State v. Allison,* 200 N.C. 190, 156 S.E. 547 (1931), the distinction between principals in the first and second degree was characterized as a distinction without a difference, but the distinction is still maintained in recent decisions. See *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972); *State v. Lyles,* 19 N.C. App. 632, 199 S.E. 2d 699 (1973).

Though 'principals in the first and second degree' have disappeared from courtroom parlance, the trial judge has the burden of recognizing the difference where there is evidence that the defendant and another are associated in the perpetration of the crime charged. If the defendant is present with another and with a common purpose does some act which forms a part of the offense charged, the judge must explain and apply the law of 'acting in concert.' This would constitute a principal in the first degree under common law. If a defendant was actively or constructively present and did no act necessary to constitute the crime but aided and abetted the other in the commission thereof, the trial judge must explain and apply the law of 'aiding and abetting.' This would constitute a principal in the second degree under common law. Too, the evidence may require the judge to charge on both 'acting in concert' and 'aiding and abetting.' "

In the present case, there was no evidence that defendant himself broke or entered the house. On the contrary, all of the evidence discloses that during the entire time the crimes were being committed by others, defendant remained in the automobile. The State's case was based entirely on the theory that defendant aided and abetted in perpetration of the crimes. There was ample evidence that defendant did aid and abet; there was no evidence that he acted in concert. It was error for the court to fail to instruct the jury on the law arising on the evidence in this case, and for this error defendant is entitled to a

New trial.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. PADEN H. COLE, JR., TOM T. COLE, JACK BARTLETT, CHARLES BARTLETT, HAROLD G. BARTLETT AND DANIEL K. WRIGHT

No. 762SC892

(Filed 20 April 1977)

1. **Animals § 7; Criminal Law § 16.1— misdemeanor — charge not initiated by presentment — jurisdiction**

A charge by presentment that defendants violated the game laws "by taking and possessing" a game animal during closed season did not charge the offense of possessing a *dead* game animal in violation of G.S. 113-103, a misdemeanor for which defendants were tried for the first time in the superior court; consequently, since the offense for which defendants were tried is a different offense than that charged in the presentment, it was not "initiated by presentment" within the exception contained in G.S. 7A-271(a)(2) giving the superior court original jurisdiction of such misdemeanor charges, and only the district court had jurisdiction of the charges against defendants.

2. **Criminal Law § 16.1— misdemeanor — jurisdiction — agreement and stipulation**

An agreement by defendants to transfer misdemeanor cases for trial to another county and a stipulation that "the defendants were properly before the court on a plea of not guilty and that the charges were heard before a jury duly and properly empaneled at the June, 1976 Criminal Session of the Martin County Superior Court" could not confer original jurisdiction on the superior court to try misdemeanor cases.

APPEAL by defendants from *Webb, Judge.* Judgments entered 28 June 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 7 April 1977.

By Ch. 103, 1973 Session Laws, which became effective 9 June 1973, it was made a misdemeanor "for any person to take or hunt bear in the County of Tyrrell at any time during the next two years." On 27 November 1974 warrants were issued charging that each defendant did on 16 November 1974 unlawfully and wilfully (1) hunt bear in Tyrrell County at a prohibited time, to wit: on 16 November 1974, and (2) "have in his possession a wild animal, to wit: a bear, knowing the same to have been taken during the closed season." After trial in the District Court in Tyrrell County, Judge Hallett S. Ward found defendants not guilty of the first charge but guilty of the second. From judgments entered on the second count, defend-

ants appealed to the Superior Court, where they moved to dismiss for the reason that the second count in the warrants did not charge a crime. On 15 September 1975 this motion was allowed by Judge Robert D. Rouse, Jr.

On 15 September 1975 new warrants were issued charging that on 16 November 1974 each defendant did unlawfully and willfully "possess a *dead* game animal, a bear, which was taken during closed season in Tyrrell County . . . in violation of G.S. 113-103." (Emphasis added.) Defendants moved to dismiss these warrants. After a hearing on defendants' motion, District Judge Chas. H. Manning, concluded that the charge contained in the new warrants did not substantially differ from the charge in the previous warrants which had been dismissed in the Superior Court. Accordingly, on 5 December 1975 he ordered the charges dismissed with prejudice. The State gave notice of appeal.

On 20 April 1976 the grand jury in Tyrrell County made a presentment charging that on 16 November 1974 defendants "violated the Game Laws of the State of North Carolina by taking and possessing a bear in Tyrrell County during closed season, contrary to Chapter 103 of the 1973 North Carolina Session Laws and G.S. 113." (sic). On the same date, 20 April 1976, the grand jury returned true bills of indictment against each defendant charging that on 16 November 1974 in Tyrrell County he did unlawfully and wilfully "possess a dead game animal, a bear, which was taken during closed season in Tyrrell County, said season being closed by Chapter 103, House Bill 398 of the 1973 Session Laws," in violation of G.S. 113-103.

On 21 April 1976 defendants appeared in Superior Court and moved to dismiss the bills of indictment for the reason, among others, that the Superior Court was without jurisdiction, the original jurisdiction of these cases being in the District Court. By order entered 21 April 1976 Superior Court Judge John Webb overruled defendants' motion to dismiss the indictments. In the same order, Judge Webb ruled on the appeal by the State from the District Court's order of 5 December 1975. In this connection, Judge Webb found that the inclusion of the word "dead" in the description of the game animal in the new warrants made the new warrants substantially different from the old warrants which Judge Rouse had dismissed on 15 September 1975 for failure to charge a crime. Accord-

ingly, on 21 April 1976 Judge Webb ordered that the District Court's order dismissing the new warrants be reversed and that the cases be returned to the District Court of Tyrrell County for trial. However, the cases were not tried in the District Court. On motion of the State, agreed to by defendants, the cases were transferred to Martin County for trial.

On 28 June 1976 the cases were consolidated for trial and were tried in Superior Court in Martin County. The jury found each defendant guilty as charged in the bills of indictment. From judgments imposed on the verdicts, defendants appealed.

Attorney General Edmisten by Associate Attorney George W. Lennon and Deputy Attorney General William W. Melvin for the State.

Wilkinson and Vosburgh by John A. Wilkinson for defendant appellants.

PARKER, Judge.

We note that the record on appeal contains the name of Jarvis L. McIntosh in the caption as one of the defendants. However, the record fails to show that Mr. McIntosh was tried or that any judgment was rendered against him. He is not a party to this appeal, and we direct that his name be removed from the caption.

The indictments on which defendants were tried charge a violation of G.S. 113-103. This statute declares that the possession of any dead game animal during the closed season is unlawful. Violation of G.S. 113-103 is a misdemeanor. G.S. 113-109.

Except as provided in G.S. Ch. 7A, Art. 22, the District Court has exclusive, original jurisdiction for the trial of criminal actions below the grade of felony. G.S. 7A-272(a). These cases were never tried in the District Court but were tried for the first time in the Superior Court. Unless provided for in G.S. 7A, Art. 22, the Superior Court has no jurisdiction to try these misdemeanor cases for the first time. G.S. 7A-271(a)(2) provides that the Superior Court has jurisdiction to try a misdemeanor "[w]hen the charge is initiated by presentment." The State contends that the charges in the present cases were initiated by presentment, that G.S. 7A-271(a)(2) applies, and that therefore the Superior Court had jurisdiction to try defendants

for the first time on these misdemeanor charges. We do not agree.

[1] The fallacy of the State's position is that the cases which were tried in the Superior Court involved different offenses than were alleged in the presentment. The presentment alleged that defendants violated the North Carolina game laws "by taking and possessing a bear in Tyrrell County during closed season, contrary to Chapter 102 of the 1973 North Carolina Session Laws and G.S. 113." (The last statutory reference is apparently to the entire Chapter 113 of the General Statutes.) The verb "take," when used with fish or game as the object, means "to get possession of . . . by killing *or capturing*." (Emphasis added.) Webster's Third New International Dictionary (1968). Therefore, a charge that the accused violated the game laws "by taking and possessing" a game animal during closed season does not charge the offense of possessing a *dead* game animal in violation of G.S. 113-103, which was the offense for which defendants were tried for the first time in the Superior Court. Since the offense for which defendants were tried is a different offense than that charged in the presentment, these cases were not "initiated by presentment" within the exception contained in Subsection (2) of G.S. 7A-271(a). The State does not contend, nor can we find, that these cases come within any other exception set forth in that statute.

[2] The record indicates that the defendants agreed to the State's motion to transfer the cases to Martin County for trial. The record also contains a stipulation signed by the District Attorney and by the attorney for defendants "that the defendants were properly before the court on a plea of not guilty and that the charges were heard before a jury duly and properly empaneled at the June, 1976 Criminal Session of the Martin County Superior Court." The agreement by defendants to the transfer of the cases for trial and the above stipulation could not confer jurisdiction on the Superior Court to try for the first time these misdemeanor cases.

Since the Superior Court had no jurisdiction to try these cases for the first time, the judgments appealed from are vacated and these cases are remanded to the Superior Court in Martin County with direction that they be transferred to the District Court in Tyrrell County for disposition by that court of the

charges contained in the indictments against the defendants. *See State v. Wall,* 271 N.C. 675, 157 S.E. 2d 363 (1967).

Judgments vacated and cases remanded.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. BOBBY DWIGHT ARMSTRONG

No. 764SC851

(Filed 20 April 1977)

Searches and Seizures § 3— warrant to search for marijuana — insufficiency of affidavit

Facts set forth in an affidavit failed to furnish any rational basis upon which the officer issuing a search warrant could reasonably make an independent determination that there was probable cause to believe that the proposed search of a trailer occupied by defendant would reveal any marijuana where such facts stated only that on 9 January 1976 Darwin Smith, from whom an undercover agent had made arrangements to buy one pound of marijuana, went to the trailer in question; there he met a man fitting defendant's description, and they left in defendant's automobile; on the following day Smith sold a pound of marijuana to the undercover agent and another agent; later that same day, defendant went to a local store where he passed a $10 marked bill which had been used earlier in the day to purchase the marijuana; but there was no allegation that any marijuana was ever seen, kept, sold or delivered at the trailer described in the application for the search warrant.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 15 July 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 5 April 1977.

Defendant was charged in a bill of indictment with feloniously possessing with intent to sell more than one ounce of marijuana. He pled not guilty. Prior to trial defendant moved to suppress evidence obtained as result of a search conducted pursuant to a search warrant. The motion was denied by Judge Joshua S. James.

At trial before Judge Rouse and a jury, the State's evidence showed that at approximately 10:30 p.m. on 10 January 1976 officers of the Onslow County Sheriff's Department, under

authority of a search warrant issued that night, searched a trailer occupied by defendant and found five plastic bags containing approximately 468 grams of marijuana. Defendant told the officers he would take responsibility for the drugs found. The defendant did not present evidence.

The court granted defendant's motion for nonsuit as to the charge of felonious possession of marijuana with intent to sell and submitted the case to the jury on the lesser included offense of simple possession of more than one ounce of marijuana. The jury found defendant guilty, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

Bailey and Raynor by Edward G. Bailey for defendant appellant.

PARKER, Judge.

The sole question presented concerns the validity of the search warrant. In apt time defendant challenged the validity of the search warrant under which the officers searched his trailer and moved to suppress the evidence obtained as a result of the search. The search was made under circumstances which required a search warrant, and unless the warrant was valid, the search was illegal and evidence obtained as a result thereof should have been suppressed. G.S. 15A-974; *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961). An "unlawful search is not made lawful because of resulting discoveries." *State v. McCloud,* 276 N.C. 518, 525, 173 S.E. 2d 753, 758 (1970).

The warrant was issued upon application of B. H. Simms, a Narcotic Agent with the Onslow County Sheriff's Department. In his application, which was signed and sworn to by Officer Simms on 10 January 1976, the applicant alleged that there was probable cause to believe that marijuana and marked narcotic money were located in a specifically described trailer in the H & J Trailer Park off of Highway 17 South. To establish probable cause for the issuance of the search warrant, the applicant swore to the following facts:

> "On 1-9-76 an undercover agent had a buy of 1 pound of marijuana set up. This individual who was going to sell

the pound of marijuana was staked out and followed by this officer. Each time the individual left he went to this trailer. The last time this individual went to this trailer he got up with a white male with medium long hair and a beard, they (sic) the individual whose name is Darwin Smith and the long hair bearded subject left in a dark colored Fiat whose tag number was HPZ264, which was registered to Bobby Dwight Armstrong, and on 1-10-76 the buy of one pound of marijuana was made by the undercover agent and Agent James Henderson where 1 pound of marijuana was bought and $5.00 of marked money was confiscated, on the same date, 1-10-76, Bobby Dwight Armstrong was staked out by this officer and Agent James E. Henderson. This individual Bobby Dwight Armstrong, white male, approximately 180 pounds with dirty blonde hair, medium long hair and beard went to a local business establishment where he, Bobby Dwight Armstrong, passed a $10.00 bill, serial #58497722B which was marked money which was used to purchase the one pound of marijuana earlier bought by an undercover agent and Narcotic Agent James E. Henderson. Bobby Dwight Armstrong was the only customer who went in this store and immediately after Bobby Dwight Armstrong left, Agent Henderson recovered the marked $10.00 bill which was kept separate from other money.

B. H. Simms, Narcotic Agent
Onslow County Sheriff's
Department."

It does not appear that any information other than that contained in the above quoted affidavit was presented to or considered by the issuing official in determining whether probable cause existed for the issuance of the search warrant. Certainly none was "either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official," as required by G.S. 15A-245(a). Therefore, a finding of probable cause in this case must be based solely upon the allegations in the affidavit. The affidavit is sufficient "if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence *upon the described premises* of the objects sought and that they will aid in the apprehension or conviction of the offender." (Emphasis added.) *State v.*

Vestal, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971). In our opinion, the affidavit in the present case does not supply reasonable cause for such a belief.

The affidavit states the following facts: On 9 January 1976 an undercover agent had made arrangements to buy a pound of marijuana from an individual whose name is Darwin Smith. The affiant, Officer B. H. Simms, placed Darwin Smith under surveillance and followed him. Each time Darwin Smith "left" (how many times and from what location is not disclosed), he went to "this trailer," apparently referring to the trailer described in the application for the search warrant. The last time Smith went to this trailer, he "got up with a white male with medium long hair and a beard," and they left in a Fiat automobile which was registered to the defendant. On the following day, 10 January 1976, the undercover agent and Agent James Henderson made the "buy" of one pound of marijuana and $5.00 of marked money was confiscated. On the same date, 10 January 1976, Officer Simms and Agent Henderson "staked out" the defendant, who is described as being a "white male, approximately 180 pounds with dirty blond hair, medium long hair and beard." Defendant went to a local business establishment, where he passed a $10.00 bill which was marked money used earlier that day by the undercover agent and Agent Henderson to purchase the one pound of marijuana. Defendant was the only customer who went in the store, and immediately after he left, Agent Henderson recovered the marked $10.00 bill.

Upon analysis, a fair summary of the facts stated in the affidavit comes to no more than this: On 9 January 1976 Darwin Smith, from whom an undercover agent had made arrangements to buy one pound of marijuana, went to the trailer; there he met a man fitting defendant's description, and they left in defendant's automobile; on the following day Smith sold a pound of marijuana to the undercover agent and Agent Henderson; later that same day, defendant went to a local store, where he passed a $10.00 marked bill which had been used earlier in the day to purchase the marijuana.

There is no allegation that any marijuana was ever seen, kept, sold, or delivered at the trailer, which was the only premises described in the application for the search warrant. Indeed, the only facts stated in the affidavit which even remotely relate to the trailer are that on 9 January 1976 Darwin Smith went

to the trailer, apparently more than once, and that the last time he did so he met a person, apparently the defendant, and left with him in defendant's car. There is no allegation that either Smith or the defendant lived at the trailer, and the connection, if any, between either one of them and the premises to be searched is not disclosed. Thus, the facts stated in the affidavit simply fail to furnish any rational basis upon which the issuing officer could reasonably make an independent determination that there was probable cause to believe that the proposed search of the trailer would discover the items specified in the application.

In *State v. Campbell*, 282 N.C. 125, 131, 191 S.E. 2d 752, 757 (1972), Justice Huskins, speaking for our Supreme Court, said: "Nowhere has either this Court or the United States Supreme Court approved an affidavit for the issuance of a search warrant that failed to implicate the premises to be searched." The affidavit now before us failed to implicate the premises to be searched and did not provide a sufficient basis for a finding of probable cause to search the premises described in the warrant.

For error committed in overruling defendant's motion to suppress the evidence obtained as result of the search, the judgment appealed from is vacated and defendant is granted a

New trial.

Judges BRITT and MARTIN concur.

ALBERTA SCOGGINS MALLOY v. JOHN HAROLD MALLOY
— AND —
JOHN H. MALLOY v. ALBERTA SCOGGINS MALLOY

No. 7615DC796

(Filed 20 April 1977)

1. Rules of Civil Procedure §§ 7, 8— responsive pleading not allowed — unpleaded issue allowed at trial

A party who is not permitted to file a responsive pleading may meet the allegations made against him at trial in any manner that would have been proper had a reply been allowed; therefore, a wife was entitled to present evidence of condonation at trial in response to

her husband's allegations of adultery since she was not permitted to raise that issue by filing further pleadings. G.S. 1A-1, Rules 7(a) and 8(d).

2. **Divorce and Alimony § 4— condonation — sufficiency of evidence**

In an action for absolute divorce and an action for alimony without divorce which were consolidated for trial, evidence of the husband's condonation of the wife's adultery through August 1973 was sufficient to be submitted to the jury where it tended to show that from January 1972 to November 1973 the husband suspected that his wife was committing adultery; the husband and wife had sexual intercourse on at least one occasion during that period; the wife never denied her husband sexual relations; and the last time they had intercourse was in August 1973.

APPEAL by Alberta Scoggins Malloy from *Paschal, Judge.* Judgment entered 3 June 1976, in District Court, ALAMANCE County. Heard in the Court of Appeals 10 March 1977.

The appeal involves two actions consolidated for trial. In the first action, the wife filed for alimony without divorce on the ground that her husband had abandoned her. In his answer the husband asked for dismissal of the complaint on the ground that the wife had committed adultery.

In the second action the husband filed for absolute divorce on the ground of one year's separation. In her amended answer the wife alleged abandonment and requested that the action for divorce be stayed pending the resolution of her suit for alimony. Instead the cases were consolidated for trial with the husband as the plaintiff. Upon this basis and for the purpose of simplicity, hereinafter the husband shall be referred to as the plaintiff and the wife as the defendant.

The evidence for the plaintiff-husband tended to show that he had been a resident of the State for twenty-one years, that he and the defendant were married on 5 October 1946, and that they had lived separate and apart after 23 November 1973. His evidence further tended to show that on 18 January 1972, Johnelle Crump was seen emerging from plaintiff's and defendant's house at a time when neither plaintiff nor his daughters were there; that in July 1972 and on several Saturdays during 1973 the defendant left her home about 7:00 a.m. purportedly to go to the laundromat but instead drove to the house of one Clarence Jones where she and Crump met and stayed until about noon; that on one occasion they were observed hugging and kissing at the door of the Jones' house; that the last time defend-

ant was followed to the Jones' house was 17 November 1973; that plaintiff offered to install a home laundry but defendant did not want one; that in September 1972 and July 1973 plaintiff and defendant had serious arguments; that after the latter argument neither defendant nor their two daughters would speak to plaintiff; that plaintiff and defendant had sexual relations on only one occasion after July 1972, that occurring in early 1973; that defendant moved to another bedroom in their house in July 1973; that in September 1973 defendant threatened to shoot plaintiff; that plaintiff left their house on 23 November 1973 and has not returned.

The evidence for the defendant tended to show that she first met Johnelle Crump at a neighbor's house in May 1974, after she and plaintiff had separated; that she first met Clarence Jones in December 1975, after learning of plaintiff's allegations of adultery; that Clarence Jones or a member of his family was home nearly every Saturday during 1973 and that defendant and Johnelle Crump had never been to that house; that she usually stayed in bed on Saturday mornings and did her laundry on Saturday afternoons; that she and plaintiff did quarrel in September 1972 and July 1973; that he thereafter continually criticized her; that she and defendant last had sexual intercourse in August 1973; that she moved out of their bedroom in August 1973 when he refused to make room for her in the bed.

The trial judge refused to submit to the jury an issue tendered by defendant as to condonation by plaintiff of defendant's alleged adultery. The jury found that plaintiff and defendant had lived separate and apart after 23 November 1973; that plaintiff had not abandoned defendant without adequate cause; and that defendant had committed adultery. From judgment granting plaintiff-husband an absolute divorce, defendant-wife appeals.

Ross and Dodge by Harold T. Dodge for plaintiff and cross-defendant appellant, Alberta Scoggins Malloy.

Latham, Wood and Cooper by Steve A. Balog for defendant and cross-plaintiff appellee, John H. Malloy.

CLARK, Judge.

[1] Defendant first assigns error to the refusal of the trial judge to submit the tendered issue of condonation to the jury.

Plaintiff contends that there is no error because condonation was neither raised in the pleadings nor tried by implied consent under G.S. 1A-1, Rule 15(b). While it is true that the pleadings contain no allegation of condonation by plaintiff of defendant's alleged adultery, we do not think this precludes defendant from litigating the issue. G.S. 1A-1, Rule 7(a) provides in pertinent part, "There shall be a complaint and an answer; a reply to a counterclaim denominated as such; . . . No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer." In the first action husband pleaded adultery in his answer but made no claim for affirmative relief; wife was not entitled to file a reply. In the second action, husband pleaded adultery in his reply to wife's original answer wherein she had asserted a counterclaim; again she was not entitled to file any further pleading. G.S. 1A-1, Rule 8(d) provides in pertinent part that "Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." Under Rule 8(d) plaintiff-husband's allegations of adultery were deemed denied. A party who is not permitted to file a responsive pleading may meet the allegations at trial in any manner that would have been proper had a reply been allowed. *Vernon v. Crist,* 291 N.C. 646, 231 S.E. 2d 591 (1977). Given this construction of Rules 7(a) and 8(d), we need not consider whether the issue was tried by implied consent under Rule 15(b). We conclude that defendant-wife was entitled to present evidence of condonation, and accordingly we now consider whether there was sufficient evidence to submit the issue of condonation to the jury.

In the present case the defendant pled abandonment as a ground for alimony without divorce and as a defense to plaintiff's claim for divorce on the ground of one year's separation. Abandonment requires that the separation be done wilfully and without just cause or provocation. *Overby v. Overby,* 272 N.C. 636, 158 S.E. 2d 799 (1968). Adultery is adequate cause for separation. *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923 (1953); *Williams v. Williams,* 230 N.C. 660, 55 S.E. 2d 195 (1949); G.S. 50-5(1). In the present case the evidence of condonation was introduced for the purpose of establishing that adulterous acts by defendant did not provide cause for plaintiff to abandon defendant. Condonation is the forgiveness of a marital offense constituting a ground for divorce. 1 Lee, N. C. Family Law, § 87 (1963). Adultery is a ground for divorce.

G.S. 50-5(1). "Condonation is forgiveness upon condition, and the condition is, that the party forgiven will abstain from like offense afterwards, and moreover treat the forgiving party, in all respects, with conjugal kindness; and, if the condition shall be violated, then the original offense shall be revived." *Lassiter v. Lassiter,* 92 N.C. 129, 136 (1885). Voluntary sexual intercourse by the innocent spouse, with knowledge or reason to know that the other has committed adultery, usually operates as a condonation of the offense. *Sparks v. Sparks,* 94 N.C. 527 (1886); 1 Lee, *supra,* § 87.

[2] The evidence, when viewed most favorably to the defendant, tended to show that from January 1972 to November 1973 the plaintiff suspected that his wife was committing adultery; that they had sexual intercourse on at least one occasion during that period; that defendant never denied her husband sexual relations; and that the last time they had sexual intercourse was in August 1973. We conclude that this evidence is sufficient to raise the issue of whether plaintiff condoned acts of adultery committed through August 1973. We are not unmindful that plaintiff's evidence tended to show that defendant continued to commit adultery through November 1973, and that condonation is conditional upon cessation of the marital misconduct. However, in this case the jury was not limited to finding adulterous conduct after the time that defendant's evidence tended to show condonation. If the jury had found that the only time that adultery was committed was prior to the time defendant's evidence tended to show condonation, as would have been sufficient under the instructions given by the trial judge, then defendant was prejudiced by the failure of the court to submit the issue of condonation and she is entitled to a new trial.

Defendant's remaining assignment of error pertains to the charge on adultery. We think that it is unnecessary to discuss this assignment since the error, if any, may not be repeated at the new trial.

Judgment vacated and cause remanded for a new trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN WILLIAMS SPRINGS

No. 7626SC782

(Filed 20 April 1977)

1. Assault and Battery § 15.3— serious injury as a matter of law — when instruction is proper

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where the evidence with respect to the injuries is not contradicted and the injuries could not conceivably be considered less than serious, the court may instruct the jury that, if they believe the evidence as to injuries, they will find that there was serious injury; therefore, where the uncontradicted evidence in this assault case tended to show that the victim remained unconscious for three days, was hospitalized for eight days, and lost two ribs and a lung as a result of defendant's shotgun blast, the trial court properly instructed the jury that the injuries were serious injuries as a matter of law.

2. Assault and Battery § 15.2—failure to define assault — explanation sufficient

Though the trial court's charge in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury did not include a definition of assault, the judge did instruct that the State was required to prove " . . . that the defendant assaulted [the victim] by intentionally and without justification or excuse shooting [the victim] in the upper left chest with a shotgun . . . , " and this language was sufficient to explain an assault to the jury so that they had no question as to the meaning of the term.

3. Assault and Battery § 16.1— assault with deadly weapon with intent to kill inflicting serious injury — lesser offenses — submission unnecessary

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where the evidence showed that the prosecuting witness had been shot in the chest by a shotgun at close range, that he was unconscious for three days and hospitalized for eight, and that he lost two ribs and a lung as a result of the shooting, defendant was not entitled to have submitted to the jury the lesser offenses of assault with a deadly weapon with intent to kill, assault with a deadly weapon, or assault inflicting serious injury.

4. Criminal Law § 73.2— officer's testimony — no hearsay

Testimony by a police officer that during the course of his investigation of the assault charged he asked bystanders what had occurred and that after hearing their responses, he placed defendant under arrest was not inadmissible as hearsay, since it consisted only of what the officer did, and not of statements made to him by third persons.

5. Criminal Law § 119— jury instruction not requested — failure to give not error

The trial court did not err in failing to instruct the jury that the indictment did not constitute evidence against defendant, absent a request by defendant for such an instruction.

APPEAL by defendant from *Baley, Special Judge.* Judgment entered 22 April 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1977.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injury and entered a plea of not guilty to the charge. He was convicted by a jury and upon that verdict judgment was entered sentencing him to imprisonment for a term of 16 to 20 years.

The State introduced evidence which tended to show the following: Between 7:00 and 7:30 p.m. on the evening of 14 December 1975, Leonard Brooks, the victim of the alleged assault, entered his car and began to leave his house when he saw defendant's car approaching. Defendant said he wanted to speak with Brooks, whereupon Brooks pulled over to the side of the road. Again, defendant said he wanted to see Brooks, so Brooks got out of his car. Defendant told Brooks "Let me hold of (sic) some money." Brooks replied that he did not have any money, but defendant persisted, "Yes, you got some money." Defendant then snatched the keys from Brooks' car, kept them, and drove away in his own car.

Brooks went to defendant's house and waited on the porch for defendant's return. When defendant arrived, he told Brooks "I'll give it to you when I come back." Defendant then went into the house and came out carrying a shotgun. As soon as defendant stepped onto the porch, he shot Brooks in the chest. Brooks lost consciousness for three days and remained in the hospital for eight days.

Defendant offered no evidence in his behalf. Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Assistant Attorney General Ann Reed, for the State.

Public Defender Michael S. Scofield, by Assistant Public Defender Mark A. Michael, for defendant appellant.

MORRIS, Judge.

In his charge to the jury, Judge Baley instructed as to assault with a deadly weapon with intent to kill inflicting serious injury as follows:

> "The fourth thing that the State must prove beyond a reasonable doubt is that the defendant inflicted serious injury, and you have heard testimony with respect to the injuries which the witness Brooks received, *and I charge you that those would constitute serious injuries.*" (Emphasis supplied.)

Judge Baley also submitted the lesser offense of assault with a deadly weapon inflicting serious injury and charged that

> " . . . for you to find the defendant guilty of assault with a deadly weapon inflicting serious injury, the State must prove three things: . . . And third, that the defendant inflicted serious injury, *and the injuries sustained that sent him to the hospital,* if you believe those to be the facts and find beyond a reasonable doubt that that was true, *would constitute serious injuries.*" (Emphasis supplied.)

Defendant contends that the trial judge erred in instructing the jury that Brooks' injuries were serious injuries as a matter of law. We disagree.

[1] The uncontradicted evidence was that the victim remained unconscious for three days, was hospitalized in Memorial Hospital for eight days, and lost two ribs and a lung as the result of the shotgun blast. There can be no possible doubt that the injuries received were serious. Where, as here, the evidence with respect to the injuries is not contradicted and the injuries could not conceivably be considered less than serious, we are of the opinion, and so hold, that the court may instruct the jury that if they believe the evidence as to injuries, they will find that there was serious injury. This assignment of error is overruled.

[2] Defendant contends that the judge erred in failing to instruct as to the legal definition of assault. Again, we disagree. In *State v. Hickman*, 21 N.C. App. 421, 423, 204 S.E. 2d 718, 719 (1974), we ordered a new trial because

> "[a]t no place in the charge did the trial judge instruct the jury as to what the term 'assault' means or what constitutes an assault. An assault is a legal term with which

> jurors are not apt to be familiar. We think it incumbent upon the trial judge *to define or otherwise explain* to a jury the meaning of the legal term 'assault'." (Emphasis supplied.)

Though the charge in the present case did not contain a definition of assault, the judge did instruct that the State was required to prove " . . . that the defendant assaulted Leonard Brooks *by intentionally and without justification or excuse shooting Leonard Brooks in the upper left chest with a shotgun. . . .* " (Emphasis supplied.) We believe that this language was sufficient to "otherwise explain" an assault to the jury so that they had no question as to the meaning of the term. This explanation was given the jury in the charge on assault with a deadly weapon with intent to kill inflicting serious injury in the instructions on the elements of the crime and the mandate. It was similarly repeated in the instructions on assault with a deadly weapon inflicting serious injury. The charge was sufficient, and this assignment is overruled.

[3] The trial judge submitted three possible verdicts to the jury: guilty of assault with a deadly weapon with intent to kill inflicting serious bodily injury; guilty of assault with a deadly weapon inflicting serious injury; and not guilty. Defendant argues that the judge erred in failing also to submit the lesser offenses of assault with a deadly weapon with intent to kill; assault with a deadly weapon; and assault inflicting serious injuries. We disagree. The trial court is not required to submit the issue of defendant's guilt of lesser offenses of the crime charged where there is no evidence from which the jury could find that the lesser offense was committed. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Williams,* 31 N.C. App. 111, 228 S.E. 2d 668 (1976). Here, the evidence showed that the prosecuting witness had been shot in the chest by a shotgun at close range; that the victim was unconscious for three days and was hospitalized for eight days; and that he lost two ribs and a lung as a result of the shooting. On these facts, defendant was not entitled to a submission of assault with a deadly weapon with intent to kill or assault with a deadly weapon. *State v. Turner,* 21 N.C. App. 608, 205 S.E. 2d 628 (1974); *State v. Brown,* 21 N.C. App. 552, 204 S.E. 2d 861 (1974). Moreover, since the evidence that defendant used a deadly weapon was uncontradicted, he was not entitled to a

charge on assault inflicting serious injury. This assignment is overruled.

[4] At trial, Charlotte Police Officer L. D. Blakeney was permitted to testify, over objection, that during the course of his investigation he asked bystanders what had occurred and that after hearing their responses, he placed defendant under arrest. Defendant maintains that the testimony was hearsay and should have been excluded. Again, we cannot agree. "Evidence, oral or written, it called hearsay when its probative force depends, in whole or in part, upon the competency and credibility of some person other than the witness by whom it is sought to produce it." *State v. Robbins,* 275 N.C. 537, 547, 169 S.E. 2d 858, 864-65 (1969); 1 Stansbury, N. C. Evidence, § 138, p. 458. Clearly, the testimony here objected to cannot be classified as hearsay since it consisted only of what the officer did, and not of statements made to him by third persons. Accordingly, it was not error for the trial judge to admit the testimony.

[5] In his final assignment of error, defendant contends that the trial court erred in failing to instruct the jury that the indictment did not constitute evidence against defendant. However, the record reveals that defendant did not request the court for such an instruction. It is well settled in this State that where a defendant desires greater elaboration in the charge on a particular aspect of the case, he must make a special request therefor. Otherwise the court is not required to so charge the jury. *State v. Boyd,* 278 N.C. 682, 180 S.E. 2d 794 (1971). We have carefully reviewed the judge's charge in its entirety and hold that it contains a full and fair summary of the evidence and an accurate statement of the law applicable thereto.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. VIRGIL LEE GAINES

No. 7612SC861

(Filed 20 April 1977)

1. **Searches and Seizures § 4— execution of search warrant — notice of identity and purpose**

An officer's notice of identity and purpose was sufficient to render valid his search pursuant to a warrant where officers observed a man hurriedly leave the premises to be searched; officers hastened to the door and saw that the front screen door was closed but unlocked and the front inside door was standing open about a foot; an officer announced his presence by stating, "Police officer, search warrant"; and the officer then opened the screen door and entered with the search warrant and his credentials in his hand. G.S. 15A-249.

2. **Criminal Law § 128.2— witness's statement about defendant's "record" — denial of mistrial**

In a prosecution for possession of heroin with intent to sell and deliver, the trial court did not err in the denial of defendant's motion for mistrial made when a witness testified she told defendant to get rid of three foil packets because she "knew he had a record" where the court granted defendant's motion to strike the testimony and instructed the jury not to consider it.

APPEAL by defendant from *Herring, Judge.* Judgment entered 23 April 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 5 April 1977.

Upon a plea of not guilty, defendant was tried (1) on an indictment charging him with possession of heroin with the intent to sell and deliver, and (2) on a magistrate's order charging him with misdemeanor possession of marijuana. A second indictment charged that this was his second offense, defendant previously having been convicted of possession of heroin.

Prior to trial, defendant moved to suppress evidence obtained by a search pursuant to a search warrant and a voir dire hearing was held. At the hearing the State's evidence tended to show:

On 28 November 1975 at approximately 9:45 p.m., Officer Mills of the State Bureau of Investigation and several other officers went to a residence in Fayetteville to conduct a search pursuant to a valid search warrant. They parked several houses away and were approaching on foot when they observed a black male come out of the house hurriedly and speed away in a car.

One of the officers followed him and the others ran to the residence. The front screen door was closed but unlocked and the front inside door was standing open about a foot. Mills announced his presence by stating, "Police officer, search warrant"; he then opened the screen door and entered with the search warrant and his credentials in his hand. His announcement and his entry into the house were almost "spontaneous."

Mills found two females in the living room and ordered them to sit down. He then entered the bedroom and found defendant in bed. While defendant was getting up, he threw three tinfoil packets to the floor. These packets were taken into custody and the house was searched.

Defendant presented as a witness one of the females who was in the house at the time. She testified that the front door was open only about three inches; that she did not hear anything outside the house until the door swung open with a loud noise and the police entered.

The trial judge made findings of fact and concluded that from the totality of the circumstances "the officer's notice of identity and purpose was sufficient." The motion to suppress was denied.

At trial Officers Mills and Chapman testified substantially to the same facts established at the voir dire hearing. The contents of the packets were shown to be heroin and it was further shown that the officers seized some marijuana from another bedroom. Agnes Carter, one of the females present when the police entered the house, also testified for the State. She stated that shortly before the police arrived, she had been in defendant's bedroom to speak to him and had noticed three "silver" packets which she told defendant to get rid of.

At the conclusion of the State's evidence, defendant's motion to dismiss was allowed in part, leaving the lesser offense of possession of heroin and the charge of possession of marijuana to be submitted to the jury.

Defendant offered the testimony of Nellie Malloy who was also in the living room when the police entered. She testified that she had not seen any foil packets or green vegetable matter on that night or on any prior occasion at the defendant's residence.

The jury found defendant guilty of possession of heroin. From judgment imposing a prison sentence of not less than five nor more than seven years, he appealed.

Attorney General Edmisten, by Associate Attorney Jack Cozort, for the State.

Assistant Public Defender John A. Decker, for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the denial of his motion to suppress the evidence obtained pursuant to the search. This assignment is without merit.

Defendant concedes that the search warrant was valid but he argues that the manner of service of the warrant resulted in an unreasonable search, thereby rendering any evidence obtained in the search inadmissible. G.S. 15A-249 provides:

> "The officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present."

Our Supreme Court has stated that even though the police officers have a valid search or arrest warrant, ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970). This requirement is for the protection of the officers as well as the protection of the occupants and their constitutional rights. *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140 (1968).

In the instant case, the officers had just observed a man hurriedly leaving the premises. They hastened to the door and noticed that it was slightly open. Officer Mills testified that he stuck his head to the screen door, identified himself, stated that he had a search warrant and then went inside. Defendant argues that Mills' statement that his notice and entry into the premises were "spontaneous" indicates that they occurred simultaneously. Therefore, he contends that the notice was insufficient to meet the requirements of the statute. We disagree.

The amount of time required to be given between notice and entry must depend on the particular circumstances. The evidence in this case indicates that the officer properly stated his identity before entering the premises. No one objected to his entry and it was not necessary to break open anything blocking entry. Under the circumstances, we think the notice was sufficient and the search was appropriate.

Moreover, the findings of fact made by a trial judge at the end of a voir dire hearing are conclusive if supported by competent evidence. *State v. Turnbull,* 16 N.C. App. 542, 192 S.E. 2d 689 (1972). Here, the findings of fact are supported by competent evidence and they support the conclusion that the notice of identity and purpose were sufficient. The motion to suppress was properly denied.

[2] Defendant next assigns as error the failure of the court to grant his motion for a mistrial. This assignment is without merit.

Agnes Carter testified that she saw three silver packets in the bed beside defendant and then told him to get rid of them. The district attorney then asked her why she told him to get rid of them, whereupon she answered, "Well, because I knew he had a record." Defendant's objection and motion to strike were sustained. Defendant then moved for a mistrial and the jury retired from the courtroom. The trial judge allowed the motion to strike but denied the motion for a mistrial. The jury returned and the trial judge properly instructed the jury to erase the remark from their memories and not to consider it in any manner whatsoever. Defendant contends that the remark was highly prejudicial in that it impeached his character when he had not taken the stand and that any limiting instruction could not cure the harm done.

The question whether to grant a mistrial ordinarily rests in the discretion of the trial court and will not be set aside absent an abuse of discretion. 3 Strong, N. C. Index 2d, Criminal Law § 128. In this case, we fail to perceive any abuse of discretion.

In *State v. Robbins,* 287 N.C. 483, 214 S.E. 2d 756 (1975), an investigating officer testified that he had obtained the address of defendant by use of defendant's "arrest record." An objection was sustained but a motion for mistrial was denied.

The Supreme Court found no error in the denial of the mistrial and stated:

> "Captain Jackson's inadvertent reference to defendant's arrest record was incompetent. We hold, however, that the action of the court in sustaining defendant's objection and prompt instruction to the jury to disregard the statement sufficed to remove any possibility of prejudice to defendant. '[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *Supra* at 488, 214 S.E. 2d at 760.

See also State v. Jarrette, 284 N.C. 625, 202 S.E. 2d 721 (1974), and *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967), for similar results. The trial judge acted properly in instructing the jury not to consider the statement, and we feel that the occurrence was not sufficient to require a mistrial.

We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. CHARLES TAYLOR

No. 7628SC863

(Filed 20 April 1977)

Assault and Battery § 8— self-defense — sufficiency of evidence

In a prosecution for assault with a deadly weapon with intent to kill where defendant presented evidence that three men attacked him within the space of a few minutes, one broke his ribs, another held him while slamming a car door on his legs, and another shot at him with a .38 caliber revolver, defendant was privileged to defend himself, even by returning the gunfire, and the trial court should have so instructed even in the absence of defendant's request therefor.

APPEAL by defendant from *H. Martin, Judge.* Judgment entered 24 February 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 April 1977.

Attorney General Edmisten, by Associate Attorney Issac T. Avery III, for the State.

Swain, Leake & Stevenson, by Joel B. Stevenson and Robert S. Swain, for defendant appellant.

ARNOLD, Judge.

Indicted for assault with a deadly weapon with intent to kill, defendant was found guilty of assault with a deadly weapon upon one Michael Worley. Error is assigned to the failure of the trial judge to charge on self-defense. We agree with defendant's contention that there was sufficient evidence to raise the issue, and the failure to instruct on self-defense was error.

Evidence tended to show that there was a fight at Larry's Tavern in rural Buncombe County between the defendant and his brother Lawrence Taylor, on one hand, and J. D. Wilson, the Peek brothers and Michael Worley, the bartender, on the other. Briefly stated, the evidence against the defendant tends to show that Lawrence Taylor started a fight with J. D. Wilson. Lawrence Taylor, who is smaller than Wilson, drew a .25 caliber automatic pistol, but Wilson disarmed Taylor, unloaded the gun, and then returned it to him. Defendant, hearing the commotion, entered the room. He was armed with a pocketknife, but Michael Worley, the bartender, kicked it out of his hand. The Taylors were ordered to leave the tavern and did leave in a car driven by Jimmy Wyatt. State's evidence further tended to show that defendant reloaded the .25 caliber pistol, placed the gun to Wyatt's head, and ordered him to return to the tavern. Defendant went to the tavern door, carrying the pistol in his hand. Wyatt shouted a warning to Michael Worley who armed himself with a .38 caliber revolver and met defendant at the door. Worley pointed the gun at defendant and forced him back to his car. J. D. Wilson and the Peek brothers followed Taylor and Worley to the car. When Taylor reached the car he sat down in the passenger seat and began firing at Worley. Worley returned the fire. J. D. Wilson tried to shut the car door on Taylor, but Taylor turned his gun on Wilson, and Wilson ran. Worley and Taylor again fired at each other, and one of Worley's bullets struck and killed Doyle Peek.

Defendant's evidence is very different. It tends to show that the Taylor brothers were originally ejected from the tavern by Worley, Wilson and the Peek brothers. Jimmy Wyatt, who

was driving for the Taylors after they left the tavern, decided that he wanted to return to Larry's Tavern in order to rejoin a poker game which was in progress there. Accordingly, he drove back to the tavern, even though the Taylors did not want to return. Upon reaching the tavern, defendant, who was unarmed, left the car and walked up to the side of the building where he relieved himself. As he returned to the car defendant was challenged by Michael Worley, who was armed. Worley demanded to know why defendant had returned, and defendant responded that he wished to buy more beer and to redeem poker chips which he had won earlier in the evening. Worley refused both requests, and as defendant returned to the car, Worley, Wilson and the Peeks followed him. Sidney Peek struck Taylor across the back with a pool cue and broke his ribs. J. D. Wilson manhandled Taylor into the car, and slammed the car door on his legs three times. Defendant cried out and swore at his assailants. Enraged by the curses, Worley shot at defendant and broke the glass out of the car window. Defendant said to his brother, "They are going to kill every damn one of us it looks like. Where is the gun at?" He retrieved it from beneath the car seat, loaded it, and fired several times toward the back of the car and into the air in an attempt to frighten Worley. Worley fired more shots, one of which killed Doyle Peek.

If defendant's evidence did raise the issue of self-defense, the court had a duty to instruct the jury on this issue even though defendant neglected to request the instructions. G.S. 1-180; *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974); *State v. Riddle,* 228 N.C. 251, 45 S.E. 2d 366 (1947); *State v. Hickman,* 21 N.C. App. 421, 204 S.E. 2d 718 (1974). In North Carolina, the law of self-defense is as follows:

> "If one is without fault in provoking, or engaging in, or *continuing* a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other, even though he is not thereby put in actual or apparent danger of death or great bodily harm." *State v. Anderson,* 230 N.C. 54, 56, 51 S.E. 2d 895 (1949) (emphasis added).

Defendant's evidence would permit a jury to find that he was not at fault in continuing the affray. Moreover, contrary to the State's argument, defendant's evidence does not show that he

was free to drive away in his car. If, as defendant says, three men attacked him within the space of a few minutes, and one broke his ribs, another held him while slamming a car door on his legs, and a third was shooting at him with a .38 caliber revolver, defendant was privileged to defend himself, even by returning the gunfire.

Defendant is entitled to a

New trial.

Judges BRITT and HEDRICK concur.

ROBERT HARRISON COX, JR. v. NELLA FAYE MAYBERRY COX

No. 7618DC780

(Filed 20 April 1977)

1. **Divorce and Alimony § 21.3— appraisal provisions of consent order — action to compel compliance**

In an action to compel defendant to accept an appraisal of property in accordance with provisions of a consent order in a divorce action, the evidence supported the court's determination that defendant employed an appraiser only to make an appraisal for her private use and not to act as a member of a three-man appraisal team provided for in the order, and that the appraisal of the three men was not binding on defendant.

2. **Appeal and Error § 16— appeal concerning appraisal provisions of consent order — jurisdiction of motion concerning support payments**

An appeal from an order concerning the appraisal provisions of a consent order in a divorce action did not deprive the trial court of jurisdiction to hear and determine plaintiff's motion for reduction of support payments called for by the consent order. G.S. 1-294; G.S. 1A-1, Rule 62(d).

APPEAL by plaintiff from *Washington, Judge.* Orders entered 14 June 1976 and 29 July 1976, in District Court, GUILFORD County. Heard in the Court of Appeals 8 March 1977.

In this action by plaintiff-husband for absolute divorce, defendant-wife counterclaimed for alimony. A consent order was entered on 20 February 1976, which provided in part, that defendant would not contest the divorce; that she would have custody of their daughter, Rena; that plaintiff would make

support payments and pay attorney's fees; and that two tracts of land owned by the parties would be appraised and plaintiff would pay one-half of the appraised value to defendant. It was agreed that each party would select an appraiser, the two appraisers would select a third, and the three would then report to counsel a single figure or value.

On 3 March 1976 defendant moved that plaintiff be held in contempt for failure to make support payments. Plaintiff then moved that support payments be reduced and that defendant be compelled to comply with the appraisal provisions of the consent order.

At hearing counsel for both parties stated to the court that the only matter to be heard was the motion to compel defendant to comply with the appraisal provisions because the other differences had been resolved.

At hearing defendant offered evidence tending to show that she employed appraiser Pickett to appraise the property for her own purposes only. Pickett testified that defendant never told him that he was to be her agent on a three-man appraisal team but did tell him that he might be asked to do so.

Plaintiff met with Pickett, showed him the land corners, and informed him that he had selected appraiser Raper. Pickett and Raper met and selected appraiser Cecil as the third man. Pickett appraised the property at $32,700.00 on 1 March 1976. At the request of plaintiff's attorney, the three appraisers met on 28 April 1976 and wrote to the attorney that they appraised the property at $34,416.00.

By order of 14 June 1976, the court found that defendant had employed appraiser Pickett to make an appraisal for her private use, and that the appraisal of 28 April 1976 by the three appraisers was not binding on defendant. From denial of plaintiff's motion to compel defendant to accept the appraisal, plaintiff appealed.

Subsequent to the appeal, plaintiff notified the court that he was mistaken in his statement to the court that his motion to reduce support payments had been settled, and plaintiff requested a hearing on the motion. By order of 29 July 1976, the court ruled that the plaintiff's appeal from the order of 14 June 1976 "divested this court of jurisdiction to hear and determine the plaintiff's pending motion." Plaintiff appealed.

Gerald C. Parker for plaintiff appellant.

Cahoon and Swisher by Robert S. Cahoon for defendant appellee.

CLARK, Judge.

[1] Plaintiff's appeal from the order of 14 June 1976 raises the following issue: Is the finding of the trial court that defendant selected appraiser Pickett as her own appraiser and not as a member of the three-man appraisal team supported by the evidence?

This finding and conclusion by the trial court is supported by the testimony of the defendant-wife and appraiser Pickett. In a hearing before the trial judge without a jury, the findings of fact are conclusive on appeal if there is evidence to support them, even though evidence may sustain findings to the contrary. G.S. 1A-1, Rule 52(a)(1); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Brooks v. Brooks*, 12 N.C. App. 626, 184 S.E. 2d 417 (1971); Shuford, N. C. Civil Practice and Procedure § 52-7 (1975).

[2] Plaintiff's appeal from the order of 29 July 1976 raises the following issue: Does the appeal from the order concerning the appraisal deprive the court of jurisdiction over support payments? In its order of 30 July 1976 the trial court ruled as a matter of law that the appeal by plaintiff from the appraisal matter divested the court of jurisdiction to hear plaintiff's motion to reduce child support payments. The court erred in so concluding. Under G.S. 1-294 an appeal stays further proceedings "upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from." It appears that the appraisal matter on the one hand and the reduction of support matter on the other are different and unrelated matters, and the appeal from the order relating to the appraisal did not divest the trial court of jurisdiction to hear and determine the plaintiff's motion for reduction of support. In *Herring v. Pugh*, 126 N.C. 852, 858, 36 S.E. 287, 289 (1900), the court stated: "And besides, section 558 of the Code is *itself* in language too plain to admit of doubt that the court in which the judgment was rendered still retains jurisdiction to hear motions and grant orders, except such as concern the subject-matter of the suit." And see *Manufacturing Co. v. Arnold*, 228

N.C. 375, 45 S.E. 2d 577 (1947). G.S. 1A-1, Rule 62(d) providing for stay of execution pending appeal is, by its own terms, subject to the conditions of G.S. 1-294 and other designated statutes relating to appeal.

The order of 14 June 1976 is

Affirmed.

The order of 29 July 1976 is

Reversed, and this cause is remanded.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. LEVI BURGESS

No. 7620SC774

(Filed 20 April 1977)

1. **Criminal Law § 21; Constitutional Law § 28— first appearance before magistrate or judge — time limitation not mandatory**

G.S. 15A-601 and G.S. 15A-511 do not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby.

2. **Criminal Law § 21; Constitutional Law § 28— first appearance before magistrate or judge — timeliness — no prejudice**

Defendant who was charged with felony escape and who was apprehended on 9 March 1976, served a warrant on 17 March 1976 and given a preliminary hearing on 6 April 1976 was not brought before a magistrate or before a district court judge for a first appearance within the times prescribed by G.S. 15A-601 and 15A-511, but defendant did not contend or show that he was prejudiced at trial by non-compliance with the statutes.

APPEAL by defendant from *Lupton, Judge*. Judgment entered 22 July 1976 in Superior Court, STANLY County. Heard in the Court of Appeals 8 March 1977.

Defendant pled not guilty to the charge of felony escape while serving a felony sentence.

Defendant left the Stanly County Unit No. 4545 of the Department of Corrections on 31 January 1976, was apprehended

on 9 March 1976, and was returned to the Unit the following day. He was served with a warrant on 17 March 1976. Preliminary hearing was held in District Court on 6 April 1976.

The State's evidence supports the charge. Defendant testified that he left after a guard gave him permission to do so. The jury found defendant guilty as charged, and he appealed from judgment of imprisonment to commence at the expiration of a specified sentence on a larceny charge.

Attorney General Edmisten by Associate Attorney Elisha H. Bunting, Jr., for the State.

David A. Chambers for defendant appellant.

CLARK, Judge.

Defendant brings forward one assignment of error, the failure of the trial court to dismiss the charge on the ground that procedural statutes, G.S. 15A-511 and G.S. 15A-601, had not been followed and "to condone non-compliance would result in an injustice."

G.S. 15A-511(a) requires a law-enforcement officer making an arrest to take the arrested person "without unnecessary delay before a magistrate." The former statute, G.S. 15-46, required that the person arrested be "immediately" taken before a magistrate. The State Supreme Court has held that G.S. 15-46 did not prescribe mandatory procedures affecting the validity of a trial. *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970); *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384 (1967). And see *State v. Foust,* 18 N.C. App. 133, 196 S.E. 2d 374 (1973); *State v. Able,* 13 N.C. App. 365, 185 S.E. 2d 422 (1971).

G.S. 15A-601(c) provides that " . . . first appearance before a district court judge must be held within 96 hours after the defendant is taken into custody or at the first regular session of the district court in the county, which ever comes first. . . . " The former statute contained no similar provision.

It appears from the Official Commentary that the main purposes of the first appearance are:

> "(1) To make sure the defendant's right to counsel is assured for the further proceedings.

(2) To determine the sufficiency of the charge.

(3) To review or determine the conditions of pretrial release.

(4) Set the date for, or secure a waiver of, the probable-cause hearing."

[1] We hold that G.S. 15A-601 and G.S. 15A-511 do not prescribe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby.

[2] It does not appear that defendant was brought before a magistrate or before a district court judge for a first appearance within the times prescribed by statute. Defendant does not contend that he was prejudiced at trial by non-compliance with G.S. 15A-511 or G.S. 15A-601. When he escaped defendant was serving a felony sentence. He had no right to pre-trial release. A probable cause hearing was held in the district court on 6 April 1976; probable cause was found, and defendant was bound over to superior court. He was fully informed of the charge against him. He was represented by counsel at trial. Witnesses were subpoenaed, and they testified in his behalf. The defendant had a fair trial free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. CROWDER DIXON, JR.

No. 7619SC886

(Filed 20 April 1977)

1. **Criminal Law § 85.1— character evidence — basis for opinion**

The trial court properly excluded a question asked a character witness as to whether he knew defendant's general reputation in the community "as a result of your daily meeting" with defendant.

2. **Homicide § 28— self-defense — instruction in final mandate**

The trial court in a homicide case did not fail to give an instruction on self-defense in his final mandate to the jury.

3. Homicide § 28— additional instructions — failure to charge again on self-defense

The trial court did not err in giving additional instructions on voluntary and involuntary manslaughter without again instructing on self-defense.

APPEAL by defendant from *Wood, Judge.* Judgment entered 3 August 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 6 April 1977.

Defendant was placed on trial for murder in the second degree. He was convicted of manslaughter.

The evidence tends to show the following:

On the afternoon of Sunday, 11 April 1976, defendant went to a place in East Spencer known as "Jerry's Cafe." Food is not prepared and served in this "cafe." It has a jukebox and a pool table. Space for dancing is available. Deceased had been there an hour or so before defendant arrived and had been drinking. Defendant and a man named Ford arrived and each bought a drink of vodka in the back room. Defendant then walked into the room where the pool table was located and saw deceased. Defendant and deceased worked for the same employer and, apparently, were not on the friendliest of terms. Deceased walked up to defendant and told him, "you ain't the only one that's got a gun. I've got one too . . . let's get it on." Defendant told deceased to leave him alone. Deceased told defendant they would talk about it the next day. More words were exchanged. Defendant had a .22 caliber pistol. Deceased had a .32 caliber pistol. Defendant fired at deceased and hit him at least twice. The deceased's gun was never fired. It was stipulated that death was caused by gunshot wounds. The evidence was conflicting as to what occurred just before the shooting.

Judgment was entered imposing a prison sentence of fifteen years.

Attorney General Edmisten, by Associate Attorney James E. Scarbrough, for the State.

Burke, Donaldson & Holshouser, by George L. Burke, Jr., for defendant appellant.

VAUGHN, Judge.

We have considered defendant's exceptions Nos. 2, 4 and 5, taken in connection with his examination of the proposed char-

acter witness. If exception No. 2 relates to a question propounded, that question is not set out as required by Rule 9(c)(1) of the Rules of Appellate Procedure. Exception No. 3 has been abandoned.

[1] Exception No. 4 is without merit. Defendant asked the following question:

> "Now, as a result of your daily meeting with . . . [defendant], do you know his general reputation and character in the community?"

The question was improper. A witness does not learn the "general reputation" of another "as a result of daily meetings with" that person. He learns it, if at all, from others. The witness, nevertheless, was allowed to testify that defendant had a very good work record at the plant.

Defendant's exception No. 5 must also be overruled. Assuming that the question was proper, the record does not disclose what the defendant would have answered. We cannot, therefore, determine whether the exclusion of the answer was prejudicial. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416.

Assignments of error Nos. 6, 7 and 8 are directed to the judge's charge.

In assignment of error No. 6 defendant "contends and argues that the instructions of the trial judge were incomprehensible to the jury . . . . " Defendant argues that the instruction to which he excepts "attempts to say too much with too few words." The problem defendant faces in this argument, however, is that he ignores the rest of the charge. The part to which he excepts is in one paragraph of the judge's final mandate dealing with voluntary manslaughter. Almost two pages in the record were required to set out the judge's earlier explanation of the law of voluntary manslaughter as it relates to the case being tried. In his final mandate, the judge is not required to repeat all that he has said earlier.

[2] In assignment of error No. 7 defendant contends the judge failed to give "a specific instruction on the law of self-defense" in his final mandate. In this assignment of error defendant ignores that part of the final mandate beginning on page 43 of the record which is as follows:

> "On the other hand, the killing would be justified on the grounds of self-defense and it would be your duty to return

a verdict of not guilty, if under the circumstances as they existed at the time of the killing the State has failed to satisfy you beyond a reasonable doubt of the absence on the part of Crowder Dixon, Jr., of a reasonable belief that he was about to suffer death or serious bodily harm at the hands of Lee Curtis Gillespie or that Crowder Dixon used more force than reasonably appeared to him to be necessary or that Crowder Dixon was the aggressor."

Earlier in the charge, the judge had explained the law of self-defense as it applied to the case being tried. Thereafter, in what were almost his last words to the jurors before they went to the jury room, the judge said:

"Ladies and gentlemen of the jury, the court again instructs you as I have heretofore, that if you find that the defendant acted in self-defense and you will recall my instructions about that, you will find the defendant not guilty of anything."

[3] After the jurors went to the jury room they returned and asked questions with respect to voluntary and involuntary manslaughter. The judge repeated his earlier instructions but did not refer to self-defense. Defendant's 8th and final assignment of error is that the judge did not repeat instructions on self-defense. We overrule this assignment of error. No prejudicial error has been shown with respect to the way the judge answered the jury's question.

We find no prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

PEGGY ANDREWS MAYS v. HERMAN NICHOLAS BUTCHER, INDIVIDUALLY AND EASTERN COMPANY

No. 7625SC803

(Filed 20 April 1977)

Appeal and Error § 30.3— necessity for motion to strike

Although a question objected to may have been incompetent, appellant is in no position to complain about testimony elicited by the

question where appellant failed to make a motion to strike the answer and answers to subsequent questions in the same vein.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 26 May 1976 in Superior Court, CALDWELL County. Heard in the Court of Appeals 10 March 1977.

Plaintiff filed this action for damages for injuries arising out of a collision between her automobile and a truck owned by the corporate defendant and being driven by the individual defendant. In their answer, defendants denied negligence, alleged that plaintiff was guilty of contributory negligence, and counterclaimed for their own property damages.

At trial, plaintiff testified that on the afternoon of 9 December 1974 she was driving home from work on the Mount Herman Road. As she approached a hill she was traveling 35 miles per hour and noticed defendant's tractor trailer on her side of the road. She was unable to pass the truck on either the right or the left and immediately applied her brakes, but she was unable to stop and collided head-on with the truck. When she hit the truck, " . . . my vehicle was completely on my side of the road and the front wheels were off on the dirt."

Policeman L. J. Coffey testified on plaintiff's behalf and stated that at approximately 3:45 on 9 December 1974 he received a radio message regarding plaintiff's accident. When he investigated, he found the tractor of the truck sitting completely in plaintiff's lane and the trailer partially blocking the other lane. There were skid marks measuring 68 feet leading to the rear of plaintiff's car. On cross-examination, Officer Coffey testified, over objection, that he could not determine the exact speed of plaintiff's car prior to the collision. Based upon the length of the skid marks and stopping distance, however, Coffey "estimated" plaintiff's speed at 45 miles per hour.

Defendant testified that he was driving the truck which collided with plaintiff's automobile on 9 December 1974. Just prior to the accident, he was attempting to make a right turn and " . . . had to pull over into the left lane to make the turn. I had pulled partly over there and as I started to turn this Gremlin [plaintiff's automobile] was coming up the road and she just ran into me." He first saw plaintiff's car approaching from a distance of 200-300 feet, and, in his opinion, it was traveling at a speed of 60 or 65 miles per hour. Defendant also

produced a witness who testified that he saw plaintiff's vehicle traveling down Mount Herman Road immediately prior to the collision and that, in his opinion, she was going between 50 and 55 miles per hour.

The case was submitted to the jury on the issues of defendant's negligence and plaintiff's contributory negligence. The jury found both negligence and contributory negligence, and judgment was entered denying relief.

Ted S. Douglas for plaintiff appellant.

Smathers and Farthing, by Edward G. Farthing, for defendant appellees.

MORRIS, Judge.

Although plaintiff made three assignments of error, she presents only one argument in her brief. She contends that the trial judge erred in permitting Officer Coffey, who never observed plaintiff's car in motion, to testify as to the car's speed prior to the collision.

The record discloses the following:

"Q. Officer Coffey, in your investigation, were you able to detremine an approximate speed of the vehicle, I mean of the Mays vehicle, prior to the point of impact?

MR. DOUGLAS: OBJECTION to that your Honor. I don't know how he could determine the speed if he was not there.

MR. FARTHING: Your Honor, I need to ask him if he was able to determine it and then I will ask him how?

COURT: OVERRULED.

EXCEPTION NO. 1.

Q. Were you able to determine the speed?

A. From the information given out by the State of North Carolina on stopping distances, I estimated the speed at 45 miles an hour.

Q. And did you in estimating that speed in part base your estimate on the skid marks that you found left by the Mays' car?

A. The skid marks and the stopping distance.

Q. Now of course you were not able to determine the exact speed that the Mays' vehicle was going when it hit the tractor?

A. No way to know that.

Q. But you estimated the speed at least at 45 miles an hour?

A. Yes sir."

Conceding that the question may have been incompetent, the court overruled the objection, and the witness proceeded to answer. The plaintiff made no motion to strike this answer, nor any answer to subsequent questions in the same vein. Plaintiff is not now in a position to complain about error in allowing the testimony to come in. *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778 (1954); *Carpenter, Solicitor v. Boyles,* 213 N.C. 432, 196 S.E. 850 (1938); *Hudson v. Hudson,* 21 N.C. App. 412, 204 S.E. 2d 697 (1974); *Collyer v. Bell,* 12 N.C. App. 653, 184 S.E. 2d 414 (1971).

Plaintiff's assignments of error are overruled.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM ARTHUR BROWN

No. 7626SC933

(Filed 20 April 1977)

1. **Criminal Law § 146.1— issue not raised in superior court — no consideration on appeal**

Defendant's contention that he was denied effective assistance of counsel because he was not represented by counsel at his preliminary hearing will not be considered by the Court of Appeals since the purported assignment of error is not based on anything that was presented or adjudicated in the superior court.

2. **Narcotics § 4— possession of heroin with intent to sell — sufficiency of evidence**

Evidence that defendant possessed heroin with the intent to sell or deliver the same was sufficient for the jury where it tended to show that defendant was caught possessing 14 aluminum packets that

were enclosed in a glassine envelope hidden in a cigarette pack; the same substance was in all of the aluminum packages; the ingredients from all the packages were combined and tested; and the substance was 2.8% heroin.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 25 May 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 April 1977.

Defendant was charged with possession of heroin with intent to sell and deliver the same. The jury returned a verdict of guilty on the charge and he was sentenced to a term of not less than eight and not more than ten years.

Attorney General Edmisten, by Associate Attorney Jesse Brake, for the State.

Public Defender Michael Scofield, by Assistant Public Defender Rufus F. Walker, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant attempts to argue that he was denied effective assistance of counsel because he was not represented by counsel when probable cause was found in District Court on 3 October 1975. The record discloses that defendant signed a waiver of right to counsel on 6 August 1975. He was represented by the Public Defender at his trial in the Superior Court and at no time did he suggest to the court that he had been prejudiced by the absence of counsel at his preliminary hearing. Judgment was entered in the Superior Court on 25 May 1976. Thereafter, on 29 October 1976, defendant executed an affidavit wherein he contends that his request for counsel was denied. That affidavit was included in the record on appeal. This Court will not consider the purported assignment of error because it is not based on anything that was presented or adjudicated in the Superior Court.

[2] In defendant's only other argument, he contends that the case should have been dismissed because of the insufficiency of the evidence. He appears to concede that the evidence was sufficient to allow the jury to find that he had heroin in his possession. He argues, nevertheless, that there was no direct evidence that he intended to sell the heroin. The evidence disclosed that defendant was caught possessing 14 aluminum packages that were enclosed in a glassine envelope hidden in a cigarette

pack. The same substance was in all of the aluminum packages. The ingredients from all of the packages were combined and tested. The substance was 2.8 percent heroin. This evidence was sufficient to allow the jury to find that defendant possessed the heroin with the intent to sell or deliver the same.

No error.

Chief Judge BROCK and Judge CLARK concur.

IN RE: CLARENCE WOODS

No. 7612SC914

(Filed 20 April 1977)

Automobiles § 2.9— revocation of license by DMV — subsequent habitual offender proceeding

The permanent revocation of defendant's driver's license by the Division of Motor Vehicles pursuant to G.S. 20-19(e) upon his third conviction of driving under the influence was the performance of a ministerial duty and not a "judgment" which could preclude the superior court from acting on a petition to have defendant declared an habitual offender of the traffic laws as defined in G.S. 20-221.

APPEAL by the State of North Carolina from *Herring, Judge.* Judgment entered 2 July 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 April 1977.

This proceeding was instituted by the State, pursuant to G.S. 20-223, to determine whether defendant, Clarence Woods, is an habitual offender of the traffic laws within the meaning of G.S. 20-221.

Defendant answered and admitted that he had been convicted of driving under the influence of intoxicating liquor on 9 February 1971, 15 September 1972 and 17 September 1975. He further alleged that, on 7 October 1975, his license was permanently revoked pursuant to G.S. 20-17(2) and G.S. 20-19(e), by the Division of Motor Vehicles.

Defendant moved for summary judgment. The judge, in pertinent part, made the following conclusion of law:

"Because of the identity of parties and subject matter existing between the revocation of the respondent's privi-

lege to drive by the Department of Motor Vehicles and the parties, subject matter, facts, and relief sought in the pending action initiated by the State, the permanent revocation of the respondent's privilege to drive operates by reason of res judicata to bar this proceeding. The Court therefore concludes as a matter of law that by reason of res judicata the petitioner is not entitled to any relief in this cause."

The judge allowed defendant's motion for summary judgment against the State and dismissed the action.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin, for the State.

Kenneth E. Banks and Doran J. Berry, by Kenneth E. Banks, for respondent appellee.

VAUGHN, Judge.

The order dismissing this proceeding must be reversed. The mandatory revocation by the Division of Motor Vehicles was nothing more than the performance of a ministerial duty by that administrative agency, which it was required to perform under G.S. 20-17(2) and G.S. 20-19(e). The revocation by the division is, in no sense, a "judgment" that can preclude the Superior Court from acting on a petition filed in that court pursuant to Article 8 of Chapter 20 of the General Statutes, entitled "Habitual Offenders."

In *State v. Freedle,* 30 N.C. App. 118, 226 S.E. 2d 184, a similar factual background was presented. Freedle's license had been permanently revoked because of three convictions for driving under the influence. An action was brought in the Superior Court to have him declared an "habitual offender" as defined in G.S. 20-221. Freedle appealed from the judgment declaring him an habitual offender and barring him from operating a motor vehicle on the highways of this State. Freedle did not argue that the division's action was "res adjudicata" so as to bar the action in the Superior Court. He argued, instead, that the habitual offender article was not intended to apply where the division had already imposed the mandatory permanent revocation. The Court overruled that argument and affirmed the judgment of the Superior Court.

The judgment dismissing the action is reversed. The case is remanded for hearing on the facts alleged in the petition.

Reversed and remanded.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. SALVATURE A. MUSUMECI

No. 7626SC931

(Filed 20 April 1977)

Criminal Law §§ 159, 166— failure to comply with appellate rules — dismissal of appeal

Appeal is dismissed for failure to comply with the Rules of Appellate Procedure where the items constituting the record on appeal are not arranged in the order in which they occurred as required by App. R. 9(b)(4); the indictment and warrant are not included as required by App. R. 9(b)(3)(iii); the verdict is not included as required by App. R. 9(b)(3)(vii); the court's charge is included even though no error is assigned thereto in violation of App. R. 9(b)(3)(vi); the record on appeal does not show that it was properly settled as required by App. R. 11; and appellant's brief contains no statement of the question presented for review as required by App. R. 28(b)(1), no concise statement of the case as required by App. R. 28(b)(2), and fails to refer to the assignments of error and exceptions and to identify the place in the record where the exceptions appear as required by App. R. 29(b)(3).

APPEAL by defendant from *Baley, Judge.* Judgment entered 30 September 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 April 1977.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Michael G. Plumides for defendant appellant.

ARNOLD, Judge.

Appellant's record on appeal violates several of the Rules of Appellate Procedure. The items constituting the record on appeal are not, so far as practicable, arranged in the order in which they occurred. Rule 9(b)(4). The indictment and warrant are missing. Rule 9(b)(3)(iii). The verdict is missing.

Rule 9(b) (3) (vii). The court's charge to the jury is included even though no error is assigned to the instructions. Rule 9(b) (3) (vi).

The record on appeal does not show that it was properly settled. Attorneys for appellant served a copy of this record on the district attorney on 1 November 1976. On the same day, the appellant caused the record to be certified by the clerk of the superior court. No agreement appears in the record showing that it was settled between the parties per Rule 11(a). Nor did any time elapse between the service of the proposed record and the certification thereof, and so the record could not have been settled by any of the alternative procedures provided in Rule 11(b) and Rule 11(c). Either the record was settled by agreement but the stipulation thereof was omitted in violation of Rule 11(a), or the record was left unsettled and then erroneously certified in violation of Rule 11(e).

Furthermore, appellant's brief violates the Rules of Appellate Procedure. It contains no statement of the question presented for review. Rule 28(b) (1). It contains no concise statement of the case. Rule 28(b) (2). It makes no reference to the assignments of error and pertinent exceptions; nor does it identify the place in the record where these exceptions appear. Rule 28(b) (3).

For all these failures to comply with the rules the appeal is

Dismissed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ALAN W. REESE

No. 7623SC941

(Filed 20 April 1977)

Narcotics § 4.5— felonious possession of drug — failure to instruct on quantity possessed — error

In a prosecution for felonious possession of ethchlorvynol, the trial court committed prejudicial error in failing to instruct the jury that defendant must have possessed more than 100 ethchlorvynol tablets in order to be guilty of felonious possession of the drug.

State v. Reese

APPEAL by defendant from *Seay, Judge.* Judgment entered 4 August 1976 in Superior Court, WILKES County. Heard in the Court of Appeals 14 April 1977.

Attorney General Edmisten, by Associate Attorney Jack Cozort, for the State.

Gregory & Joyce, by Dennis R. Joyce, for defendant appellant.

ARNOLD, Judge.

Defendant was found guilty by a jury of felonious possession of ethchlorvynol, a violation of G.S. 90-95(d) (2). We agree with defendant's contention that the trial judge failed to charge the jury on one of the essential elements of the crime charged. Specifically, the jury was not instructed that defendant must have possessed more than 100 ethchlorvynol tablets in order to be guilty of felonious possession of the drug.

Under the terms of G.S. 90-95(d) (2) " . . . if the quantity of the controlled substance . . . exceeds 100 tablets, capsules or other dosage units, . . . the violation shall be a felony . . . . " Possession of 100 dosage units or less is a misdemeanor. Possession of more than 100 dosage units is an essential element of felonious possession of ethchlorvynol. The failure of the court to so charge was prejudicial error, since the essential elements of the crime must be explained to the jury. G.S. 1-180; *see* also, *State v. Wingo,* 30 N.C. App. 123, 226 S.E. 2d 221 (1976).

We cannot agree with the State's position that since there was no evidence to indicate defendant possessed less than 100 tablets it is manifest that the quantity exceeded 100 tablets. Defendant did not admit that he possessed more than 100 tablets, and thus it was for the jury to decide the quantity of tablets defendant possessed.

New trial.

Judges MORRIS and HEDRICK concur.

RICHARD E. EMERSON AND JACQUELINE A. EMERSON v. GEORGE G. CARRAS AND CARRAS REALTY COMPANY

No. 7626SC745

(Filed 4 May 1977)

1. **Boundaries § 10.2; Vendor and Purchaser § 3— latent ambiguity — admissibility of parol evidence**

In an action to recover a sum of money as a refund or rebate of the purchase price of property purchased by plaintiffs from defendant where the sales contract specified that plaintiffs were purchasing "2927 Sharon Road . . . including house, lot and all improvements thereon," the sales contract contained a latent ambiguity, and the trial court therefore did not err in allowing parol evidence to show that plaintiffs understood and were told that the lot had dimensions of 213 feet by 201 feet and contained about one acre while the lot in fact had a front footage of 106.5 feet and contained approximately one-half acre.

2. **Contracts § 25.1— breach of contract — sufficiency of allegations**

In an action to recover a sum of money as a refund or rebate of the purchase price of property purchased by plaintiffs from defendant, plaintiffs' complaint sufficiently alleged the existence of a contract, the inability of defendant to perform the contract, and that plaintiffs were damaged by reason of the failure and inability to perform, and defendants recognized a cause of action for breach of contract when they filed their answer asserting the defenses of accord and satisfaction and rescission; accordingly, it was not error for the trial judge to permit the case to go to the jury on the theory of breach of contract.

3. **Cancellation and Rescission of Instruments § 4— purchase of property — size of property — no mutual mistake**

In an action to recover part of the purchase price of a piece of property sold by defendants to plaintiffs where plaintiffs bought a lot about half as large as they thought they were buying, defendants' contention that plaintiffs' evidence disclosed a mutual mistake is without merit, since there was sufficient evidence of a mutual meeting of the minds to submit the issue to the jury.

4. **Appeal and Error § 50— requested instructions denied — similar instructions given — no error**

The trial court in a breach of contract action did not err in denying defendants' request for instructions on mutual mistake where the instructions given by the court embodied those requested by defendants, though defendants' language was not used.

5. **Appeal and Error § 50.3— improper jury charge — error cured**

Misstatement of the evidence by the trial court during the jury charge was not prejudicial to defendants where the error was called to the court's attention, the court referred the exhibit in question to the jury, and the court directed the jury to use their own recollection.

6. Appeal and Error § 48— hearsay testimony admitted — subsequent similar testimony — no prejudice

Though evidence admitted by the trial court was clearly hearsay, defendants were not prejudiced by its admission, since defendants subsequently offered the same evidence themselves.

APPEAL by defendants from *Thornburg, Judge.* Judgment entered 17 June 1976, Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 February 1977.

Plaintiffs, by this action, sought to recover from defendants the amount of $13,500 as a refund or rebate of the purchase price of property purchased by them from defendant George G. Carras. Their complaint, in substance, alleges the following: Carras owned property known as 2927 Sharon Road in Charlotte, being all of Lot 1, Block 3, of the Subdivision known as Forest Hills as shown on the map recorded in Map Book 4 at page 273 in the Mecklenburg County Public Registry. On or about 7 April 1975 plaintiffs and Carras entered into a written contract for the purchase and sale of this property. The contract attached to the complaint and incorporated therein by reference, described the property as "2927 Sharon Road Charlotte, North Carolina, including house, lot and all improvements thereon." Purchase price was designated as $76,000. Carras had entered into an exclusive listing contract with defendant Carras Realty Company as his agent in securing a purchaser for the property, which contract was in effect at the time of negotiations for and purchase of the property. The contract was also incorporated by reference in the complaint and it described the lot as being "213 X 201.67 X 125 X 226" in size, and as a "1 acre lot w/running brook at rear." Prior to plaintiff's execution of the contract with Carras, Carras Realty Company, as agent for defendant Carras, through its duly authorized employee and agent, Steve McIntosh, represented to plaintiffs on a number of occasions that the property had a frontage on Sharon Street of approximately 200 feet and had other dimensions set forth in the exclusive listing agreement which he summarized as approximately 200 feet by 200 feet by 200 feet by 200 feet or approximately one acre. Contrary to those assurances, the property had a frontage on Sharon Road of 106.5 feet, a rear lot line of 125.1 feet and contained approximately one-half of the acreage described by defendants. The representations made were false, made with knowledge or made recklessly without knowledge, made with intention that

plaintiffs would rely on them and plaintiffs did rely on them. Neither defendants, prior to the execution of the contract, advised plaintiffs of the discrepancies in the size of the lot. Defendant Carras is able to convey only a portion (approximately ½ of the acreage) of the property referred to in the contract, and the property which he is unable to convey has a fair market value of $13,500. Plaintiffs asked for a refund of $13,500, from defendant Carras, or a judgment in that amount against both defendants.

Defendants answered, admitting the execution of the contract but denying that any real estate has been conveyed to plaintiffs pursuant thereto. They admitted the Exclusive Listing Agreement contained an error in the boundary description which was the result of an inadvertent error in copying the bounddaries of the property from a tax map. Plaintiffs were not informed of the error prior to 7 April 1975 because neither defendant was aware of the error. All allegations of intentional misrepresentation were denied. Defendants denied that defendant Carras was unable to convey all the property referred to in the contract.

By further answer, defendants averred that the contract set a closing date of on or before 10 May 1975; that defendant Carras discovered the error in the listing contract on or about 1 April 1975 and immediately informed plaintiffs by accompanying Richard Emerson to the property and pointing out the correct lot boundaries; that even though plaintiffs occupied the house on or about 1 April 1975, they informed defendant Carras that they did not intend to purchase and they agreed to a mutual "recession" of the contract; that about two weeks later, plaintiffs informed defendant Carras that they had looked at other houses but had not found anything they liked as well "nor which was as good a bargain," so the plaintiffs and defendant Carras agreed orally for the purchase of the Sharon Road property and sale was closed 21 May 1975 pursuant to the oral contract.

As affirmative defense, defendants asserted accord and satisfaction, estoppel, and waiver.

At trial defendants moved for directed verdict at the close of plaintiffs' evidence. The motion was allowed as to the cause of action for fraud and misrepresentations but denied as to the cause of action for breach of contract. The defendants' motion

for directed verdict at the close of all the evidence was denied. The court submitted three issues:

> "1. Did the plaintiffs and the defendant George G. Carras enter into a contract for the purchase and sale of a lot located at 2927 Sharon Road, bearing dimensions of 213 X 201 X 67 X 125 X 226 feet, as alleged in plaintiffs' complaint?
>
> 2. Did defendant breach his contract with plaintiffs by failing to convey the lot referred to in Issue No. 1?
>
> 3. What amount of damages are plaintiffs entitled to recover of defendant?"

The jury answered the first two issues "Yes" and the third "$6500.00." Judgment was entered against defendant Carras. Both defendants appealed. Both defendants moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. By order entered 30 June 1976, the court denied both motions and ordered that judgment be entered on the verdict for the plaintiffs. Defendants excepted.

Farris, Mallard and Underwood, P.A., by Ray S. Farris, for plaintiff appellees.

Sanders and London, by Richard A. Lucey, for defendant appellants.

MORRIS, Judge.

[1] The sales contract specified that plaintiffs were purchasing "2927 Sharon Road Charlotte, North Carolina, including house, lot and all improvements thereon." The court allowed parol evidence to show that plaintiffs understood and were told that the lot had dimensions of 213 feet X 201 feet and contained approximately one acre. This defendants assign as error, the exceptions taken to the overruling of their objections being grouped under assignment of error No. 1. We note at the outset that objections appear at only four places in the record and that interspersed at various places between these objections is testimony of the same import without objection raised. Testimony to the effect that plaintiffs thought they were buying a lot with 213 feet frontage and only got 106 feet frontage was elicited from plaintiff by defendants on cross-examination. Be that as it may and regardless of whether defendants have waived their objection

to this testimony, we are of the opinion that it was admissible. Defendants urge that there was no ambiguity, latent or patent, with respect to what was the subject of the contract and that, because parol evidence cannot be allowed to vary, add to, or contradict a written instrument, the evidence was not admissible. We do not disagree with this legal principle, but we do not agree that its application to this case is as crystal clear as defendants would have us believe. We agree that the contract does not contain a patent ambiguity. However, we are of the opinion that it does contain a latent ambiguity.

"The term 'latent ambiguity' is defined to mean an ambiguity which arises not upon the words of the instrument, as looked at in themselves, but upon those words when applied to the object or subject which they describe. 3A C.J.S., Ambiguity, p. 410. In *Miller v. Green,* 183 N.C. 652, 654, 112 S.E. 417, 417-18, (1922), our Supreme Court said:

> " . . . [I]f there is a latent ambiguity . . . preliminary negotiations and surrounding circumstances may be considered for the purpose of determining what the parties intended —*i.e.,* for the purpose of ascertaining in what sense they used the ambiguous language, but not for the purpose of contradicting the written contract or varying its terms. A latent ambiguity may arise where the words of a written agreement are plain, but by reason of extraneous facts the definite and certain application of those words is found impracticable. (Citations omitted.)"

See also, Restatement of Contracts, § 242 (1932); *Logue v. Von Almen,* 379 Ill. 208, 40 N.E. 2d 73 (1941).

Here the evidence to which defendant objects shows that the handwritten listing sheet, which he says he prepared, shows the property designated thereon as 2927 Sharon Road as being a one-acre lot having dimensions of 213 feet X 201.67 feet X 125 feet X 226 feet. Prior to the execution of the agreement and during negotiations for the sale and purchase of the property, plaintiffs were shown a copy of the typed listing, prepared from the handwritten listing, which gave the same dimensions. The evidence also disclosed that McIntosh, agent for defendant Carras, referred to the listing sheet and indicated to plaintiffs that the lot had a frontage of 213 feet and contained approximately one acre. Plaintiff further testified that prior to 30 April 1975, no one told him that the lot dimensions were less than those

shown on the typed listing sheet and as indicated by Mr. McIntosh. The complaint alleged, on the other hand, that the lot known as 2927 Sharon Road had a front footage of 106.5 feet and contained approximately one-half acre. Testimony at trial revealed this to be true.

It, therefore, appears that a latent ambiguity did exist. The evidence to which defendant objects was admissible, under the circumstances of this case, and this assignment of error is overruled.

Defendants next contend, by assignments of error two and three, that the court erred in denying their motions for directed verdict and for judgment notwithstanding the verdict or a new trial. They base these contentions on two grounds: first, that the complaint does not state a cause of action for breach of contract and the motion for directed verdict as to the cause of action in tort was granted; and, in the alternative, that the plaintiffs' evidence disclosed a mutual mistake, and the issue of whether there was a contract should not have been submitted to the jury.

[2] With respect to the first contention, while it is true that plaintiffs alleged that defendants misrepresented the size of the lot, we are of the opinion that the complaint sufficiently alleged the existence of a contract, the inability of defendant Carras to perform that contract, and that plaintiffs were damaged by reason of the failure and inability to perform. We note, also, that defendants by their answer asserted the defenses of accord and satisfaction and rescission. These are proper defenses in a contract action. Defendants must have recognized a cause of action for breach of contract when they filed their answer. Certainly, they can claim no element of surprise, nor that they were denied a fair opportunity to defend their case. Accordingly, it was not error for the trial judge to permit the case to go to the jury on a theory different from that alleged in the complaint. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972).

[3] With respect to the mutual mistake contention, the evidence for plaintiffs tends to show that plaintiffs were of the opinion that the lot contained the acreage shown on the listing sheet and they had the dimensions shown thereon. The uncontradicted evidence was that this listing sheet was prepared by defendant Carras, and that his agent was of the opinion that the listing sheet correctly described the property. Although defend-

ant Carras testified that when he entered into the agreement he did not have any intention of selling a lot having those dimensions, whether he was aware of the true size of the lot at the time was for the jury. We think there was sufficient evidence of a mutual meeting of the minds to submit the issue to the jury. These assignments are, therefore, overruled.

Defendants' fourth assignment of error is directed to the court's charging the jury in a manner which allowed the jury erroneously to believe that plaintiffs had instituted an action for breach of contract. The view we have taken with respect to assignments of error two and three requires that assignment of error four be overruled.

[4] Defendants filed a written request for instructions on mutual mistake. The request was denied and defendants excepted. This exception is the basis for defendant's assignment of error five. The court, in instructing the jury, defined a contract as " . . . a mutual agreement between two or more competent parties based upon a sufficient consideration to do or not to do a particular thing." He further charged that there could not be a contract " . . . unless the parties assent to the same thing in the same sense at the same time," and that there must be "mutuality of agreement." He then instructed the jury that " . . . this is where the dispute arises. The plaintiffs saying and contending that there was a mutual agreement, and the defendant denying that there was a mutuality of agreement." The jury was precisely instructed that if they should find that at the time the agreement was signed the defendant intended to describe the lot as one having 106 feet frontage, they must answer the first issue "no." It is clear that the jury could not have misunderstood the instructions. They embodied the requested instructions, even though not in that language. Nor is the court required to use the precise language of the tendered instruction " . . . so long as the substance of the request is included in language which doesn't weaken its force." *King v. Higgins*, 272 N.C. 267, 270, 158 S.E. 2d 67, 69 (1967).

The court further instructed, with respect to the rights of the parties, in the event the jury should find a contract existed, that should the purchaser find that the seller could not convey the amount of property described in the contract, he could elect to affirm the contract and retain whatever property he received thereunder; that affirmance would end the right to

rescind, but would not prevent the affirming party from recovering from the seller the difference in value of the property sold as it was and as it would have been had the seller been able to convey the amount called for in the contract. Defendants do not except to this portion of the charge. It correctly states the law of this State. *See Goldstein v. Trust Co.*, 241 N.C. 583, 86 S.E. 2d 84 (1955), and cases there cited.

[5] Defendants contend by their sixth assignment of error that prejudicial error was committed by the court when, during his instructions to the jury, he stated: " . . . [I]f the plaintiff has satisfied you . . . that on or about the 7th day of April, 1975, Mr. McInosh, who at the time was acting in behalf of Mr. Carras, executed a contract for the sale . . . " There is no question but that defendant Carras executed the contract. This was admitted in defendants' answer, and was not at issue at the trial. At the end of the charge, the court told the jury that it had been called to his attention that he had said the contract was signed by McIntosh, that the attorneys for the parties had called his attention to defendants' Exhibit 4 (the contract in question) as having been signed by Mr. Carras, and that he was sure the jury's recollection as to that was proper. While the court was in error, we fail to perceive error sufficiently prejudicial to warrant a new trial. The error was called to his attention. He was referred to the exhibit and referred to that exhibit to the jury, directing them to use their own recollection. This assignment of error is overruled.

[6] By their seventh assignment of error defendants urge that they were prejudiced by the court's allowing hearsay testimony as to the handwriting on plaintiff's Exhibit 4, the sales listing sheet. Plaintiff Emerson was allowed to testify that Mr. McIntosh told him the listing sheet was in defendant Carras's handwriting. Defendant Carras, during his testimony, identified the listing sheet and stated that it was in his handwriting. While the testimony was clearly hearsay, defendants have not been prejudiced. This assignment is without merit.

Finally, defendants raise objection to the court's allowing plaintiff Emerson to testify that Mr. McIntosh told him that " . . . [t]hey would probably take some property off the front of your property." Defendants contend this was irrelevant hearsay testimony and prejudicial to defendants. They do not give any indication of the manner in which they were prejudiced.

While the court may have ruled erroneously, every erroneous ruling in the admission or exclusion of evidence does not *ipso facto* entitle the appealing party to a new trial. He must show that he was prejudiced and that the erroneous ruling probably influenced the jury verdict. *Board of Education v. Lamm*, 276 N.C. 487, 173 S.E. 2d 281 (1970), and cases there cited. This assignment of error is overruled.

No error.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, OLD DOMINION FREIGHT LINE, INC., AND HARPER TRUCKING COMPANY, INC., APPLICANTS v. ESTES EXPRESS LINES, FEDERAL MOTOR EXPRESS, FREDRICKSON MOTOR EXPRESS CORPORATION, OVERNIGHT TRANSPORTATION COMPANY AND THURSTON MOTOR LINES, PROTESTANTS

No. 7610UC820

(Filed 4 May 1977)

1. **Carriers § 2.10— suspension of common carrier authority**

The Utilities Commission was authorized by G.S. 62-30 to suspend a trucking company's irregular route common carrier authority pending final determination of an application for transfer of the authority, and the suspension prevented the loss of such authority through duplication or merger when the company merged with another company which held a similar irregular route authority.

2. **Carriers § 3— regular and irregular route authorities — transfer of irregular route authority**

Determination by the Utilities Commission that a trucking company's regular and irregular route common carrier authorities were distinct and that a transfer of the irregular route authority will not result in the creation of two route authorities out of one was supported by the trucking company's evidence that there are a significant number of points and towns that could not be served by its regular route authority, and that the regular and irregular route authorities differ in the nature of services they provide as well as the areas served in that regular route authority provides services to the same points, over specified roads, and on a regular basis, while irregular route authority provides service to broader territories over the most convenient roads on a call and demand basis.

3. Carriers § 3— transfer of authority — public convenience and necessity

A finding by the Utilities Commission supported by competent evidence that a trucking company was actively engaged in providing transportation services under its common carrier irregular route authority was sufficient to establish that a transfer of the authority is "justified by the public convenience and necessity."

4. Carriers § 3— transfer of authority — public interest

The transfer of a trucking company's common carrier irregular route authority was not contrary to "the public interest" where the transferor acquired the irregular route authority of another company through merger; there were thus two irregular route carriers prior to and after the transfer; the record does not show that the transferee will be a more competitive carrier; and the Utilities Commission found upon supporting evidence that the transferee has the business experience and financial ability to render adequate and reliable service under the franchise.

APPEAL by protestants from order of the North Carolina Utilities Commission issued on 29 June 1976. Heard in the Court of Appeals 16 March 1977.

This proceeding was initiated by an application filed with the North Carolina Utilities Commission (commission) on 30 March 1976 by which Old Dominion Freight Lines, Inc. (Old Dominion), and Harper Trucking Company, Inc. (Harper), seek approval of the transfer of a portion of Old Dominion's common carrier franchise authority, certificate no. C-97. The certificate authorizes: transportation of general commodities over irregular routes from points within a 35 mile radius of Greensboro to twelve towns outside that radius; from Charlotte to points within a radius of 35 miles of Greensboro; and irregular routes from Roanoke Rapids to points within 35 miles of Greensboro. The certificate also authorizes the transportation of general commodities over 46 regular routes within the same geographical area encompassed by the irregular route authority. Old Dominion seeks to transfer its irregular route authority contained in the certificate to Harper.

Prior to the filing of the application to transfer the irregular route authority, Old Dominion and Barnes Truck Lines, Inc. (Barnes), filed a joint application with the commission seeking approval of a merger of the two companies. This acquisition and merger was required by the Interstate Commerce Commission to be consummated by 4 May 1976. Barnes held irregular route authority to transport general commodities between all points

and places on and east of U. S. Highway 21. Upon the merger with Barnes, Old Dominion would therefore hold duplicative irregular route operating authority. To avoid cancellation of its irregular route operating authority upon its merger, Old Dominion, along with Harper, filed a joint petition with the commission on 29 April 1976 seeking a suspension of Old Dominion's irregular route authority pending final determination by the commission of the application for approval of the sale of the authority to Harper.

On 30 April 1976 Estes Express Lines, Federal Motor Express, Fredrickson Motor Express Corporation, Overnite Transportation Company and Thurston Motor Lines (protestants) filed a "protest and motion for intervention" asking that the application for transfer of operating authority be denied. On 3 May 1976 the commission granted the applicants' suspension petition and ordered that Old Dominion suspend operations under its irregular route authority pending final determination of the application for transfer of the irregular route authority. A hearing was held before the commission on the transfer application and on 29 June 1976 the commission approved the transfer of the irregular route authority granted by certificate no. C-97 from Old Dominion to Harper.

The commission made findings of fact which include: Old Dominion was actively engaged in transportation under the authority sought to be transferred until the temporary suspension of such authority by the commission on 3 May 1976. There are a number of points that Old Dominion can reach pursuant to its irregular route authority only and not by way of its regular route authority. Harper has the requisite experience and financial ability to render adequate and reliable service under the franchise to be transferred. The transfer is in the public interest and will not unlawfully affect the service presently being offered the public by other public utilities.

The commission concluded that: its order granting a temporary suspension of operations prevented the loss through merger or duplication of the rights Old Dominion is now seeking to transfer to Harper; Old Dominion's irregular route authority is distinct from its regular route authority; and if the transfer is not allowed the public will be without a carrier to fill Barnes' absence.

From the order approving a transfer of that portion of the certificate authorizing irregular route authority, protestants appealed.

Bailey, Dixon, Wooten, McDonald & Fountain, by Ralph McDonald, for applicant appellees.

Allen, Steed & Allen, P.A., by Thomas W. Steed, Jr., for protestants.

BRITT, Judge.

Is the order of the commission approving the transfer of common carrier franchise authority under G.S. 62-111 erroneous as a matter of law and unsupported by competent, material and substantial evidence? We answer in the negative.

The transfer of carrier operating authority is governed by G.S. 62-111 which includes the following applicable provisions:

"(a) No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition or control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given *if justified by the public convenience and necessity.* Provided, that the above provisions shall not apply to regular trading in listed securities on recognized markets. (Emphasis added.)

* * *

"(e) The Commission shall approve applications for transfer of motor carrier franchises made under this section upon finding that said sale, assignment, pledge, transfer, change of control, lease, merger, or combination is in the public interest, will not adversely affect the service to the public under said franchise, will not unlawfully affect the service to the public by other public utilities, that the person acquiring said franchise or control thereof is fit, willing and able to perform such service to the public under said franchise, and that service under said franchise has

been continuously offered to the public up to time of filing said application or in lieu thereof that any suspension of service exceeding 30 days has been approved by the Commission as provided in G.S. 62-112(b)(5)."

Protestants contend that the transfer of the irregular route authority from Old Dominion to Harper is not "justified by the public convenience and necessity" and that the transfer will "unlawfully affect the service to the public by other public utilities."

In *Utilities Comm. v. Petroleum Carriers*, 7 N.C. App. 408, 413-14, 173 S.E. 2d 25, 28 (1970), relying on *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461 (1967), we find: "' . . . the policy of the State, as declared in the Public Utilities Act of 1963, * * * clearly favors transfers of actively operated motor freight carriers certificates without unreasonable restraint. A policy following protestant's position would diminish the value of existing motor freight franchises and deprive the holders thereof of valuable rights. . . . '"

[1] Protestants argue that upon the acquisition of the operating rights of Barnes by Old Dominion, the irregular route authority of Barnes merged and unified with the previously held irregular authority of Old Dominion to the extent that the operating authorities duplicated each other; thereupon, Old Dominion holds only one active certificate containing irregular route operating authority; and that any transfer by Old Dominion to Harper of its irregular route authority would necessarily leave Old Dominion without any irregular route authority.

The applicants contend that any merger of duplicate operating authority upon Old Dominion's merger with Barnes was properly avoided by the commission's order of 3 May 1976 authorizing suspension of its operations under the irregular route authority pending final approval of the application for transfer to Harper. They cite G.S. 62-112(b) which provides in part that "Any franchise may be suspended or revoked, *in whole or in part*, in the discretion of the Commission, upon application of the holder thereof . . . . " (Emphasis ours.) Applicants argue that under the commission's general powers set forth in G.S. 62-30, and in the quoted provision, the commission was fully authorized to suspend the irregular route authority of Old Dominion upon its acquisition of Barnes thereby

preventing any unification or merger of operating authority. We think these contentions are correct.

The statute expressly provides that any franchise may be suspended in whole or in part. Here, that part of the franchise certificate providing irregular route authority was suspended by the commission after a full disclosure of all circumstances. We think the commission exercised its lawful discretion in granting the temporary suspension.

Protestants contend that the commission's conclusion that the temporary suspension of the irregular route operating authority prevented any duplication or merger of operating authority was erroneous as a matter of law. They argue that under G.S. 62-112(b)(5) any "suspension of authorized operations" is merely a suspension of *services* by a carrier under its franchise authority. Apparently, protestants reason that in this case there was only a suspension of services under the franchise authority rather than a suspension of the franchise operating authority itself. Protestants further argue that since only service was suspended the two irregular route authorities were duplicative and therefore merged. We find these arguments unpersuasive.

When the irregular route operating authority portion of Old Dominion's franchise certificate was suspended, any service provided under this part of the certificate naturally was suspended. We hold that the commission did not err in concluding that the portion of the franchise certificate providing for irregular route authority was suspended.

[2] Old Dominion's irregular route authority which it seeks to transfer contains the following restriction:

> "EXCEPTION: Irregular route operations are not authorized which would duplicate regular route operations."

The commission's Rule R2-30 also provides that:

> "DUPLICATION OF REGULAR AND IRREGULAR AUTHORITY. No carrier authorized to operate both as a regular route common carrier of property and as an irregular route common carrier of property shall transport any shipment under its irregular route authority which it is authorized to transport under its regular route authority."

Under these restrictions, protestants contend that Old Dominion has no irregular route authority for general commodities over all routes and between all points which can be served by its regular route authority. They argue that Old Dominion's regular and irregular route authority overlap to such an extent that any transportation services under its irregular route authority are negligible. Therefore, protestants contend that by the transfer of its irregular route authority, Old Dominion will be creating two route authorities out of one; that Old Dominion will continue to provide the same services under its continued regular route authority while Harper will be a new competitor under an irregular route authority that has not hereinbefore existed. We find no merit in these contentions.

The commission found "[t]hat while the Transferor holds both regular and irregular route authority in the same general territory, there are a number of points that the Transferor can only reach pursuant to its irregular route authority, sought herein to be transferred, and not by way of its regular route authority." The commission concluded that the transferor's irregular route authority is distinct from its regular route authority; that they are of a different nature; and that if the transfer is not allowed the public will be minus a carrier to fill Barnes' absence. We think the commission's findings are supported by competent, material and substantial evidence and are therefore binding on appeal. *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461 (1967).

There was sufficient evidence presented by Old Dominion that there are a significant number of points and towns that could not be served by its regular route authority. The applicants also assert, and we agree, that the evidence indicates that the regular and irregular route authorities differ in the nature of services they provide as well as the areas served in that regular route authority provides service to the "same points, over specified roads, on a regular basis," while irregular route authority provides for service to "broader territories over the most convenient roads, on a call and demand basis." We think the evidence presented is sufficient to support the commission's findings and its conclusion that the regular and irregular route authorities were distinct.

[3] Protestants also contend that the present transfer is not "justified by the public convenience and necessity" as required

by G.S. 62-111(a). They rely on the case of *Utilities Comm. v. Petroleum Carriers, supra,* where this court approved the language of the commission in *In Re Comer Transport Service,* N.C.U.C. Docket No. T-821, Sub. 2, in stating that:

> "The Commission in effect interpreted the criteria 'if justified by the public convenience and necessity' in G.S. 62-111(a) to be a statutory basis for the test of dormancy. Where the authority has been abandoned or 'dormant,' the Commission has denied applications for transfer because approval would in effect be the granting of a new authority without satisfying the new authority test of public need set out in G.S. 62-262(e)(1) . . . . Thus, the Commission in *Comer* held that 'the statutory requirement referred to [G.S. 62-111(a)] is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need theretofore found.' "

Protestants argue that there has been no active operation by Old Dominion under its irregular route authority for the reason that the irregular route authority is duplicated by regular authority.

If protestants' contentions are correct and Old Dominion's irregular route authority had been dormant, the present transfer would be improper under G.S. 62-111(a) in that it must meet the test required by G.S. 62-262(e)(1) for the granting of a new authority. However, the commission found: "That the transferor [Old Dominion] was actively and continuously engaged in transportation under the authority sought to be transferred up through the time of the Commission's May 3, 1976, Order authorizing a temporary suspension of operations." This finding is supported by competent and material evidence and is sufficient to establish that the transfer is "justified by the public convenience and necessity." The record and exhibits indicate that Old Dominion was actively engaging in providing transportation services under its common carrier irregular route authority.

[4] Finally, protestants contend that the challenged transfer will create a new service in Harper, thereby creating a new competitor adversely affecting the existing carriers. This contention is without merit.

Prior to the transfer, there were two irregular route carriers: Old Dominion and Barnes. After the transfer, there

are still two irregular route carriers: Old Dominion and Harper. It is conceded that Old Dominion will now hold a more extensive irregular route authority, that which was previously held by Barnes. However, we fail to see how the transfer of the irregular route authority to Harper is contrary to "the public interest." The commission found that Harper "has the business experience, the financial ability and is otherwise fit, willing and able to acquire the authority sought from the Transferor and to properly perform and render adequate and reliable service under the franchise on a continuing basis." The commission also found that the transfer is in the public interest; that it will not unlawfully affect the service to the public; and that it will not unlawfully affect the service to the public which is presently being provided by other utilities.

These findings are supported by substantial, competent and material evidence and are sufficient to meet the requirements of G.S. 62-111. A new authority has not been created as contended by protestants, but rather there has been a transfer of a preexisting active authority to a different competitor. As stated in *Utilities Comm. v. Petroleum Carriers, supra* at 416, 173 S.E. 2d at 30:

> " 'There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition.' The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to the 'public interest' as a matter of law. In G.S. 62-111(e) the General Assembly has empowered the Utilities Commission to find in a proper case that transfer to a more actively competitive carrier might *not* be 'in the public interest.' In the instant case, however, the record fails to show that operations by M & M would, as Bobbitt, J., expressed it in *Coach Co., supra,* 'be contrary to *the public interest* as distinguished from the interests of protestants.' "

The record does not show that the transferee, Harper, will be a more competitive carrier nor does it show that the transfer is contrary to the public interest. We hold that there is competent, material, and substantial evidence to support the findings of the commission.

The order appealed from is

Affirmed.

Judges HEDRICK and CLARK concur.

MARY E. RAUCHFUSS v. ARTHUR A. RAUCHFUSS

No. 7625DC810

(Filed 4 May 1977)

1. **Husband and Wife § 14— entirety property — purchase by husband — presumption of gift**

The fact that the husband made payments on property held as an estate by the entirety would not create an estate solely for the husband because the law presumes that he intended it as a gift to the wife.

2. **Trusts § 14— entirety property — conveyance to secure loan — reconveyance to husband — constructive trust for wife**

Where a husband and wife purchased real property as an estate by the entirety with funds derived from the conveyance of two preceding estates by the entirety and funds borrowed from a corporation, the property was conveyed to the corporation as security for the loan, the corporation agreed to reconvey the property to the husband and wife upon payment of the loan, the loan was thereafter fully paid, the corporation reconveyed the property to the husband individually without the knowledge, consent or permission of the wife, and the husband knew that the wife's name was left off the reconveyance, it was *held* that the failure of the husband to have the deed of reconveyance made to both himself and his wife was a violation of a confidential relationship amounting to actual or presumptive fraud, and that the husband holds title to a one-half interest in the property in constructive trust for the wife.

3. **Husband and Wife § 15— entirety property — right to income**

The husband is entitled to the rents, profits, and income from entirety property to the exclusion of the wife.

4. **Divorce and Alimony § 16— alimony barred by adultery — absence of findings**

The court erred in concluding that plaintiff wife's claim for alimony was barred by her adultery where the court found no facts to support such conclusion.

Judge MORRIS concurs in the result.

Rauchfuss v. Rauchfuss

APPEAL by defendant from *Tate, Judge*. Judgment rendered 27 April 1976 in District Court, CALDWELL County. Heard in the Court of Appeals 15 March 1977.

This is a civil action in which plaintiff alleging defendant's cruelty in her complaint, sought the impression of a constructive trust upon one-half interest in the home and furnishings held by the defendant in his name and for alimony without divorce and counsel fees.

Defendant answered and denied that plaintiff was entitled to a constructive trust on one-half interest in the home and alleged adultery in bar of plaintiff's claim for alimony and counsel fees.

Plaintiff's evidence tended to show that she and defendant were married in 1943 and separated in December 1973 and that six children were born of the marriage, all of whom are now emancipated. In 1953 they purchased a house on Sharon Road in Lenoir as tenants by the entirety with proceeds from the sale of a house in Baltimore, Maryland, which they owned as tenants by the entirety. One year later they moved to an old house on a 266 acre tract in Happy Valley which they acquired as tenants by the entirety; the Sharon Road house was sold and the proceeds applied to the Happy Valley home. Plaintiff was employed from 1955 until 1963 and contributed her salary to the family's living expenses and she also purchased specific items of furniture for the house. Plaintiff and defendant maintained two joint bank accounts and defendant made the house payments. In 1964 the Happy Valley house burned down, and she and defendant built a new house on the property. The house was rebuilt with insurance proceeds paid for the loss of the house and a loan of $35,000 from Doll Brothers, Inc. A conveyance of the Happy Valley property for security was made to Doll Brothers, Inc. by both plaintiff and defendant. The Doll Brothers, Inc. executed an agreement whereby they were to transfer the Happy Valley property back to plaintiff and defendant when the loan was repaid.

Defendant made the payments on the loan and in 1969 told plaintiff they were all paid up, and plaintiff assumed the property had been transferred back to her and her husband as tenants by the entirety. In 1971 plaintiff learned that title to the property was in defendant's name only. The Happy Valley

property is worth $300,000, and specific items of furniture belong to her, but the rest is owned jointly by plaintiff and defendant.

In 1973 plaintiff was forced to move from the home due to defendant's physical attacks upon her.

Defendant offered evidence tending to show that plaintiff committed adultery with Dr. Gaillard in 1973. A private detective testified that he followed plaintiff to a motel in Charlotte where she entered a room with Dr. Gaillard and remained overnight.

The trial judge heard the matter and received in evidence voluminous oral testimony, several documentary exhibits, and made the following findings of fact (summarized):

> The house acquired by the parties in Baltimore as tenants by the entirety was sold and its proceeds used to purchase a house on Sharon Road in Caldwell County. This house was purchased and owned by the parties as tenants by the entirety. On 28 February 1957 the parties acquired by purchase as tenants by the entirety a tract of land recorded in Deed book 332, page 174, in Caldwell County of 266 acres and moved into a Civil War vintage home located thereon. They rented the Sharon Road home for approximately a year and thereafter sold the house and applied the proceeds to the purchase of the 266 acre tract of land.
>
> In 1964 the house was destroyed by fire and the proceeds from insurance were applied to the new home located on the 266 acre tract. It became necessary after the construction of the new home to obtain additional financing upon it. They borrowed the money from Martin Doll and wife, Felicite Doll; Brendon Doll and wife, Jacquelyn K. Doll; Gregg Doll and wife, Beverly K. Doll; and Max Doll and wife, Karen E. Doll; and as security for the loan conveyed to the Dolls the 266 acre tract of land in fee simple by deed of conveyance dated 30 November 1965. The premises were thereafter deeded to Doll Brothers Industries, Inc. and then to Cellu-Products Company. Simultaneously with said conveyance, Doll Brothers Industries, Inc. and the parties entered into a contract dated 29 November 1964, and recorded in Caldwell County Registry to reconvey to the parties herein the premises upon said loan being fully

repaid in the sum of $52,800 payable in 120 monthly installments of $440.00 each. One of the express provisions of the contract which all parties executed was the following:

> "That upon complete reimbursement and payment of the sums above set forth by the parties of the second part within the period of 120 months, the party of the first part does hereby promise and agree to execute and deliver to the said parties of the second part, their heirs and assigns, a good and sufficient deed, with full covenants and warranty, for that tract of land lying and being Yadkin Valley Township, Caldwell County, North Carolina. . . . "

The property thus described is the same property conveyed by the parties to the Dolls and the same property conveyed to the plaintiff and the defendant by deed recorded in Book 332, page 176, Caldwell County Registry. The loan was thereafter fully repaid. The "parties of the second part" referred to in said agreement dated 29 November 1965 are the plaintiff and defendant herein.

Thereafter the Cellu-Products Company reconveyed the premises to the defendant Arthur A. Rauchfuss, Jr., individually, but did not convey to the plaintiff either individually or as a tenant by the entirety; that the conveyance to the defendant was made without the knowledge, consent, or permission, either express or implied, of the plaintiff; and that she did not know of said conveyance until two years after the date of conveyance.

The defendant knew of the conveyance and that plaintiff's name was left off the conveyance; that he accepted delivery of the deed and placed it on record for the purpose of defrauding plaintiff of her interest in the property.

The premises reconveyed to the defendant by Cellu-Products Company together with the furnishings has a fair and reasonable market value of $300,000.

At all times up to 19 December 1973 plaintiff was a faithful wife, did all the duties of housewife, worked at public work for more than eight years during their marriage and the parties jointly acquired all of their joint properties, the subject of this action, and jointly disposed

of their joint and several earnings. The defendant's earnings were in excess of $30,000 per year.

Upon the foregoing findings of fact, the court concluded (summarized):

> The real estate described in the deed of conveyance recorded in Deed Book 332, page 174, Caldwell County Registry and further described in the contract between the parties and Doll Brothers Industries, Inc., is jointly owned by the plaintiff and defendant as tenants by the entirety; that the conveyance to the defendant by Cellu-Products Company was done by defendant for purposes of defrauding plaintiff of her interest in the property; that the conveyance created a resulting trust in favor of the plaintiff; and the evidence to this effect presented in this cause is clear, strong and convincing, and that the defendant holds a one-half undivided interest in the property in trust for the plaintiff; that plaintiff's claim for alimony is barred by her adultery; that plaintiff is sole owner of certain personal property in the house and one-half in interest in all other furnishings; and that defendant has the means to pay plaintiff's attorneys fees of $10,000.

Both plaintiff and defendant appeal.

West, Groome & Baumberger, by Bryce O. Thomas, Jr., for the plaintiff.

Wilson and Palmer, by Bruce Lee Cannon, for the defendant.

MARTIN, Judge.

The defendant contends the trial court erred as a matter of law in concluding that a resulting trust should be impressed upon the real property, because there was no showing by plaintiff that she contributed any of the consideration for the property.

[1] It is one of the essentials of the peculiar estate by entirety sometimes enjoyed by husband and wife that the spouse be *jointly entitled* as well as jointly named in the deed. *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643 (1965); *Deese v. Deese,* 176 N.C. 527, 97 S.E. 475 (1918); *Freeman v. Belfer,* 173 N.C. 581, 92 S.E. 486 (1917); *Sprinkle v. Spain-*

hour, 149 N.C. 223, 62 S.E. 910 (1908). The fact that defendant made the payments on the property held as an estate by entirety would not create an estate solely for the defendant, because the law persumes he intended it as a gift to his wife. *Waddell v. Carson,* 245 N.C. 669, 97 S.E. 2d 222 (1957); *Honeycutt v. Bank,* 242 N.C. 734, 89 S.E. 2d 598 (1955); *Shue v. Shue,* 241 N.C. 65, 84 S.E. 2d 302 (1954); *Sprinkle v. Spainhour, supra; Strange v. Sink,* 27 N.C. App. 113, 218 S.E. 2d 196 (1975).

The property in question having been purchased as an estate by the entirety with funds derived from the conveyance of two preceding estates by the entirety, is sufficient to show that consideration was furnished by the wife. Thus, payment of consideration on her part toward the house supports a resulting trust in her favor. *Tire Co. v. Lester,* 190 N.C. 411, 130 S.E. 45 (1925).

Defendant contends that plaintiff's evidence failed to meet the high burden of proof required to establish a constructive trust (i.e., clear, strong, cogent and convincing) because plaintiff's evidence failed to show fraud on defendant's part.

In *Electric Co. v. Construction Co.,* 267 N.C. 714, 719, 148 S.E. 2d 856, 860 (1966), the Court said:

> " 'A constructive trust * * * is a trust by operation of law which arises contrary to intention and *in invitum,* against one who * * * in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.' (Citation omitted.) In order for a constructive trust to arise it is not necessary that fraud be shown. (Citation omitted.) It is sufficient that legal title has been obtained in violation, express or implied, of some duty owed to the one who is equitably entitled. (Citation omitted.) 'A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.' (Citation omitted.) Of necessity, the circumstances out of which such constructive trust arises may be shown by parol evidence."

[2] The property was conveyed to Doll Brothers Industries, Inc. by both plaintiff and defendant to secure the loan. Simultaneously with the conveyance, Doll Brothers Industries, Inc.

made a contract agreeing to " . . . execute and deliver to the parties of the second part . . . a good and sufficient deed . . . for that tract of land. . . . " It was speaking of the property conveyed by the plaintiff and defendant to secure the loan. The loan was thereafter fully paid. The court found, without exception, that the "parties of the second part" referred to in said agreement dated November 29, 1965 are the plaintiff and defendant herein; that by deed dated 4 June 1969, and recorded in Deed Book 593, page 01, Cellu-Products Company reconveyed the premises to the defendant Arthur A. Rauchfuss, Jr., individually, but did not convey to the plaintiff either individually or as a tenant by the entirety; that the conveyance to the defendant Arthur A. Rauchfuss was made without the knowledge, consent, or permission, either express or implied, of the plaintiff; and that she, the plaintiff, did not know of said conveyance until two years after date of the conveyance.

The court found that defendant knew of the conveyance, knew that plaintiff's name was left off the conveyance, accepted delivery of the deed of conveyance, and placed it on record for the purpose of defrauding plaintiff of her interest in the property. It further found as a fact that the premises reconveyed to defendant by Cellu-Products Company together with the furnishings located in the house thereon had a fair and reasonable market value of $300,000.

A confidential relationship existed between the parties, and the law presumes fraud in transactions when confidential relationships exist between the parties. *Sorrell v. Sorrell,* 198 N.C. 460, 152 S.E. 157 (1930). In *Link v. Link,* 278 N.C. 181, 192, 179 S.E. 2d 697, 704 (1971), the Court said:

> "Such a relationship 'exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.' (Citation omitted.) Intent to deceive is not an essential element of such constructive fraud. (Citation omitted.) Any transaction between persons so situated is 'watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.'" (Citation omitted.) See *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968); *Fulp v. Fulp,* 264 N.C. 20, 140 S.E. 2d 708 (1965).

More accurately considered, constructive trusts have no element of fraud in them, but the Court merely uses the machinery of a trust for the purpose of affording redress in cases of fraud and of working out the equity of the complainant. *Avery v. Stewart,* 136 N.C. 426, 48 S.E. 775 (1904). In the instant case the failure of the defendant to have the deed of conveyance from Cellu-Products Company made to both him and his wife was violation of a duty he owed to his wife, amounting to actual or presumptive fraud. Consequently, a constructive trust in favor of the plaintiff is impressed upon the property purely by construction of equity. While the legal estate is vested in the defendant, the equitable estate is held by the plaintiff and the defendant is deemed to hold the property in trust for her benefit.

The court's findings of fact are comparable to the verdict of a jury. They are conclusive on appeal if there is competent evidence to support them. The weight of evidence is solely the province of the fact finder. See *Trust Co. v. Gill, State Treasurer,* 286 N.C. 342, 211 S.E. 2d 327 (1975). The judge was aware of the applicable standard for the burden of proof and his verdict is conclusive in the absence of error of law. See 1 N. C. Index 3d, Appeal and Error § 56. We find plaintiff's evidence sufficient to satisfy the burden of proof and to justify the verdict.

The trial court concluded that the conveyance created a resulting trust in favor of the plaintiff. The essential elements and distinguishing characteristics of resulting trusts and constructive trusts are defined in *Bowen v. Darden,* 241 N.C. 11, 84 S.E. 2d 289 (1954), and cases therein cited. The plaintiff alleged facts sufficient to constitute a constructive trust, and the evidence on which she relies to establish such trust is sufficient to support the verdict rendered.

[3] The trial court erred in its findings that defendant must account to the plaintiff for all rents, profits, and income from the property. In estates by the entirety the husband is entitled to the rents and profits to the exclusion of the wife. *Board of Architecture v. Lee, supra.*

[4] Plaintiff's cross-assignment of error is well taken. The court found no facts which support its conclusion that plaintiff had committed adultery. Therefore the case must be remanded for the findings of fact.

The trial court decreed that plaintiff is the owner of and entitled to one-half interest in the described property. We hold that plaintiff is entitled to hold the described property with her husband as tenants by the entirety. The defendant husband is entitled to the rents and profits from the subject real estate property as long as it is so held. Except as herein modified, the judgment of the trial court is affirmed.

Defendant's appeal—modified and affirmed.

Plaintiff's appeal—remanded.

Judge VAUGHN concurs.

Judge MORRIS concurs in the result.

CAMERON M. McRAE AND WIFE, ALETA M. McRAE v. JERRY MOORE AND WIFE, JENNETTE MOORE

No. 7613DC751

(Filed 4 May 1977)

1. **Frauds, Statute of § 2; Boundaries § 10— contract to convey land — ambiguous description — admissibility of parol evidence**

When it is apparent upon the face of a written contract that there is uncertainty as to the land intended to be conveyed and the contract itself refers to nothing extrinsic by which the uncertainty can be resolved, the description is said to be patently ambiguous, parol evidence is not admissible to explain the ambiguity, and the contract is void; however, if the contract, although insufficient in itself to identify the property, refers to matters extrinsic by which identification might possibly be made, the description is said to be latently ambiguous, and evidence, parol and other, may be offered with reference to the extrinsic matter tending to identify the property.

2. **Boundaries § 10.2— contract to convey land — latently ambiguous description — parol evidence admissible**

A written option to purchase land was latently ambiguous and parol evidence was admissible to fit the description to the land where the option was insufficient in itself to identify the property which was the subject matter of the contract, but it did refer to matters extrinsic, i.e., the reference to a lot "presently occupied by Cameron M. and Aleta M. McRae as residence and real estate office," from which it might have been possible to identify the property with certainty.

3. Boundaries § 10— contract to convey land — latently ambiguous descriptions — insufficiency of parol evidence

In an action for specific performance of a latently ambiguous contract to convey land, parol evidence disclosed that there was no clearly identifiable lot with boundaries capable of being established with certainty "occupied by Cameron M. and wife Aleta M. McRae as residence and real estate office" as set forth in the contract; instead, all the evidence showed that the house occupied by the McRaes was located on a larger tract, of which only a portion was being sold, and the correct dividing line separating the portion to be sold from the portion to be retained was never established.

4. Boundaries § 10.2— contract to convey land — latently ambiguous description — admissibility of parol evidence

In an action for specific performance of an option to purchase property, the trial court did not err in admitting defendants' evidence as to location of the property dividing line, since defendants' admission in their answer that they executed the option agreement did not eliminate an issue as to adequacy of the property description contained therein.

5. Boundaries § 10.2— contract to convey land — latently ambiguous description — admissibility of parol evidence

In an action for specific performance of a contract to convey land, plaintiffs' contention that defendants' parol evidence was inadmissible because it altered an unambiguous written contract is without merit, since the description in the contract mentioned only two lines which could not by themselves enclose any lot; the description failed to state which line, if either, fronted on Causeway Road; and the unit of measure referred to, whether feet or yards or some other, was not stated.

6. Rules of Civil Procedure § 15— "litigation by consent" — issue not raised by pleadings — litigation of issue proper

Where plaintiffs never objected to defendants' evidence on the specific ground that the evidence offered was not within the issues raised by the pleadings, under G.S. 1A-1, Rule 15(b), the rule of "litigation by consent" applied, and it was not error for the court to receive evidence and to decide the case on an issue not formally raised by the pleadings.

APPEAL by plaintiffs from *Sauls, Judge.* Judgment entered 17 June 1976 in District Court, BRUNSWICK County. Heard in the Court of Appeals 16 February 1977.

This is an action for specific performance of a contract to convey land. Plaintiffs alleged that the parties had entered into an option agreement, a copy of which was attached to the complaint; that plaintiffs had notified defendants they were exercising the option and had tendered the full purchase price;

and that defendants had refused to convey. The land was described in the option agreement as follows:

> "Rt #1 Box 379-A Causeway Rd. Brunswick Cty. Supply, N.C. approximately 105 x 208.7 lot size presently occupied by Cameron M. & wife Aleta M. McRae as residence and real estate office."

The option included a provision imposing the obligation on "Seller to install deep well and water pump."

Defendants admitted the option but denied they had refused to perform under its terms. The answer also stated two counterclaims not relevant to this appeal. The case was tried without a jury.

The plaintiffs offered evidence to show: The property described in the option is located on Highway 130, the causeway to Holden Beach. At that location defendants own a tract almost an acre in size on which there are two houses. Plaintiffs rent the house on the southern portion of the tract and occupy it as their residence and as a real estate office. The other house is occupied by Mr. and Mrs. Davis, the parents of the defendant, Jeannette Moore. The Davis house is some 28 to 30 feet north of the house in which plaintiffs live, and there is a driveway between the yards. One well serves both houses. After the option was signed, the defendants sent a surveyor to the property. He at first surveyed a lot 105 feet wide. When this survey was completed and a plat was prepared, the defendant, Jerry Moore, met with the plaintiff, Cameron McRae, and said that he made a mistake and that he didn't realize the 105 foot line would go as close to the Davis house as it did. A new survey was made and a plat was prepared showing a lot fronting 94.68 feet on Highway 130, with the south side line being 197.22 feet in length, the north side line being 191.65 feet in length, and the back property line being 69.16 feet in length. Defendants offered to convey this lot to plaintiffs, but plaintiffs refused to accept. Plaintiffs notified defendants they were exercising the option, but defendants refused to convey. Plaintiffs never actually tendered the full purchase price to defendant, but they were ready to do so as soon as defendants tendered a deed conveying the property described in the option.

The defendants offered evidence to show: Prior to signing the option the defendant, Jerry Moore, and the plaintiff, Cam-

eron McRae, did not go upon the ground, but they did discuss where the line would be upon the ground. Mr. Moore told Mr. McRae he would sell approximately 10 feet on the north side of the house being sold to give him room to drive his car in, but that he would not sell him the existing well which served the Davis house. This was the reason for the provision in the option requiring the seller to install a well. When the surveyor surveyed the 105 foot wide lot, it was found it would include the existing well. Mr. McRae and Mr. Moore had guessed at the frontage of the lot along the road and guessed it to be around 100 to 105 feet. However, the parties intended the lot being sold to plaintiffs to extend about 10 feet north of the house which is located on that lot, and they did not intend that the lot contain the existing well. The deed which defendants prepared from the second survey and which they offered to plaintiffs conforms to that understanding.

The court entered judgment making detailed findings of fact, including the following:

"2. That as a special condition of this option agreement, the Defendants were to install a deep well and water pump on the portion of his property which is the subject of the option agreement.

3. That the parties understood prior to entering into the option agreement that the existing well and water pump on the Defendant's property was to be retained by the Defendants and was not to be included in the tract to be conveyed to the Plaintiffs; further, the Defendants understood that the northern boundary line between the property to be conveyed by him and the property to be retained by him would be approximately 10 feet north of the existing house on the property to be conveyed which is occupied by the Plaintiffs as lessees.

4. That the existing well and water pump presently serves a residence occupied by the Plaintiffs as lessees which is included in the property description in the option agreement as well as a separate residence occupied by Harry S. Davis and wife, Annie L. Davis, which is located on that portion of the property which was to be retained by the Defendants.

5. That on or about 9 June, 1975, Jan K. Dale, Registered Land Surveyor, came upon the property of Defend-

ants at Defendants' request and to perform a survey for the purpose of establishing a boundary line between the tract Plaintiffs were interested in buying under the option agreement and the tract to be retained by Defendants. The Defendants were absent at the time the survey was made, and the western boundary line of the tract in question was set as being 105 feet in length from the southwestern corner of said tract; this length was based on the description contained in the option (a copy of which was available to Jan K. Dale), and also based on information furnished to Jan K. Dale by the Plaintiff, Cameron M. McRae, at the time of the survey.

6. That when Defendants returned home and learned of locations of the surveyor's stakes on the property, he immediately informed the Plaintiffs and the surveyor, Jan K. Dale, that the line dividing the property to be conveyed to Plaintiffs and the property to be retained by Defendants was surveyed on the grounds at the wrong place and further informed the surveyor that he would have to re-survey the property.

7. That by setting the western boundary line of the property in question as being 105 feet in length, the existing well and water pump would be located on the property to be conveyed to Plaintiffs.

8. That the defendant, Jerry Moore, had the property re-surveyed by Jan K. Dale so as to place the dividing line between the property to be conveyed and that to be retained by him (the northern boundary line of the property to be conveyed) 10 feet north of the house on the property to be conveyed and in such a manner as to locate the well on the property to be retained by him; this re-survey resulted in the western boundary line being 94.68 feet rather than exactly 105 feet in length."

Based on its findings of fact, the court concluded as a matter of law that due to a mutual misunderstanding as to the actual location of the northern boundary line, there was never any meeting of the minds of the parties as to the description of the property and therefore the option was void. From judgment for defendants in accord with this conclusion, plaintiffs appeal.

Powell and Smith by William A. Powell for plaintiff appellants.

Mason H. Anderson by Douglas W. Baxley for defendant appellees.

PARKER, Judge.

[1] A contract to convey land "must contain a description of the land, the subject matter of the contract, either certain in itself or capable of being reduced to certainty by reference to something extrinsic to which the contract refers." *Lane v. Coe,* 262 N.C. 8, 12, 136 S.E. 2d 269, 273 (1964). When it is apparent upon the face of the written contract that there is uncertainty as to the land intended to be conveyed and the contract, itself, refers to nothing extrinsic by which the uncertainty can be resolved, the description is said to be patently ambiguous. "Parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument." *Overton v. Boyce,* 289 N.C. 291, 294, 221 S.E. 2d 347, 349 (1976). In such a case the contract is void. If, however, the contract, although insufficient in itself to identify the property, refers to matters extrinsic by which identification might possibly be made, the description is said to be latently ambiguous. When that is the case, evidence may be offered, parol and other, with reference to the extrinsic matter tending to identify the property. *Lane v. Coe, supra.*

[2, 3] The description in the written option in the present case is insufficient in itself to identify the property which is the subject matter of the contract. It does, however, refer to matters extrinsic, i.e., the reference to a lot "presently occupied by Cameron M. and wife Aleta M. McRae as residence and real estate office," from which it might have been possible to identify the property with certainty. It was, therefore, not patently but only latently ambiguous, and parol evidence was admissible to fit the description to the land. When this was attempted, however, the difficulty which plaintiffs encountered was that the evidence, both that introduced by plaintiffs and by defendants, disclosed that there was no clearly identifiable lot with boundaries capable of being established with certainty "occupied by Cameron M. & wife Aleta M. McRae as residence and real estate

office." Instead, all of the evidence showed that the house occupied by the McRaes was located on a larger tract, of which a portion only was being sold, and the correct location of the dividing line separating the portion to be sold from the portion to be retained was never established. Plaintiffs thought the line was to be fixed so as to give them a lot fronting 105 feet on the highway and having a rear lot line also 105 feet in length, but the written option contract did not say this and the parol evidence failed to establish that this was the lot "presently occupied" by the plaintiffs. Defendants thought the line was to be fixed so as to run approximately 10 feet north of the house occupied by the McRaes and so as to leave the existing well on the portion of the lot to be retained, but the written option contract did not say this either nor did the parol evidence show this to be the lot "presently occupied" by plaintiffs. Thus, the evidence failed to dispel the latent ambiguity in the description contained in the written option agreement. The detailed findings of fact made by the trial judge were supported by the evidence, and his findings of fact in turn support his conclusion that there was never a meeting of the minds of the parties as to the location of the new dividing line. Accordingly, the contract was void and unenforceable.

[4] Plaintiffs assign error to the court's overruling their objections to the evidence presented by defendants which tended to show defendants' version of the dividing line as being approximately 10 feet north of the house occupied by plaintiffs and as being so located as to leave the existing well on the portion of defendants' property which was not being conveyed. In their brief, plaintiffs present three arguments in support of their contention that the court erred in admitting this evidence. First, plaintiffs point out that defendants filed answer in which they admitted execution of the option agreement. Citing *Burkhead v. Farrow*, 266 N.C. 595, 146 S.E. 2d 802 (1966), plaintiffs contend no issue as to adequacy of the description of the land to be conveyed was raised by the pleadings. We do not agree. In *Burkhead v. Farrow, supra*, defendants admitted in their further answer that they executed an option to plaintiff to purchase the lands *described in the complaint*, and the complaint in that case contained a metes and bounds description of the property. Here, plaintiffs' complaint contains no description of the property other than that contained in the written option agreement which was attached to and made a part of the complaint. Defendants'

admission of executing the option agreement did not eliminate an issue as to adequacy of the property description contained therein.

[5] As their second contention, plaintiffs contend that defendants' parol evidence was inadmissible because it altered an unambiguous written contract. The simple answer is that the writing was far from unambiguous. The description, "approximately 105 x 208.7 lot size," mentions only two lines, which cannot by themselves enclose any lot. It fails to state which line, if either, fronts on Causeway Road. The unit of measure referred to, whether feet, yards, or some other, is not stated.

[6] Finally, plaintiffs point out that defendants failed to allege mutual mistake as a defense and that for this reason it was error to admit defendants' parol evidence and to grant relief on a defense that was not alleged. However, the record discloses that plaintiffs never objected to defendants' evidence on the specific grounds that the evidence offered was not within the issues raised by the pleadings. Therefore, under G.S. 1A-1, Rule 15(b), the rule of "litigation by consent" applied, and it was not error for the court to receive evidence and to decide the case on an issue not formally raised by the pleadings. *Mangum v. Surles,* 281 N.C. 91, 187 S.E. 2d 697 (1972); *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972).

Plaintiffs' final assignment of error brought forward in their brief is directed to the court's second conclusion of law, in which the court found that the option agreement expired because plaintiffs failed to tender payment within the time required by the agreement. We need not consider this assignment of error, because the judgment appealed from was fully supported by the court's first conclusion that the option was void for the reason that there was never any meeting of the minds of the parties as to the description of the property to be conveyed.

The judgment appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

THE COCA-COLA COMPANY v. J. HOWARD COBLE, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 7610SC809

(Filed 4 May 1977)

1. **Taxation § 38— unconstitutional statute — recovery of tax — voluntary or involuntary payment**

Generally, one who voluntarily pays a tax imposed by an unconstitutional law without knowledge that the law is unconstitutional may not subsequently recover the tax paid; however, where payment of the tax is involuntary, it may be recovered by the taxpayer.

2. **Taxation § 38— mistake as to constitutionality of statute — voluntary payment**

A mere mistake as to the constitutionality of a taxing statute does not make payment of the tax involuntary.

3. **Taxation § 38— soft drink tax — nonresident distributor — amount in excess of alternate method — voluntary payment**

A nonresident distributor voluntarily paid the soft drink tax by means of taxpaid lids rather than the less expensive alternate method provided by G.S. 105-113.56A and is not entitled to recover the amount paid in excess of the alternate method where the distributor made no attempt to report or pay the tax by the alternate method and did not pay the tax under protest, notwithstanding the nonresident distributor was informed by the Department of Revenue on several occasions that the alternate method was unavailable to it and the Court of Appeals thereafter held that the exclusion of nonresident distributors from the operation of the statute allowing the alternate method of payment constituted an undue burden on interstate commerce.

4. **Taxation § 38— overpayment — action for refund — voluntary payment**

G.S. 105-266.1 does not permit a taxpayer to recover unconstitutionally assessed taxes where the payment was made voluntarily.

APPEAL by defendant from *Herring, Judge.* Judgment entered 22 July 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 15 March 1977.

Plaintiff, a Delaware corporation, instituted this action to recover certain taxes paid on its distribution of a soft drink known as "Hi-C." The taxes were collected pursuant to G.S. 105-113.45, which levies a soft drink excise tax at the rate of one cent for each bottle sold in North Carolina. G.S. 105-113.51 establishes a method whereby the tax is paid by affixing North Carolina taxpaid stamps or crowns to the soft drink container.

An alternate method for payment of the tax was provided by G.S. 105-113.56A:

> "Instead of paying the tax levied in this Article in the manner otherwise provided, any resident distributor or wholesale dealer, and any distributor or wholesale dealer having a commercial domicile in this State may pay the tax in the following manner, with respect to bottled soft drinks:
>
> Beginning with sales made on and after October 1, 1969, of bottled soft drinks subject to the tax, sales reports shall be made by the Commissioner on or before the fifteenth day of each succeeding month, accompanied by payment of the tax due, determined as follows: For the first fifteen thousand gross of bottled soft drinks sold annually, seventy-two cents (72¢) per gross; for all in excess of fifteen thousand gross, one cent (1¢) per bottle. In addition, there shall be allowed a discount of eight percent (8%) of the said tax to be remitted.
>
> All persons paying the tax in this manner shall be subject to such rules and regulations as the Commissioner may prescribe, including the requirement that such persons furnish such bond as the Commissioner may deem advisable, in such amount and upon such conditions as in the opinion of the Commissioner will adequately protect the State in the collection of the taxes levied by this Article."

The lower tax rate and less burdensome method of payment afforded only to resident distributors under the alternative method of G.S. 105-113.56A was held by this Court to be discriminatory and an undue burden on interstate commerce. *Food Stores v. Jones, Comr. of Revenue,* 22 N.C. App. 272, 206 S.E. 2d 346 (1974). We said that "[t]he implied exclusion of nonresident distributors from the act has the same effect as if [it] were boldly stated in express terms and is equally noxious to the Constitution of the United States. It is void." *Id.* at 275, 206 S.E. 2d at 348.

Plaintiff's complaint alleged the following (summarized except where quoted): that plaintiff is a Delaware corporation with its principal place of business in Atlanta, Georgia; that it is domesticated in North Carolina; that a subdivision of plaintiff, The Coca-Cola Company Foods Division, has been

registered with and licensed by defendant under Soft Drink Tax License No. 5079 since 12 September 1969; that during the tax years ending 30 September 1971, 1972, 1973 and 1974, plaintiff's subdivision manufactured and distributed in North Carolina a soft drink called "Hi-C"; "[t]hat since October 1, 1969, the plaintiff, pursuant to G.S. Sec. 105-113.45, paid a soft drink excise tax in the amount of one cent (1¢) per can for every can of Hi-C sold in North Carolina . . ."; that pursuant to G.S. 105-113.51, plaintiff was required to affix a taxpaid crown or stamp to its cans of Hi-C since it was not a North Carolina distributor and had not established a commercial domicile in the State; that a less costly alternate method of payment of the tax was available to in-state distributors by G.S. 105-113.56A; "[t]hat the director of defendant's Privilege License, Beverage and Cigarette Tax Division on several occasions, over the period of time cited above, instructed the plaintiff that G.S. Sec. 105-113.56A did not apply to the plaintiff, and that the North Carolina Department of Revenue would not permit the plaintiff to use the alternate method of payment with respect to its canned soft drinks sold in North Carolina"; that in reliance on the director's instructions and the express provisions of the Soft Drink Tax Act, plaintiff refrained from employing G.S. 105-113.56A's alternate method of payment of the tax; that the Court of Appeals held the alternative method of payment to be discriminatory and an undue burden on interstate commerce; that plaintiff's inability to utilize the alternative method of payment resulted in an additional tax burden to plaintiff of $43,200; that plaintiff had filed for a refund pursuant to G.S. 105-266.1, but that defendant had denied plaintiff's claim for a refund in its entirety. In its prayer for relief, plaintiff asked the court to require defendant to refund plaintiff the sum of $43,200 with interest from the date of each payment.

In his answer, defendant admitted that plaintiff had paid the soft drink tax pursuant to the method in G.S. 105-113.51. However, defendant ". . . denied that any excessive or incorrect tax has been paid by the plaintiff, the plaintiff having paid a tax, correct in amount, pursuant to G.S. 105-113.51, without ever having reported or paid, and without ever having offered or attempted to report or pay, the tax by means of the alternate method pursuant to G.S. 105-113.56A. . . ." Defendant further alleged that "[i]n order for plaintiff to be entitled to any refund, it would either have had to file returns pursuant to G.S.

105-113.56A, or to have paid additional taxes assessed by the defendant, or to return unused lids for refund pursuant to G.S. 105-113.56, neither of which it did," and that plaintiff was not entitled to a refund of any amount.

After pretrial discovery and motions, defendant moved for summary judgment as to plaintiff's claim for refund for the taxable year 1970-71 on the ground that such refund was barred by the limitations of G.S. 105-266.1. On 20 November 1975, Hobgood, Judge, granted summary judgment for defendant as to plaintiff's alleged overpayment of $10,800 in fiscal 1970-71.

Prior to trial, the parties stipulated, *inter alia*, that during the times in question, plaintiff had paid the soft drink tax by means of taxpaid lids; that plaintiff had made several inquires of W. C. Pickett, Jr., an officer in the Department of Revenue, as to whether the law would allow plaintiff to pay the tax according to the alternative method of G.S. 105-113.56A; that plaintiff was informed by Pickett that "the law did not permit" plaintiff to use the alternate method; that ". . . relying on Mr. Pickett's statements, the plaintiff paid the soft drink tax by means of taxpaid lids, the means of payment provided for in G.S. Chapter 105-113.51, and did so without protest"; and that also in reliance on Mr. Pickett, plaintiff failed to file any reports pursuant to G.S. 105-113.56A.

Plaintiff introduced evidence at trial which tended to show that the alternative method of payment was less expensive and more advantageous to plaintiff than the method of taxpaid lids. No evidence was offered by defendant. Judgment was entered for plaintiff granting a refund of $32,400, representing an overpayment of $10,800 for each of the three taxable years in question, plus interest. Defendant appeals from this judgment.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for defendant appellant.

Blanchard, Tucker, Twiggs and Denson, by Charles F. Blanchard and R. Paxton Badham, Jr., for plaintiff appellee.

MORRIS, Judge.

By its first five assignments of error, defendant contends that the trial judge erred in ordering that plaintiff is entitled

to recover any refund for taxes paid by its purchase of taxpaid lids.

[1] Generally, one who voluntarily pays a tax imposed by an unconstitutional law, and does not know that the law is unconstitutional, may not subsequently recover the tax paid. 84 C.J.S., Taxation, § 637, p. 1284; 72 Am. Jur. 2d, State and Local Taxation, § 1087, p. 349. *See also* Annots., 74 A.L.R. 1301 (1931), 48 A.L.R. 1381 (1927), and cases cited therein. Where payment of the tax is involuntary, however, it may be recovered by the taxpayer. *Sneed v. Shaffer Oil & Refining Co.*, 35 F. 2d 21 (8th Cir. 1929); *Tyler v. Dane County*, 289 Fed. 843 (W.D. Wis. 1923), *appeal dismissed*, 266 U.S. 637, 69 L.Ed. 481, 45 S.Ct. 10 (1924); *Manufacturer's Casualty Insurance Co. v. Kansas City*, 330 S.W. 2d 263 (Mo. App. 1959).

[2] Problems most often arise in determining whether the payments of the tax were voluntary or involuntary. Payment is deemed involuntary when it is made to release the payor or his property from an actual, existing duress imposed by the payee. *C. & J. Michel Brewing Co. v. State*, 19 S.D. 302, 103 N.W. 40 (1905). "Duress is the result of coercion. It may exist even though the victim is fully aware of all facts material to his or her decision." *Link v. Link*, 278 N.C. 181, 191, 179 S.E. 2d 697, 703 (1971). However, a mere mistake as to the constitutionality of the taxing statutes does not make the payment involuntary. "The weight of authority is to the general effect that a payment of taxes, with knowledge of all the facts, is not rendered involuntary by the fact that it was paid in the mistaken belief that the statute or ordinance under which it was levied was valid." *Manufacturer's Casualty Insurance Co. v. Kansas City, supra*, at 265.

[3] Plaintiff made inquires "on more than one occasion" to the Department of Revenue to determine whether it could employ the alternate method of payment under G.S. 105-113.56A but was informed that such method was unavailable. Throughout the entire period in question, plaintiff continuously paid the tax pursuant to G.S. 105-113.51 and made no other effort to comply with the alternate method. Moreover, plaintiff did not pay the tax under protest as did the taxpayer in *Food Stores, supra*. Plaintiff maintains, however, that it could not have utilized the alternate method ". . . without violating North Carolina law, incurring civil and criminal sanctions and

involving itself in a constitutional lawsuit, which it did not wish to do and which it had no duty to do." Yet the threat of civil or criminal proceedings is not sufficient coercion to constitute duress and make the payments involuntary. "It has been held in numerous cases that threats or apprehension of judicial proceedings to enforce the payment of an asserted claim will not prevent the payment from being considered voluntary. (Citations omitted.)" *C. & J. Michel Brewing Co. v. State, supra* at 310, 103 N.W. at 42. *See also* 70 C.J.S., Payment, § 150, p. 357.

[4] Plaintiff nevertheless contends that it is entitled to a refund by virtue of G.S. 105-266.1 which provides in pertinent part:

> *"Refunds of overpayment of taxes.*—(a) Any taxpayer may apply to the Commissioner of Revenue for refund of tax or additional tax paid by him at any time within three years after the date set by the statute for the filing of the return or application for a license or within six months from the date of payment of such tax or additional tax, whichever is later. The Commissioner shall grant a hearing thereon, and if upon such hearing he shall determine that the tax is excessive or incorrect, he shall resettle the same according to the law and the facts, and adjust the computation of tax accordingly. The Commissioner shall notify the taxpayer of his determination, and shall refund to the taxpayer the amount, if any, paid in excess of the tax found by him to be due."

Plaintiff argues that G.S. 105-266.1 provides a remedy whereby unconstitutionally assessed taxes may be recovered by the taxpayer regardless of whether or not their payment was voluntary. We disagree.

Some states have enacted legislation which permits recovery of all unconstitutionally assessed taxes. Under these statutes, it is not necessary to determine whether the tax was paid voluntarily or involuntarily. *E.g., Reynolds Fasterners, Inc. v. Wright,* 197 So. 2d 295 (Fla. 1967); *Bank v. Board of Supervisors,* 168 Iowa 501, 150 N.W. 704 (1915); *Schlesinger v. State,* 195 Wis. 366, 218 N.W. 440 (1928). We do not believe, however, that G.S. 105-266.1 is so broad. G.S. 105-266.1 is a procedural statute. It does not set out *when* a taxpayer is entitled to a refund but only the steps by which a refund may be received.

The instances in which a refund is proper are a matter of substantive law and depend, in the present case, upon whether plaintiff's tax payment was voluntary.

Moreover, we do not find *B-C Remedy Co. v. Unemployment Compensation Com.*, 226 N.C. 52, 36 S.E. 2d 733 (1946), cited by plaintiff, to be controlling in this case. In *B-C*, the plaintiff applied for a refund of tax erroneously paid on an employee's salary. Application for a refund was made pursuant to a section of the North Carolina Unemployment Compensation Act which provided for an adjustment or refund where ". . . the Commission shall determine that such contributions or interest or any portion thereof was *erroneously collected* . . ." (Emphasis supplied.) Our Supreme Court stated:

> "As a part of its defense, appellant suggests that there is no remedy for recovery of tax voluntarily paid. That could only be true where the statute fails to provide for a refund under such circumstances, and in a jurisdiction which would regard an action at law for its recovery as a suit against the State, without statutory authority for its institution. In view of the construction we give the statute, we do not find it necessary to discuss the point. The Act is broad enough in its phraseology to cover refund of money paid through mistake, without raising technical distinctions between voluntary and involuntary payments. There is no question that the item was erroneously collected or paid within the meaning of that term as used in the statute." 226 N.C. at 55, 36 S.E. 2d at 735-36.

Thus, the statute involved in *B-C*, unlike G.S. 105-266.1, provided that the taxpayer was entitled to a refund whenever the tax was "erroneously collected." The court's interpretation of the statute was sufficiently broad to include both voluntary and involuntary payments. We do not believe, however, that G.S. 105-266.1 can be interpreted to entitle a taxpayer to a refund where the payment is made voluntarily. Having determined that plaintiff's payment of the soft drink tax constituted voluntary payment, we are of the opinion, and so hold, that plaintiff did not qualify for a refund for the taxable years in question.

In view of our ruling, defendant's other assignments of error are not discussed.

The judgment is reversed.

Reversed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM RAY VAWTER

No. 7621SC829

(Filed 4 May 1977)

1. **Criminal Law §§ 66.10, 66.17— confrontation between victim and defendant at sheriff's office — in-court identification not tainted**

The trial court properly allowed into evidence an armed robbery victim's in-court identification of defendant where the court found that the identification was based on the victim's observation of defendant at the scene of the crime, which was a well-lighted store, and that it was not tainted by a one-on-one confrontation between the victim and defendant at the sheriff's office one day after the crime.

2. **Burglary and Unlawful Breakings § 3.1— breaking and entering store — allegation and proof of ownership — no fatal variance**

There was no fatal variance between indictment and proof in a breaking and entering case where the indictment alleged that defendant "did feloniously break and enter a building occupied by E. L. Kiser (sic) and Company, Inc., a corporation, d/b/a Shop Rite Food Store used as retail grocery located at Old U.S. Highway # 52, Rural Hall, North Carolina with the intent to commit a felony therein, to wit: larceny," and the evidence indicated that members of the Kiger family owned and operated the Shop Rite Food Store located on Old U.S. 52 at Rural Hall, but no evidence was introduced as to the corporate ownership or occupancy of the Shop Rite Food Store.

3. **Larceny § 4— larceny of property from store — allegation and proof of ownership — fatal variance**

A fatal variance existed in a felonious larceny case where the State charged larceny of property belonging to E. L. Kiser (sic) and Company, Inc., but proved larceny of property belonging to the Kiger family.

4. **Kidnapping § 1— armed robbery and kidnapping committed together — no merger of offenses**

In a prosecution for breaking and entering, larceny, armed robbery and kidnapping, defendant's contention that the trial court erred in denying his motion to dismiss the charge of kidnapping on the ground that there was a merger of the offenses of armed robbery and kidnapping is without merit, since the evidence was sufficient to show

that the victim not only was robbed by a firearm but was thereafter confined and restrained by defendant for the purpose of (1) facilitating the commission of a felony in that the victim was forced to aid in the robbery of a store, and (2) facilitating defendant's flight from the sheriff's deputies who arrived at the crime scene.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 16 July 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 March 1977.

Upon a plea of not guilty, defendant was tried on indictments charging him with breaking and entering, larceny, armed robbery and kidnapping. The State's evidence tends to show:

On 11 May 1976 at approximately 4:00 a.m., Milton Kiger, part owner of a Shop Rite Food Store in Rural Hall, went to the store in response to a burglar alarm. When Kiger entered the stockroom two white males, defendant and Dennis Wilson, approached him. Defendant pressed a knife to Kiger's back and demanded his keys and pocketbook. Kiger gave defendant his keys and pocketbook while Wilson proceeded to fill several shopping carts with cigarettes. Defendant then told Kiger to push one of the carts toward the outside door. Wilson had left the building to get their car when some deputies sheriff drove up to the back porch of the store. Defendant, who was holding Kiger by the top of his pants, told Kiger, "If you want to live, get rid of this man." When defendant released his hold of Kiger's pants, Kiger ran out the door toward the officer's car.

Before Kiger was allowed to identify defendant at trial, an extensive voir dire hearing was held. Kiger testified that he observed defendant for five to seven minutes, four minutes of which he was face to face with defendant. Kiger described defendant to the investigating officers as "a slender, tall white male with blondish hair wearing a blue shirt." The day after the robbery Kiger was called to the sheriff's department to view a suspect. Kiger observed defendant, who was alone at the time, through a two-way mirror and identified him as the robber. The trial judge found that Kiger's in-court identification was of independent origin, based on his observations at the time of the alleged crime; that it was not tainted by any improper conduct or methods of the sheriff's department; and that the identification testimony was admissible.

Defendant presented no evidence.

The jury found defendant guilty as charged. From judgments imposing a prison sentence of not less than forty and not more than fifty years on the armed robbery charge; a prison sentence of twenty-five years on the kidnapping charge to run concurrently with the armed robbery sentence; and a suspended ten-year prison sentence on the breaking and entering and larceny charges, defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward, for the State.

White and Crumpler, by G. Edgar Parker, for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the trial court's denial of his motion to suppress his in-court identification. This assignment is without merit.

Defendant argues that the out-of-court identification procedure violated his due process rights in that the one-on-one confrontation between the prosecuting witness, Kiger, and defendant was unnecessarily suggestive and was conducive to irreparable mistaken identication as a matter of law. He further contends that the out-of-court identification by Kiger so tainted the in-court identification of defendant as to render it inadmissible.

As stated in *State v. Henderson,* 285 N.C. 1, 11, 203 S.E. 2d 10, 17-18 (1974):

> "The practice of showing suspects singly to person for purposes of identification has been widely condemned. *Stovall v. Denno, supra; State v. Wright, supra.* However, whether such a confrontation violates due process depends on the totality of the surrounding circumstances. *Stovall v. Denno, supra.*

Assuming, *arguendo,* that the out-of-court confrontation was impermissibly suggestive and conducive to misidentification, we think the in-court identification was properly admitted into evidence. It is well established that the illegality of an out-of-court identification will render inadmissible the in-court identification unless it is first determined on voir dire that the

in-court identification is of independent origin. *State v. Smith*, 278 N.C. 476, 180 S.E. 2d 7 (1971), *State v. Henderson, supra.*

Here, the trial judge, upon a motion to strike, conducted an extensive voir dire hearing. The evidence on voir dire reveals that the witness observed the defendant approximately five to seven minutes. Of this time, approximately four minutes were spent with the prosecuting witness and the defendant face to face in a well lighted store. Immediately thereafter the witness gave a general but accurate description of defendant. The court found as facts and concluded as a matter of law that Kiger's in-court identification of defendant was of independent origin, based on observations of defendant at the scene of the crime, and that the identification was not tainted in any way by any illegal or improper procedures used at the sheriff's department.

In *State v. Tuggle*, 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974), Chief Justice Bobbitt concisely stated the rules governing voir dire hearings where identification testimony is challenged:

> "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 417, 177 S.E. 2d 874, 878 (1970); *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 432, 183 S.E. 2d 652, 655 (1971); *State v. Morris*, 279 N.C. 477, 481, 183 S.E. 2d 634, 637 (1971)."

In the case at bar the findings of the trial court as to facts concerning the admissibility of the challenged testimony are well-supported by competent evidence and are conclusive on this appeal.

Defendant next assigns as error the denial of his motions for dismissal of the counts of felonious breaking and entering and larceny on the ground of fatal variance between the indictments and the proof.

[2] As to breaking and entering, the indictment states that defendant "did feloniously break and enter a building occupied

by E. L. Kiser (sic) and Company, Inc., a corporation, d/b/a Shop Rite Food Store used as retail grocery located at Old U. S. Highway #52, Rural Hall, North Carolina, with the intent to commit a felony therein, to wit: larceny." The evidence presented by Jerry and Milton Kiger indicates that they, along with other members of their family, own and operate the Shop Rite Food Store located on Old U. S. 52 at Rural Hall. No evidence was introduced as to the corporate ownership or occupancy of the Shop Rite Food Store.

In 2 Strong, N. C. Index 3d, Burglary and Unlawful Breakings, pp. 660-661, under § 3.1 entitled "Sufficiency of description of victim and premises," we find: "The recommended practice is to identify the location of the subject premises by street address, rural road address, or some other clear description. However, an indictment under G.S. 14-54 is sufficient if the building allegedly broken and entered is described sufficiently to show that it is within the language of the statute and to identify it with reasonably particularity so that defendant may prepare his defense and plead his conviction or acquittal as a bar to further prosecution for the same offense. . . ."

In *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967), the court held that there was a fatal variance between pleading and proof where the indictment alleged the felonious breaking and entering of a building "occupied by one Friedman's Jewelry, a corporation" and the evidence showed that the building was occupied by "Friedman's Lakewood, Incorporated" and that there were three "Friedman's" stores in the city where the offense took place.

Defendant strongly relies on *State v. Brown,* 263 N.C. 786, 140 S.E. 2d 413 (1965). In that case the indictment charged defendant in separate counts with feloniously breaking and entering a building occupied by "Stroupe Sheet Metal Works, H. B. Stroupe, Jr., owner," and with larceny of a number of blank checks, the property of "Stroupe Sheet Metal Works, H. B. Stroupe, Jr., owner." The evidence showed that the occupant of the place of business and the owner of the property was a corporation. The Supreme Court held that there was a fatal variance between the indictment and the proof.

We think *Miller* and *Brown* are distinguishable from the case at hand. In those cases the location of the subject premises by street address, rural road address, "or some other clear de-

scription" was not shown in the indictments. In the case *sub judice* the location of the subject premises is set forth with sufficient particularity to enable defendant to prepare his defense and to plead his conviction or acquittal as a bar to further prosecution for the same offense.

With respect to the breaking and entering charge, we hold that there was no fatal variance between pleading and proof.

[3] With respect to the larceny count, we think there was a fatal variance between the indictment and the proof. The larceny count alleges that defendant "did feloniously steal, take and carry away 249 Cartons of assorted brands of Cigarettes, the personal property of E. L. Kiser (sic) and Company, Inc., a corporation, d/b/a Shop Rite Food Store . . . ."

The indictment for larceny must correctly charge the owner or the person in possession of the property stolen. *State v. McKoy,* 265 N.C. 380, 144 S.E. 2d 46 (1965). All of the evidence indicates the Kiger family owned and operated the store. There was no evidence of any corporate ownership. Therefore, a fatal variance exists since the State charged larceny of property belonging to E. L. Kiser (sic) and Company, Inc., but proved larceny of property belonging to the Kiger family. *State v. Crawford,* 3 N.C. App. 337, 164 S.E. 2d 625 (1968), *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972).

We hold that the court erred in denying defendant's motion to dismiss the larceny count. Since the breaking and entering and larceny counts were consolidated for purpose of judgment, the judgment in Case No. 76CR18146 is vacated and said case is remanded to the superior court where a proper judgment based solely on the breaking and entering count will be entered.

[4] By his final assignment of error defendant contends the trial court erred in denying his motion to dismiss the charge of kidnapping on the ground that there was a merger of the offenses of armed robbery and kidnapping. This assignment is without merit.

The indictment for kidnapping charges that defendant "unlawfully and wilfully did feloniously kidnap Milton G. Kiger a person who had attained the age of sixteen years, by unlawfully confining and restraining the said Milton G. Kiger for the purpose of facilitating the commission of felonies; to wit: Breaking and Entering and Larceny, and Robbery with a Dan-

gerous Weapon; and facilitating the flight of the defendant, and Wilton Dennis Wilson, alias David Arthur Childress following his participation in the commission of felonies; to wit: Breaking and Entering and Larceny, and Robbery with a Dangerous Weapon."

Our new kidnapping statute, G.S. 14-39, provides in pertinent part that:

> "(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person."

Defendant contends that both the alleged armed robbery and kidnapping arose out of the same act or occurrence and that both of the offenses should not have been submitted to the jury. While we can envision cases in which the trial court should not submit counts of kidnapping and armed robbery to the jury, we think the facts in this case warranted the submission of both counts.

It is settled that a continuous series of acts by a defendant, all occurring on the same date and as parts of one entire plan of action, may constitute two or more separate criminal offenses. *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967), *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967).

The evidence in the case at hand showed that the crimes of armed robbery and kidnapping were separate offenses and based on separate features of one continuous course of conduct. *State v. Kinsey,* 17 N.C. App. 57, 193 S.E. 2d 430 (1972), *cert. denied,* 282 N.C. 674, 194 S.E. 2d 153 (1973), *State v. Rich-*

ardson, 279 N.C. 621, 185 S.E. 2d 102 (1971). We think the offenses of kidnapping and armed robbery each have essential elements which are not component parts of the other. As to conviction of both armed robbery and kidnapping under the prior kidnapping statute, see *State v. Sommerset,* 21 N.C. App. 272, 204 S.E. 2d 206, *cert. denied,* 285 N.C. 594, 205 S.E. 2d 725 (1974), *State v. Glenn,* 22 N.C. App. 6, 205 S.E. 2d 352 (1974).

The evidence showed that defendant placed a knife to the back of Milton Kiger and demanded that he give him his keys and pocketbook; that Kiger surrendered his keys and pocketbook. The offense of armed robbery was thereupon completed. Thereafter, defendant's accomplice stated that, "We'll have to take him with us. He has seen us and can identify us." Defendant agreed and stated "okay." While the accomplice was loading cigarettes into grocery carts, defendant pushed Kiger in the direction of the carts and demanded that Kiger, "Push one of those carts." Several carts were pushed to the outside door after which the accomplice went to get the car. While he was gone, a police car drove up and stopped within a few feet of the back porch. Defendant told Kiger, "If you want to live, get rid of this man." Kiger stepped in front of the door while defendant was holding him by the top of his pants. When defendant released his grip, Kiger "scooted out the door in the direction of the officer's car."

This evidence was sufficient to show that Kiger not only was robbed with a firearm but was thereafter confined and restrained by defendant. This restraint was for the purpose of facilitating the commission of a felony in that Kiger was forced to aid in the robbery of the store by pushing the carts of cigarettes. The evidence also indicates that defendant restrained the victim for the purpose of facilitating his flight from the deputies who had arrived. We hold that the evidence was sufficient to withstand the motion to dismiss and to take the case to the jury on the charges of kidnapping and armed robbery.

In Case No. 76CR18146 (B&E&L) judgment vacated and cause remanded for proper judgment.

In Case Nos. 76CR18147 and 76CR18148, no error.

Judges HEDRICK and CLARK concur.

JANE J. PERRY v. DAVID F. PERRY

No. 766DC775

(Filed 4 May 1977)

1. **Divorce and Alimony § 24.7— change in child support — needs at time of separation agreement**

It was not necessary for plaintiff mother to present evidence or for the court to make findings as to what the needs of a child had been at the time a separation agreement was signed in order for the court to enter a *pendente lite* order requiring defendant father to make child support payments larger than those provided in the separation agreement.

2. **Divorce and Alimony § 24.2— child support — change in amount required by separation agreement**

Where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions.

3. **Divorce and Alimony § 24.7— child support — separation agreement — change in circumstances**

A mother's serious illness which caused permanent disability and a reduction in her income from $512.00 to $157.50 per month constituted a sufficient change in conditions affecting the welfare of her child to support a *pendente lite* order directing the father to make child support payments larger than those provided in a separation agreement and to pay the mother's counsel fees.

4. **Judges § 5— denial of motion for recusal**

The trial judge did not err in the denial of defendant's motion that he disqualify himself from the trial of this action to obtain increased child support on the grounds that the judge had presided at a criminal trial of defendant for failure to provide adequate child support, had erroneously admitted testimony in the criminal trial concerning income earned by defendant's present wife, and after announcing a verdict of not guilty in the criminal trial, had stated that two people having the income of defendant and his present wife should furnish more child support than that paid by defendant pursuant to a separation agreement, where the judge stated that he would not consider evidence of the income of defendant's present wife and that he did not remember the statement attributed to him by defendant, and where the record reveals that the judge conducted the hearing in a fair and impartial manner.

APPEAL by defendant from *Blythe, Judge.* Order entered 9 July 1976 in District Court, HERTFORD County. Heard in the Court of Appeals 8 March 1977.

This is an appeal from a *pendente lite* order awarding child support payments and attorney fees. Plaintiff-mother and defendant-father married on 11 August 1968 and lived together until February 1974, when they separated. One child was born of their marriage. On 6 March 1975 they executed a separation agreement by which custody of the child remained in plaintiff and defendant agreed to provide $65.00 on the first and fifteenth of each month (a total of $130.00 per month) for the support of the child. When this agreement was executed, plaintiff was employed on a full-time basis as a secretary and was receiving a gross salary of $118.00 per week; and defendant was employed on a full-time basis by Carolina Telephone and Telegraph Company and was receiving a gross salary of $225.00 per week. On 14 April 1975 defendant was granted an absolute divorce from plaintiff on the grounds of one year's separation. The divorce decree did not alter, amend, or modify the custody or support provisions of the separation agreement.

On 15 May 1975 plaintiff suffered a severe stroke which necessitated her hospitalization and an operation. As a result, she was paralyzed along the left side and extremeties of her body. She remained so for some months until her condition improved enough to allow some functioning in the left side of her body. Because of her illness, she has been unable to return to her employment and has been advised by her physicians that she is permanently disabled and not physically capable of any type of continuing employment. The only payments she receives from which she can support her child are monthly social security checks in the amount of $157.70 and the support payments made by defendant under the separation agreement.

On 7 May 1976 plaintiff filed this action seeking an order requiring defendant to provide adequate support for the child. In her complaint plaintiff alleged the foregoing facts, all of which the defendant admitted in his answer. In addition, plaintiff alleged, but defendant denied, the following:

Plaintiff's illness and resulting unemployment has reduced her income from approximately $512.00 to $157.50 per month. This reduction in income and plaintiff's permanent disability are significant changes in the circumstances that existed when the separation agreement was executed. This change, coupled with the increasing cost of living and the growing needs of the child, make the support payments provided for in the separa-

tion agreement inadequate to provide proper maintenance for the child. Plaintiff has notified defendant of this inadequacy and has made demand for an increase in the amount of child support payments to be made by him. Defendant is employed on a full-time basis earning a salary of $238.50 per week. Despite the fact defendant is financially capable of providing adequate support for his child, he refuses to do so.

The matter was heard on plaintiff's motion for an increase in the child support payments *pendente lite*, and on defendant's motion to take custody of the child away from the plaintiff and to place it with the defendant. Plaintiff testified concerning her physical and financial condition, her living arrangements, her care of the child, and the living expenses and needs of the child. She also presented evidence concerning defendant's earnings from his employment. Defendant did not testify and presented no evidence except his verified answer and counterclaim for custody, which he presented as an affidavit.

The court entered an order making detailed findings of fact and conclusions of law on the basis of which it ordered that plaintiff continue to have custody of the child, that defendant pay $45.00 per week for support of the child until the trial of this action, and that defendant pay the costs of this action, including the payment of $150.00 to plaintiff's attorneys for their services. From this order, defendant appeals.

Carter W. Jones and Ralph G. Willey III for plaintiff appellee.

Revelle, Burleson and Lee by L. Frank Burleson, Jr., for defendant appellant.

PARKER, Judge.

[1] Defendant contends there was insufficient evidence of a change in the child's circumstances and needs to support the *pendente lite* order directing him to make child support payments larger than provided in the separation agreement. In particular, he contends that it was necessary that the plaintiff present evidence not only to show the needs of the child at the time of the hearing but also to show what those needs had been at the time the separation agreement was signed, and he contends that in absence of such evidence and findings based

thereon showing a change in the needs of the child, the court was not warranted in ordering him to make the increased payments. Defendant's contentions are based on a misconception of the effect of the separation agreement upon the court's power to protect the welfare of the child. What was said by Sharp, J. (now C.J.), speaking for the Court in *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964), is applicable to the present case:

> "When a wife petitions the judge to increase the amount which the Court itself has previously fixed for the support of minor children, she assumes the burden of showing that circumstances have changed between the time of the order and the time of the hearing upon the petition for the increase. In such case, she must show either that the need of the children or the cost of their support has increased, or that the ability of the father to pay has increased if the amount originally fixed was inadequate because of the father's inability to pay more. However, prior to the entry of the order appealed from in this case, the defendant's support payments for the children had been made pursuant to the terms of a deed of separation which was in no way binding on the court insofar as it applied to the children. Therefore, plaintiff's only burden was to show the amount reasonably required for the support of the children at the time of the hearing. The amount which the parties fixed [in their deed of separation] was merely evidence for the judge to consider, along with all the other evidence in the case, in determining a reasonable amount, for support of the children." 261 N.C. at 58-59.

It was, therefore, not necessary in this case for the plaintiff to present evidence or for the court to make findings as to what the needs of the child had been at the time the separation agreement was signed.

[2] Although the provisions of a valid separation agreement relating to marital and property rights of the parties cannot be ignored or set aside by the court without the consent of the parties, such agreements "are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children." *Hinkle v. Hinkle*, 266 N.C. 189, 195, 146 S.E. 2d 73, 77 (1966). No agreement between the parents will serve to deprive the court

of its inherent authority to protect the interests and provide for the welfare of infants. Husband and wife "may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). Nevertheless, where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions. *Fuchs v. Fuchs, supra.*

[3] Here, there was ample evidence of a change in conditions. The mother's serious illness and the resulting drastic reduction in her income immediately and directly affected one source of support for the child. A change far less drastic, the mother's loss of her job as a teacher, was held in *Bishop v. Bishop*, 245 N.C. 573, 96 S.E. 2d 721 (1957), sufficient to show that the welfare of the minor children had been affected and to sustain an order increasing the amount of child support payments required of the father over those provided for in a separation agreement. G.S. 50-13.4, which deals with an action for the support of a minor child, provides in part as follows:

> G.S. 50-13.4
>
> "(b) In the absence of a pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. Upon proof of such circumstances the judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case. . . .
>
> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due re-

gard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, and other facts of the particular case."

Here, the trial court made detailed findings as to the needs of the child and as to the relative ability of the parties to provide for those needs. Included is a finding that defendant earns a gross salary of $238.50 every week from which he could provide a reasonable support for his child. These findings are fully supported by admissions in the pleadings and by evidence presented. In turn, the court's factual findings support its conclusions and its order awarding custody to the plaintiff and directing the defendant to pay increased child support payments *pendente lite* and counsel fees.

[4] The final question presented by this appeal involves the denial by the trial judge of defendant's motion that the judge disqualify himself from the trial of this case. Prior to filing answer, the defendant moved that the judge disqualify himself on the grounds that he had presided at a prior criminal trial in which defendant had been charged with failing to provide adequate support for his child. Although defendant was found not guilty, defendant asserted that he could not get a fair trial in this case because the judge had erroneously admitted testimony in the criminal trial concerning income earned by defendant's present wife and because the judge, after announcing the verdict of not guilty in the criminal trial, had "stated on open court in substance that two people having the income defendant and his present wife have could or should furnish more child support than called for by the separation agreement." In denying this motion, the trial judge stated that he did not remember any evidence from the criminal trial as to the income of defendant's present wife and would not consider such evidence. No such evidence was admitted at the trial of this case, and an allegation in plaintiff's complaint relating to it was ordered stricken on motion of the defendant. In denying defendant's motion that he disqualify himself, the judge also stated that he did not remember making the statement attributed to him by the defendant. Even had the judge made such a statement, we perceive no sufficient grounds why the judge should have been required to disqualify himself. The record reveals that the judge conducted the hearings leading up to the *pendente lite* order

here appealed from in a fair and impartial manner. The order appealed from is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. JAMES T. FOSTER AND RUDOLPH McCURDY, JR.

No. 7618SC838

(Filed 4 May 1977)

1. **Criminal Law § 84; Searches and Seizures § 2— warrantless search of auto — consent by owner — objections by passengers irrelevant**

The lawful user of a car may consent to its search, and passengers in a car may not object to incriminating evidence seized pursuant to a warrantless search when the owner or person having possession and control of the car consented to the search.

2. **Criminal Law § 84; Searches and Seizures § 2— warrantless search of auto — consent by owner**

Evidence was sufficient to support the trial court's conclusion that one of defendant's companions was in control of the car driven by defendant and that the companion consented to its search; however, even if defendant was in some way a part owner of the car, his consent to its search could be inferred from his silence in the face of the consent given by the one in apparent control of the car.

3. **Criminal Law § 92— severance — discretionary matter**

The right or propriety of a severance rests on circumstances showing that a joint trial would be prejudicial and unfair, and in the absence of showing that defendant has been deprived of a fair trial, the exercise of the court's discretion will not be disturbed.

4. **Criminal Law § 35— evidence that crime committed by another — exclusion proper**

The trial court in an armed robbery case did not err in excluding evidence that two other people had pled guilty to armed robbery and another had pled guilty to accessory after the fact, since the excluded evidence tended to show that those three people were involved in the crime, but it did not show that defendant was not involved as a principal in the first or second degree or as an accessory.

5. **Constitutional Law § 81; Criminal Law § 138.11— different punishment upon second trial — error**

Where defendants were convicted in an earlier trial and given sentences to run concurrently with any other sentences they were then

serving, but defendants appealed and were awarded a new trial, the trial court upon retrial erred in considering evidence of prior convictions of both defendants, which evidence was not before the judge at the first trial, and in imposing sentences to run consecutively to any sentences they were then serving.

APPEAL by defendants from *Seay, Judge.* Judgments entered 13 May 1976, in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 March 1977.

Defendants pled not guilty to charges of armed robbery of T. W. Hollingsworth from his store on Kivett Drive in High Point on 21 October 1974.

Evidence for the State tended to show that about 8:20 p.m. on 21 October 1974 T. W. Hollingsworth was approached in his store by two men wearing ski masks and rubber gloves; one carried a revolver and the other a sawed-off shotgun. While one held the shotgun to the victim's head, the other rifled the cash register, taking about $1,546.00 in cash and several checks and money orders. Both then ran out of the store to a waiting car with a red body and a black top. The victim ran out of his store with a gun and shot twice when the men were getting in the car, which "scratched off" at high speed. Carolyn Owenby, who was standing in front of her house near the store, saw the red car with black top in front of the store, saw two men run from the store to the car, and heard two shots.

Mr. Hollingsworth called the High Point Police immediately after the robbery. Officer Allred, Winston-Salem Police, received a radio call at 8:36 p.m. which reported the robbery, and stated that the robbers left the scene in a late model red car with black top occupied by several black men. At 8:45 p.m. Officer Allred saw a red car with black top, began following it, and called for assistance; another car with two officers joined him, and they stopped the car.

Defendant McCurdy was driving the car; defendant Foster, John Lyons, Fred Roger McCormick and Joe Floyd Medley were passengers. They were told that they were stopped because of the radio report of the armed robbery. They were advised of their *Miranda* rights. The title to the car was in the name of Medley's wife. Medley consented to a search and gave to the officers a set of keys. They opened the trunk but found nothing. They saw on the floor of the car a paper bag with rubber

gloves on top of it. The bag was taken from the car. In it the officers found three knit ski masks, money, and checks made payable to Hollingsworth's store. On the front seat they found wrapped in a rag a sawed-off shotgun and a revolver. Hollingsworth identified the shotgun as the one used by one of the robbers. The shotgun was identified as one sold to defendant Foster on 14 September 1974.

Defendants moved to suppress evidence taken from the car. After *voir dire* hearing the court found that Medley was in control of the car and gave consent to search and also found that the rubber gloves and paper bag were in plain view. Defendants' motions to suppress were denied.

Defendant McCurdy offered no evidence. McCormick testified for defendant Foster that he and Lyons robbed Hollingsworth, that Medley drove the car to the store and then to an apartment where they picked up the defendants.

The court excluded evidence offered by defendant Foster that Lyons and McCormick pled guilty to armed robbery, that Medley pled guilty to accessory after the fact, and that all were sentenced to imprisonment.

The jury found defendants guilty as charged and they appealed from judgments imposing imprisonment.

Attorney General Edmisten by Assistant Attorney General Roy A. Giles, Jr., for the State.

Assistant Public Defender Frederick G. Lind for defendant appellants.

CLARK, Judge.

[1] The denial of defendants' motions to suppress was not error. The constitutional right to be free from unreasonable searches and seizures may be waived. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). The lawful user of a car may consent to its search. 68 Am. Jur. 2d, Searches and Seizures § 53 (1973). Passengers in a car may not object to incriminating evidence seized pursuant to a warrantless search when the owner or person having possession and control of the car consented to the search. *State v. Grant,* 279 N.C. 337, 182 S.E. 2d 400 (1971); *State v. Raynes,* 272 N.C. 488, 158 S.E. 2d 351 (1968).

[2] Defendants contend that there is evidence that Foster was the owner of the car on the night in question and that there is no evidence that Foster ever consented to the search. The only evidence which would support a finding that defendant Foster owned the car was the testimony of Officer Johnson, who stated that

> ". . . After advising them of their rights and they stated that they understood their rights, I then made an attempt to determine who the owner of the car was. To the best of my recollection, Mr. McCurdy had been operating the vehicle. Mr. Medley was the owner. Or his wife, was the owner of the car and he had sold the automobile, or his wife had sold the automobile somehow or another to Foster. Foster was making payments but the title had never changed. . . ."

He also testified that the keys to the trunk were obtained from Mr. Medley. Defendant Foster did not testify on *voir dire* that he was the owner. Neither Mr. or Mrs. Medley testified on *voir dire* about any sale to Foster. Officer Allred testified on *voir dire* that he checked the license number and found that the car was registered to Mrs. Medley.

Upon *voir dire,* the weight to be given to the evidence is for the trial judge to determine, and his findings are conclusive when supported by competent evidence. *State v. Little,* 270 N.C. 234, 154 S.E. 2d 61 (1967). We conclude that the trial court committed no error in concluding that Mr. Medley was in control of the car and that he consented to its search. Even assuming that defendant Foster was in some way a part owner of the car, we conclude that his consent may be inferred from his silence in the face of the consent given by Mr. Medley, the one in apparent control of the car. *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961).

The trial court denied the motion of the defendant McCurdy for a severance of his case from that of defendant Foster for trial. Under G.S. 15A-926(b) "joinder of defendants for trial" refers to what frequently has been called "consolidation" for trial. See Official Commentary. The statute provides:

> "(1) Each defendant must be charged in a separate pleading.
>
> (2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial . . . . "

[3] Ordinarily, the ruling on a motion to consolidate cases for trial lies within the sound discretion of the trial judge. *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976). The right or propriety of a severance rests on circumstances showing that a joint trial would be prejudicial and unfair, and in the absence of showing that defendant has been deprived of a fair trial, the exercise of the court's discretion will not be disturbed. *State v. Brower,* 289 N.C. 644, 224 S.E. 2d 551 (1976).

The trial court may in its discretion order a joinder of defendants for trial as provided in G.S. 15A-926(b) unless there is a showing that a joint trial would be prejudicial and unfair, i.e., the existence of antagonistic defenses, or the admission of evidence which would be excluded on a separate trial, or the exclusion of evidence which would be admitted. In the case before us there was no showing of prejudice by the joinder, and we find no merit in this assignment of error.

[4] The defendant Foster assigns as error the exclusion of evidence that Lyons and McCormick had pled guilty of armed robbery and Medley pled guilty of accessory after the fact. The obvious purpose of this evidence was to show that someone else committed the crime charged. Evidence that another committed the crime charged is not competent unless it is of such character as to exclude the guilt of the accused. *State v. Millican,* 158 N.C. 617, 74 S.E. 107 (1912); *State v. Baxter,* 82 N.C. 602 (1880). The proffered evidence tended to show that McCormick, Lyons and McCurdy were involved in the crime, but not to show that defendant Foster was not involved as a principal in the first or second degree or as an accessory. The evidence was properly excluded.

We find no error in the denial of defendants' motions for nonsuit. The evidence that the defendants aided and abetted in the commission is circumstantial, but it could be reasonably inferred from the evidence that the defendants were present in the car at the time of the robbery, that defendant McCurdy drove the car from the scene, and that defendant Foster's shotgun was used in the robbery. We find the evidence sufficient to support the verdicts.

[5] The judgments sentencing the defendants to imprisonment were ordered to begin at the expiration of any sentence already being served. This was the second trial of the defendants. In the first trial they were convicted, and judgments were entered

on 31 January 1975. The judgment for defendant McCurdy ordered that the sentence of 25 years to imprisonment "run concurrently with any other sentence the defendant is now serving." The judgment for defendant Foster of 25 years to imprisonment was silent as to when the sentence began to run, but by operation of law his sentence would also run concurrently with any other unserved sentence or sentences. *State v. Troutman,* 249 N.C. 398, 106 S.E. 2d 572 (1959). The defendants appealed from the 31 January 1975 judgments, and this Court found error and ordered new trials for both defendants. See *State v. Foster,* 27 N.C. App. 531, 219 S.E. 2d 535 (1975).

After verdict in the second trial, the trial judge in sentencing hearings received and considered evidence of prior convictions of both defendants, which evidence was not before the trial judge when the sentences of 31 January 1975 were imposed. Thereupon, judgments were entered imposing prison sentences of 25 years to run consecutively with any already being served. We find that the trial court erred in imposing more severe sentences than the court imposed in the first trial of the defendants. In *North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), it was held that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction but that the due process clause would be violated if the trial court imposed a heavier sentence on retrial for the purpose of punishing the defendant for his having succeeded in getting his original sentence set aside.

> "In order to assure the absence of such motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. These reasons must be based upon objective information concerning identifiable conduct on the part of the defendant *occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." (Emphasis added.) 395 U.S. at 726, 89 S.Ct. at 2081, 23 L.Ed. 2d at 670.

In the case before us, the criminal conduct of the defendants and their convictions therefor occurred before the time of

the original sentencing proceeding. Even though the trial judge in imposing the original sentences did not consider this information, on retrial the trial judge still could not consider those prior convictions of the defendants in imposing a more severe sentence. Although the language of *Pearce* limits the judge to consideration of conduct after the original sentencing proceeding, we are unsure that the policies underlying *Pearce's* construction of the due process clause (elimination of retaliatory motivation upon resentencing) would not be equally well served by allowing consideration of any conduct unknown to the judge at first trial, irrespective of when the conduct occurred. See *North Carolina v. Pearce, supra,* (White, Justice concurring). Nonetheless, we feel constrained by the unequivocal language of *Pearce. United States v. Hawthorne,* 532 F. 2d 318 (3d Cir. 1976); *United States v. Floyd,* 519 F. 2d 1031 (5th Cir. 1975) (2-1); *United States v. Gambert,* 433 F. 2d 321 (4th Cir. 1970); *United States v. Lopez,* 428 F. 2d 1135 (2d Cir. 1970) (2-1); *Pinkard v. Neil,* 311 F. Supp. 711 (M.D. Tenn. 1970).

We find no error in the trial of the defendants, but the judgments entered herein are vacated, and the cases are remanded for proper judgments consistent with *North Carolina v. Pearce, supra.*

No error but judgments vacated and remanded for proper sentences.

Judges BRITT and HEDRICK concur.

JAMES PETER KRITZER AND WIFE, CAROLINE T. KRITZER, HAROLD M. DeVOLT AND WIFE, FLORENCE L. DeVOLT, O. G. GARRETT AND WIFE, MARGARET F. GARRETT, PRIDE-TRIMBLE CORPORATION, ALBERT WINFIELD, JACK F. CARTER, WILLIAM J. GRAHAM, JR. AND WIFE, MARTHA MOORE GRAHAM, GEORGE CARL LEWIS, JR. AND WIFE, PEGGY KINLAW LEWIS, FRED M. MORGAN AND WIFE, GENE H. MORGAN, ELEANOR WADE POE, RICHARD L. DANA AND WIFE, SANDRA O. DANA, CHESTER J. TERRELL AND WIFE, IRENE K. TERRELL, GEORGE D. ANDERSON AND WIFE, CAROLYN B. ANDERSON AND HOWARD N. BUTLER v. TOWN OF SOUTHERN PINES, A MUNICIPAL CORPORATION

No. 7620SC879

(Filed 4 May 1977)

1. **Municipal Corporations § 2— oral resolution of notice of intent to annex**

A resolution of notice of intent to consider annexation is not required by G.S. 160A-49(a) to be written.

2. **Municipal Corporations § 2— resolution of intent to annex — description of lands**

A resolution of notice of intent to consider annexation adequately described the lands under consideration for annexation where the oral resolution referred to the lands as "these areas," the uncontradicted evidence showed that "these areas" referred to areas clearly marked on maps which were before the town council when the resolution was offered, and the oral resolution thus incorporated by reference the descriptions of the lands contained in the maps.

3. **Municipal Corporations § 2— annexation study — timetable for sewer construction**

An annexation study set forth a sufficient timetable for construction of sewer lines where it stated that construction would begin within twelve months of the effective date of annexation. G.S. 160A-47(3)(c).

APPEAL by petitioners from *Lupton, Judge.* Judgment entered 31 August 1976 in Superior Court, MOORE County. Heard in the Court of Appeals 14 April 1977.

On 17 June 1976 the Town of Southern Pines, having a population in excess of 5,000, adopted ordinances calling for annexation of areas in which petitioners live or own property. Pursuant to G.S. 160A-50 petitioners appealed to superior court for review of the annexation ordinances.

Evidence presented at the hearing indicated that during the spring of 1976, the Town Manager of Southern Pines began an annexation study. When this study was completed, its findings were recorded in a document entitled "Annexation Study Phase II, Town of Southern Pines, Moore County, North Carolina, March 1976." The study included, among other information, the description of the land to be annexed and, also, the statement that if the Town proceeded with the proposed annexation construction of necessary sewer lines would begin before 30 June 1977. At the 13 April 1976 meeting of the Southern Pines Town Council, the Town Manager presented the annexation question to the Council, and they discussed the merits of the proposal and the desirability of adopting a resolution of notice of intent to consider annexation. During the Council's discussions, its members had before them the written annexation study and, also, a large map of the areas which were proposed for annexation. According to the testimony of the Town Council's members, they fully understood the boundaries and location of the land they proposed to consider annexing.

At the end of the meeting, the Council voted unanimously to adopt an oral resolution of the Council's intent to consider annexation of the land described in the study and displayed on the map. This resolution was made part of the minutes; however, it was not transcribed and signed by the Mayor until sometime after an annexation ordinance was adopted. Nor did the oral resolution describe the land by metes and bounds. Instead, the resolution said " . . . that we [the Town Council] adopt notice of intent to consider annexing *these areas* and call for a public hearing on the question for May 25, 1976 . . . [emphasis added]."

The following day a notice was placed in a Southern Pines newspaper informing the public that a hearing would be held on 25 May 1976 to consider the desirability of annexing certain land. The notice was prepared by the Town Manager's staff, and it contained a metes and bounds description of the land under consideration and also a map of the area. This description corresponded to those in the written study, and the map was a reproduction of the one which the Town Council had used. The notice was accurately reproduced in the newspaper, and an affidavit so stating was properly recorded.

At the public hearing the Town Manager presented the annexation proposal, and people in attendance spoke for and

against the proposal. Thereafter, on 17 June 1976, the Town Council voted to annex the land effective 30 June 1976.

Judgment entered in superior court affirmed the annexation ordinances. Petitioner appealed to this Court.

James R. Van Camp, P.A., by James R. Van Camp, and Seaweli, Pollock, Fullenwider, Robbins & May, P.A., by Bruce T. Cunningham, Jr., for petitioner appellants.

Brown and Pate, by W. Lamont Brown and W. Daniel Pate, for respondent appellees.

ARNOLD, Judge.

Petitioners argue that certain proceedings of the annexation statutes, G.S. 160A-45, *et seq.*, were violated. They contend that the court erred in finding of fact number eight, and in conclusions of law numbers four and five. The finding of fact is as follows:

> "8. On April 13, 1976, the Southern Pines Town Council adopted a motion signifying its Notice of Intent to consider the annexation of four (4) areas adjacent to . . . the Town of Southern Pines . . . , which areas the Court has determined were properly identified and the boundaries outlined in explanation of Annexation Study made by the Town Manager prior to the time said motion was made and adopted, clearly indicating on a map that was displayed on a screen visible to all members of the Council, and each area was outlined by pointer on said map by the Town Manager, and that the phrase in the motion, 'these areas,' was clearly shown to mean the areas considered for annexation as shown on the map, and testimony of each member of the Council showed that each of them understood that these were the areas, the boundaries of which were shown on the map, that were being considered for annexation and that the Notice of Intent being adopted had to do with those areas."

And, the conclusions of law say:

> "4. That G.S. 160A-49 does not require that the Resolution of Notice of Intent to Consider Annexation of certain properly identified areas must be in writing or that the boundaries of the areas under consideration be set forth by

metes and bounds; that maps showing the boundaries are sufficient, and that in this case the maps showing the boundaries were sufficient to comply with the requirements of this section."

"5. That the action of the Town Council . . . in passing a resolution upon an oral motion and the recording of the action in the minutes, and therein making references to the areas as shown on the map showing the boundaries, complies with the provisions of the law since the evidence clearly shows that [each Council member had before him, and fully understood, the map showing the areas to be annexed]."

The petitioners argue that these findings and conclusions are contrary to G.S. 160A-49(a), which says:

"Any municipal governing board desiring to annex territory under the provisions of this Part shall first pass a resolution stating the intent of the municipality to consider annexation. Such resolution shall describe the boundaries of the area under consideration and fix a date for a public hearing on the question of annexation . . . . "

[1] Petitioners insist that the resolution of notice of intent to consider annexation must be written. They cite no authority, and we are not convinced by their argument. The statute does not specifically require a written resolution; nor is such a requirement implicit in the fact that the resolution must describe the land under consideration.

[2] Petitioners also argue that the Town Council's resolution did not adequately describe the lands under consideration for annexation. We find, however, that an adequate description was embodied in the resolution and that there was substantial compliance with the statute, G.S. 160A-49(a). The purpose of G.S. 160A-49(a) requiring the resolution stating the intent to consider annexation is to record the town board's decision and to mark the formal beginning of the municipality's actions. *Town of Hudson v. Town of Lenoir,* 279 N.C. 156, 181 S.E. 2d 443 (1971). This resolution expresses the intent of the governing board and it has little significance to the public. However, the public is significantly affected by the notice of the public hearing, which must be published in a newspaper, or by other means, and must contain a clear description of the land under consideration. G.S. 160A-49(b). By virtue of G.S. 160A-49(e)

the governing board is prohibited from annexing any land except that described in the notice of the public hearing.

An examination of the resolution reveals that while it does not explicitly describe the lands under consideration, or incorporate such a description by explicit reference, it does refer to the land as "these areas." Testimony by members of the Town Council revealed that "these areas" referred to areas clearly marked on maps which were before the Council when the resolution was offered. These maps were admitted into evidence at the hearing in superior court, and they were found to be authentic. Upon this finding the court concluded that such a map provided an adequate description of the land and that such a reference incorporated the description into the resolution.

We agree. The maps were before the Councilmen when they considered the resolution. Reference in the resolution to the maps is sufficient to show that the Council saw and understood the boundaries of the areas under consideration and that the members realized the significance of their action. While the description contained in the resolution may not have been clear to the general public, the oral resolution incorporating by reference the maps before the Town Council substantially complies with G.S. 160A-49(a). The rights of petitioners, and the general public, are protected by G.S. 160A-49(b) and G.S. 160A-49(e).

Petitioners' next argument is very similar to their first. Part of the annexation statute, G.S. 160A-47(3)(c), says:

> "A municipality exercising authority under this Part shall make plans for the extension of services to the area proposed to be annexed and shall, prior to the public hearing . . . , prepare a report setting forth such plans to provide services to such area. The report shall include:
>
> . . .
>
> (3) A statement setting forth the plans of the municipality for extending to the area to be annexed each major municipal service performed within the municipality at the time of annexation. Specifically, such plans shall:
>
> . . .
>
> (c) . . . set forth a proposed timetable for construction of [water] mains and [sewer] outfalls as soon as

possible following the effective date of annexation. In any event, the plans shall call for contracts to be let and construction to begin within 12 months following the effective date of annexation."

[3] Petitioners argue that Southern Pines did not comply with G.S. 160A-47(3)(c) because the annexation study failed to set forth a sufficient timetable for construction of sewer lines. The annexation report filed by the Town provided that "construction would begin" within twelve months of the effective date of annexation, and petitioners say this is not a sufficient timetable as required by the statute. This argument has been rejected before by our Supreme Court. *Dunn v. City of Charlotte,* 284 N.C. 542, 201 S.E. 2d 873 (1974); *see In re Annexation Ordinances,* 253 N.C. 637, 117 S.E. 2d 795 (1961). We find that the Town substantially complied with the requirements of G.S. 160A-47(3)(c).

Petitioners' remaining assignments of error relating to evidentiary rulings have been considered, and we find no prejudicial error in them.

The record shows substantial compliance with Chapter 160A of the General Statutes. Judgment of the trial court is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JERRY LEE SELPH

No. 7611SC904

(Filed 4 May 1977)

Criminal Law § 101— conversation between juror and accomplice's mother — sufficiency of trial court's inquiry

Defendant was not prejudiced by the alleged misconduct of one of the jurors where the evidence showed that officers observed a juror talking to the mother of defendant's alleged accomplice, who was not on trial with defendant but whose name was mentioned often; the officers could not hear the conversation but reported the fact that it took place to the attorneys for the State and defendant just before the jury returned its verdict; the verdict was guilty; counsel for de-

fendant moved to question the juror involved on *voir dire;* the court then questioned the jury generally as to whether any of them had talked to anyone during the noon recess about the case; and the jury, including the juror involved in the suspicious conversation, remained silent in the face of the judge's questioning.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 21 July 1976 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 7 April 1977.

Defendant was indicted for felonious breaking and entering with intent to commit larceny. At the trial, the State's evidence tended to show that defendant and an accomplice, Steve Aswald, broke into Jack P. Austin's drugstore in Four Oaks, North Carolina with the intention of stealing drugs. Defendant offered no evidence.

Facts pertinent to this appeal show that on the day of defendant's trial, during the lunch recess, two police officers saw juror number seven, Mrs. Annie Pearl Small Irving, in private conversation with the mother of Steve Aswald, defendant's alleged accomplice. Though Steve Aswald was not on trial with the defendant his name was mentioned often, and his mother was frequently in the courtroom. The police officers who observed this conversation between Mrs. Irving and Mrs. Aswald did not overhear what was said. Nor did the officers witness the beginning or end of the conversation; they only saw the two women, returning from lunch, climb a flight of stairs and walk down a hall together toward the courtroom. Because this conversation seemed improper, the police officers told the attorneys for the State and the defendant about it; however, the officers were unable to do so until just before the jury returned with its verdict.

The verdict was guilty. Counsel for the defendant then moved to question Mrs. Irvin on *voir dire.* The jury was asked to retire, and the court allowed counsel for the parties to question the police officers, who testified to the facts stated above. Thereafter, the following occurred:

"THE COURT: . . . All right, any further evidence from the Defendant?

"[DEFENSE COUNSEL]: No further evidence, Your Honor.

"THE COURT: Do you want to be heard?

"[DEFENSE COUNSEL]: Yes, sir, to be sure. Your Honor. . . .

"THE COURT: Before you start, let me tell you what I'm going to do. I am going to call the jury in and ask them if anyone has talked to them about this case, and then I'll see from there, but I do not intend to bring a juror out here on this information and cross examine a juror as to what goes on, until I have more information."

DEFENDANT'S EXCEPTION No. 14

"[DEFENSE COUNSEL]: Well, Your Honor, if you will tell us what further evidence you want, we will try to get it to you.

"THE COURT: Mr. Dobson, you've got to bring the evidence before me, and I've got to rule on it. I can't put my own evidence up and rule on that both. All right, let the jury come in and have a seat.

(Jury returned to box at 4:40 P. M.)

"Now Ladies and Gentlemen, it has been brought to my attention that possibly some member of the jury panel talked with somebody during the Noon recess, and I am sure all of you talked to somebody during the Noon recess, but my inquiry is to whether someone mentioned this case to any member of the jury during the Noon recess or at any other time since you've been impaneled and started the trial of this case this morning?

(No response from any juror.)

"I take it that no one has mentioned this to you outside of what you've talked about in your jury deliberations?

(No response from any juror.)

"All right, sir. All right, anything else of this jury?"

From judgment imposing a sentence of not less than eight nor more than ten years defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell and Associate Attorney Elisha H. Bunting, Jr., for the State.

James W. Narron for defendant appellant.

ARNOLD, Judge.

The principal argument on this appeal concerns the possibility of misconduct by one of the jurors. Defendant contends that his attorney should have been allowed to question vigorously this juror as to whether she talked to Mrs. Aswald about the case. The trial judge, according to defendant, misapplied an axiom of common law announced by Lord Mansfield in *Vaise v. Delaval,* 1 T.R. 11, 99 Eng. Rep. 944 (K. B. 1785), which says that a juror will not be heard to impeach his own verdict. This rule apparently was first followed in North Carolina in *Suttrell v. Dry,* 5 N.C. 94 (1805).

Counsel for defendant, in an excellent and lucid brief, argues that defendant has been denied his constitutional rights to an impartial jury and to confront witnesses against him. *Parker v. Gladden,* 385 U.S. 363, 17 L.Ed. 2d 420, 87 S.Ct. 468 (1966). He also contends that because he was refused permission to examine the juror (" . . . the one person present who knew what actually happened . . . ") there was a denial of due process. Defendant asserts that these rights were violated because he was not allowed to examine the juror, or because the trial judge failed to conduct a vigorous examination of her. He argues that the judge should have made findings of fact and conclusions of law regarding allegations and evidence of possible jury misconduct, and that Mrs. Irving's conduct was so suspicious that the judge abused his discretion by not conducting a more vigorous examination. We do not agree.

Defendant relies on many federal cases to support his constitutional arguments. The leading case is *Parker v. Gladden, supra,* wherein substantial evidence showed that the bailiff told several jurors that the defendant was "wicked" and "guilty." The United States Supreme Court held that these remarks violated the defendant's rights to an impartial jury and to confront the witnesses against him, i.e., the bailiff. The court further held that the bailiff's remarks were so prejudicial as to violate due process. In other words, their probable effect on a typical juror would reasonably appear to be harmful beyond any cure. *Parker,* of course, is distinguishable from the case at bar, because the bailiff's remarks were known and obviously prejudicial. In the present case, Mrs. Aswald's remarks are unknown, and thus, those parts of *Parker* which consider ir-

reparable inherent violations of due process and the right to cross examine witnesses are inapposite.

Defendant cites numerous cases in support of his contention that his rights have been violated. Most are distinguishable in that the trial court refused to hold any sort of hearing to determine the facts of the alleged jury misconduct. *See U. S. v. Remmer,* 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954); *U. S. v. Howard,* 506 F. 2d 865 (5th Cir. 1975); *Oakes v. Howard,* 440 F. 2d 1075 (6th Cir. 1971); *Richardson v. U. S.,* 360 F. 2d 366 (5th Cir. 1966). These cases all involve specific allegations of misconduct supported by direct evidence, and the various trial courts erred in refusing to hold hearings.

In two other cases the trial court conducted an inadequate hearing in its attempt to discover and evaluate jury misconduct. These are: *U. S. ex rel. Tobe v. Bensinger,* 492 F. 2d 232 (7th Cir. 1974), and *Morgan v. U. S.,* 380 F. 2d 915 (5th Cir., 1967). In both cases the hearings were, under the circumstances, manifestly inadequate. In *Bensinger,* the hearing was abbreviated, and the findings ignored some of the uncontradicted evidence. In *Morgan,* the trial court's findings were ambiguous.

In the case at bar, the trial judge's inquiry was sufficient to guarantee an impartial jury and to satisfy due process. The trial judge in North Carolina traditionally has conducted these inquiries according to his sound judicial discretion. *Stone v. Baking Co.,* 257 N.C. 103, 125 S.E. 2d 363 (1962); *State v. Drake,* 31 N.C. App. 187, 229 S.E. 2d 51 (1976). The hearing which the judge held was an exercise in sound discretion. His inquiry, though not in a vigorous and adversary manner, was unmistakably clear and broad enough. It was addressed to the entire jury so as to elicit from Mrs. Irving, or any member of the jury, whether there had been improper conversation with anyone concerning this case. Mrs. Irving's silence, and the silence of her fellow jurors, supports the conclusion that no improper conversation occurred. Denial of defendant's motions for mistrial and new trial on grounds of jury misconduct amounts to a finding by the trial court that no misconduct occurred. *State v. Waddell,* 279 N.C. 442, 183 S.E. 2d 644 (1971); *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968).

Defendant's remaining assignments of error have been reviewed, and we find no prejudicial error. The State delayed

too long before taking defendant before a district court judge for his initial appearance. G.S. 15A-601(c). However, this delay is not prejudicial error. *State v. Burgess,* (No. 7620SC744, filed 20 April 1977). Nor did the judge commit prejudicial error by admitting allegedly irrelevant testimony that defendant was armed while breaking into the drugstore. Other evidence against defendant completely overwhelmed the effect of this small bit of evidence. The decision against defendant could not have been different had this testimony been excluded. Finally, though certain testimony concerning defendant's cache of drugs may have been inadmissible, the defendant did not make a timely objection to this, and so his objection is waived. *State v. Blount,* 20 N.C. App. 448, 201 S.E. 2d 566 (1974).

In defendant's trial we find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JEFFREY HUGHES LEE

No. 7610SC889

(Filed 4 May 1977)

1. Criminal Law § 15.1— denial of venue change

Defendant failed to show that the trial court abused its discretion in the denial of his motion for a change of venue of his trial for felonious assault and kidnapping.

2. Kidnapping § 1— validity of kidnapping statute — meaning of "hostage"

The statute making it a crime unlawfully to confine, restrain or remove a person from one place to another for the purpose of holding such other person as a "hostage," G.S. 14-39(a)(1), is not void for vagueness and uncertainty, since the term "hostage" implies the unlawful confining, restraining or taking of a person with the intent that the person be held as security for the performance or forbearance of some act by a third person, and the trial court in this kidnapping case sufficiently instructed on the meaning of the word "hostage."

3. Kidnapping § 1— sufficiency of evidence

The State's evidence was sufficient for the jury in this kidnapping case where it tended to show that defendant entered the office where his wife worked and shot her twice; the wife's supervisor at-

tempted to render assistance to her but was ordered by defendant to get on the floor; defendant blocked the door to the office with a cabinet and refused to let the police in the room; defendant stated that he would surrender to a relative who was a policeman; and after making several threats defendant surrendered to his relative 45 minutes later.

4. Criminal Law § 169.6— exclusion of evidence — absence of answer in record

An exception to the exclusion of evidence cannot be sustained unless the record shows what the witness would have testified had he been permitted to answer.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 11 June 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1977.

The defendant was indicted and tried by a jury for assault with a deadly weapon with intent to kill inflicting serious bodily injury and for kidnapping. He entered a plea of not guilty as to each charge.

The State offered evidence tending to show the following: On the 16th day of February 1976 the defendant entered a mail room in the State office building where his wife, Sherry H. Lee, was employed. He then walked into the inner office of William H. Cole, Mrs. Lee's supervisor, pulled a gun, and ordered him to leave. The defendant, who was armed with a .22 caliber rifle, shot his wife at least two times as she attempted to run from the inner office. Cole, who had left the general area, as ordered, came back to render assistance but was ordered to get on the floor on his hands and knees. At this point, the defendant ordered someone to shut the door and he blocked it with a cabinet. The State's evidence further tended to show that the defendant refused to let the police in the room but said he would surrender to Randy Carroll, a relative who was a policeman. After making several threats, the defendant finally surrendered himself to Carroll approximately 45 minutes later.

The defendant offered evidence tending to show the following: The defendant, who was having marital problems, went searching for his wife at the Albemarle Building, her place of employment. He armed himself with a rifle out of fear for his own safety. When he entered the office, his only intention was to speak to his wife about the location of their son, but she attempted to run and the gun went off as he tried to grab her. He made no conscious effort to pull the trigger. The defendant

offered further evidence tending to show that he did not intend at any time to harm his wife or any other person in the office and that he forced Cole to lie on the floor only because he wanted to prevent any attack by Cole.

The defendant was found guilty of both crimes as charged and was sentenced accordingly. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

George R. Barrett, for the defendant.

MARTIN, Judge.

[1] The defendant first assigns as error the trial court's failure to grant defendant's motion for a change of venue. Such a motion is addressed to the sound discretion of the trial judge and his decision in the exercise of this discretion is not reviewable unless gross abuse is shown. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Allen,* 222 N.C. 145, 22 S.E. 2d 233 (1942). In order for the defendant to prevail on this assignment of error, he must show an abuse of discretion. *State v. Mitchell, supra; State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971). No such abuse has been shown in the case at bar. This assignment of error is overruled.

[2] Defendant's second and fourth assignments of error are based on the contention that the trial court erred in denying defendant's motion to dismiss and his motion in arrest of judgment, both relating to the kidnapping charge. More specifically, the defendant attacks the sufficiency of the indictment for kidnapping. He says that the word "hostage," as used in the statute, is susceptible to several slightly different definitions and, hence, that a man of ordinary intelligence must guess at its meaning. Accordingly, he contends that the statute is void because of uncertainty, vagueness, and indefiniteness. We disagree.

The defendant in the case at bar was tried for kidnapping pursuant to G.S. 14-39(a)(1) which provides as follows:

> "(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age, or over without the consent of such person, or any other under the age of 16 years

without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for ransom or as a *hostage* or using such other person as a shield." (Emphasis added.)

In explaining to the jury what the word "hostage" meant, the trial judge charged that:

"The term 'hostage' when used with reference to a person and in the context in which it is used in the Statute law that I have read to you implies the unlawful taking, restraining or confining of a person with the intent that the person or victim be held as security for performance or forbearance of some act by a third person."

This definition is practically identical to the definition given by the New Mexico Supreme Court in the case of *State v. Crump*, 82 N.M. 487, 484 P. 2d 329 (1971). In that case, the defendant was tried under a kidnapping statute which, like our own G.S. 14-39(a)(1), included the word "hostage." The New Mexico court concluded that:

"It appears clear from the foregoing definitions that the term hostage, when used with reference to a person and in the context in which it is used in our kidnapping statute . . . implies the unlawful taking, restraining or confining of a person with the intent that the person, or victim, be held as security for the performance, or forbearance, of some act by a third person." *State v. Crump, supra* at 492, 484 P. 2d at 334.

Although there is no other North Carolina case on point, Justice Lake, in the case of *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976), gives us some insight as to how our Court might define the term "hostage." Without giving an exact definition of the word, he uses the phrase "shield or hostage" to describe a kidnapping situation in which a victim was unlawfully detained against her will, held as security while the defendant robbed a bank, and forced to drive the defendant away from the scene of the crime.

By reason of the foregoing discussion, we conclude that the term "hostage" as used in G.S. 14-39(a)(1) implies the unlaw-

ful taking, restraining, or confining of a person with the intent that the person, or victim, be held as security for the performance or forbearance of some act by a third person.

The instruction given by the trial court in the instant case was therefore sufficient to explain the meaning of the word "hostage" to the jury. The jury was completely and accurately instructed on the kidnapping charge and there was plenary evidence to support its verdict. This assignment of error is overruled.

[3] By his third assignment of error, defendant contends the trial court erred in denying his motion for nonsuit of the kidnapping charge. This argument is without merit. The defendant's only motion for nonsuit was made at the close of the State's evidence. Following the trial court's denial of this motion, the defendant proceeded to introduce his own evidence. It is well settled that a defendant, by introducing evidence at trial, waives his right to except on appeal to the denial of a nonsuit motion made at the close of the State's evidence. G.S. 15-173; *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Logan,* 25 N.C. App. 49, 212 S.E. 2d 236 (1975). In any event, we reviewed the State's evidence pursuant to G.S. 15-173.1 and conclude that the trial court properly denied defendant's motion for a nonsuit.

[4] Defendant's fifth assignment of error is grounded on the contention that the trial court committed prejudicial error by sustaining the State's objection to the following portion of the testimony by defendant's witness, Dr. James Gross.

"Q. Would his mental condition be affected by rapid movement?

Mr. Hall: Objection.

Court: Sustained.

Defendant's exception No. 6."

The answer to this question was not included in the record. We cannot sustain an exception based on the exclusion of evidence unless the record shows what the witness would have testified had he been permitted to answer. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970). Hence, this assignment of error is without merit.

By his eighth and ninth assignments of error the defendant contends the court committed prejudicial error by making certain statements in its charge to the jury. The charge of the court must be read as a whole and construed contextually. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970); *Gregory v. Lynch,* 271 N.C. 198, 155 S.E. 2d 488 (1967); *State v. Lankford,* 31 N.C. App. 13, 228 S.E. 2d 641 (1976). We find that it presents the law of the case in such a manner as to leave no reasonable cause to believe that the jury was misled or misinformed. The instruction made it clear to the jury what they had to find from the evidence in order to convict the defendant. The eighth and ninth assignments of error are therefore overruled.

By his twelfth assignment of error, defendant contends that the trial court erred in the entry of judgment in each case. We find no error in the judgment in the kidnapping case (No. 76CR8439).

However, the State concedes that there is what appears to be a clerical error in the judgment and commitment in the felonious assault case (No. 76CR8440) in that it reads: "This sentence [in case No. 76CR8440] shall commence at the expiration of the sentence this date imposed in case 76CR8440." Because of said error, the judgment in case No. 76CR8440 is vacated and the cause will be remanded to the superior court where defendant will be resentenced on the felonious assault charge.

We have reviewed the other assignments of error brought forward and argued in defendant's brief but find them to be without merit.

In the kidnapping case (No. 76CR8439), no error.

In the felonious assault case (No. 76CR8440), no error in trial but judgment vacated and case remanded for entry of proper judgment.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. GENE HEWITT

No. 7619SC939

(Filed 4 May 1977)

1. **Conspiracy § 6— conspiracy to commit armed robbery — sufficiency of evidence**

Evidence was sufficient to support a conviction of defendant for conspiracy to commit armed robbery of a doctor's wife where such evidence tended to show that defendant and his accomplices intended to rob the doctor's office; they decided to grab the doctor at his house to find out the combination to the safe located in the office; the robbers had been to the doctor's house before but backed off because of activity there; defendant remained in a motel room across from the doctor's office waiting for the doctor to come out, while his accomplices went to the doctor's house; once there the accomplices robbed the doctor's wife; and defendant received some of the proceeds from the robbery.

2. **Criminal Law § 10.2; Robbery § 4— accessory before the fact to armed robbery — sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for accessory before the fact to armed robbery of a doctor's wife where it tended to show that defendant originated the criminal activities disclosed in this case; defendant induced his accomplices to rob the doctor; he provided information to them concerning the doctor; he carried them to Asheboro and introduced them to the magistrate who provided further information and material necessary to carry out the robbery; the accomplices did in fact rob the doctor's wife at gun point; and defendant was not present at the time of the robbery.

APPEAL by defendant from *Smith (Donald L.), Judge.* Judgments entered 13 July 1976 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 14 April 1977.

Defendant was charged in case No. 75CR11987 with conspiracy to commit armed robbery of Hazel Wilhoit. In case No. 76CR3010, he was charged with accessory before the fact of armed robbery of Hazel Wilhoit. The defendant entered a plea of not guilty in each case. The jury found him guilty as charged in both cases, and judgments were entered imposing a prison sentence of 10 years in case No. 75CR11987, and a prison sentence of 10 years in case No. 76CR3010.

The State's evidence tended to show that Hazel Wilhoit is the wife of Dr. Robert Wilhoit, a physician in Asheboro. On the afternoon of 12 September 1974 she was at home when a man came to the door and asked if the doctor was at home.

The man pulled a gun and forced his way into the house stating that he wanted "money and dope." Two other men entered the house and Mrs. Wilhoit was forced to lie down and her hands, feet, and mouth were taped. The men asked her where the valuables were located in the house and when the doctor would return. She eventually freed herself after the men left and called the police. The robbers took cash from a freezer, various guns, a watch, and other items from the house.

The State further offered evidence tending to show that Charles Fredrick Rice and Cary James Messinger were in the Asheboro area in September 1974 and engaged in stealing. Both men testified that around the first of September 1974 defendant talked with them about whether they were interested in breaking into Dr. Wilhoit's office, where there was located a large amount of money in a safe. Defendant took them by the doctor's office and then to the office of Sumner Farlow, a magistrate. The magistrate gave Messinger more information about the doctor and his office. It was agreed that defendant would receive a share of the proceeds from the robbery. They took the defendant home and on the way there was further conversation with the defendant who told them there would be a sum of money in the freezer at the doctor's house and that the doctor had the combination of his safe inside his wallet. They drove by the doctor's home in going to Asheboro and on returning defendant to High Point.

The witnesses, Rice and Messinger, stated they stayed in the Sir Robert Motel across from the doctor's office during the time they were planning the robbery. They planned to wait for the doctor at his residence and then go to the office for the robbery. While waiting for the doctor, they gathered up guns, rifles, cameras, and money in the home. After waiting some time for the doctor, who had not shown, and after being unable to get in touch with Cary who was at the motel waiting for the doctor to leave his office, they decided to leave. They got around $1,000 in cash from the doctor's home out of which they gave defendant $200.00. Defendant took no part in the actual commission of the robbery.

Further evidence for the State tended to show that on 11 September 1974, Cary Messinger made a call from his motel room to a telephone number registered in defendant's name.

Defendant presented no evidence.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua, for the State.

Coltrane and Gavin, by T. Worth Coltrane, for the defendant.

MARTIN, Judge.

[1] Defendant first contends the court erred in denying his motion to dismiss the charges against him. He argues that the evidence discloses that he neither planned nor had any knowledge of the robbery at the doctor's home and that he was not told that his co-conspirators had decided to rob the doctor's home instead of his office. Thus, he argues, the charges should have been dismissed.

> " 'A conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the combination or agreement to do an unlawful thing or to do a lawful thing in an unlawful way by unlawful means.' (Citations omitted.) A conspiracy to commit a felony is a felony. (Citations omitted.) The crime is complete when the agreement is made. (Citations omitted.) Many jurisdictions follow the rule that one overt act must be committed before the conspiracy becomes criminal. Our rule does not require an overt act." *State v. Gallimore*, 272 N.C. 528, 532, 158 S.E. 2d 505, 508 (1968).

The State's evidence, viewed in the light most favorable to the State, would support the following findings: that seven to ten days before the robbery defendant inquired of his co-conspirators if they were interested in breaking into Dr. Wilhoit's office; that he took them to Asheboro and showed them Dr. Wilhoit's office and told them there was between $75,000 and $100,000 in a safe in the office; that he took them to the magistrate's office where they received additional information and assistance; that it was agreed that he would receive a share of the proceeds of the contemplated robbery; and that the co-conspirators were told that between $1,000 and $1,500 was in a freezer as you walk in the side door of the doctor's home and that the combination of the doctor's safe was in the doctor's wallet.

Obviously, the plan at the outset was to rob the doctor's office. Thus, the conspiracy to rob the doctor's office was com-

plete. The unlawful agreement is the crime and not its execution. *State v. Wrenn,* 198 N.C. 260, 151 S.E. 261 (1930).

However, defendant was not charged with conspiracy to rob Dr. Wilhoit; rather he was charged with conspiracy to rob Mrs. Wilhoit with the use of a deadly weapon. The question presented, therefore, is whether the defendant conspired with his confederates to rob Mrs. Wilhoit.

A criminal conspiracy may be established by circumstantial evidence from which it may be legitimately inferred. *State v. Horton,* 275 N.C. 651, 170 S.E. 2d 466 (1969), cert. den. 398 U.S. 959, 26 L.Ed. 2d 545, 90 S.Ct. 2175 (1970). It may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, may point unerringly to the existence of a conspiracy. See *State v. Wrenn, supra.* In speaking on this particular point, our Supreme Court has said:

> "When resorted to by adroit and crafty persons, the presence of a common design often becomes exceedingly difficult to detect. Indeed, the more skillful and cunning the accused, the less plainly defined are the badges which usually denote their real purpose. Under such conditions, the results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists." (Citation omitted.) *State v. Anderson,* 208 N.C. 771, 787, 182 S.E. 643, 652 (1935).

Tested by this rule, the inferences reasonably deducible from the evidence subsequent to the formation of the conspiracy to rob the office of Dr. Wilhoit, are listed as follows:

1. For several days prior to the robbery of Mrs. Wilhoit, the magistrate, who was introduced by the defendant, supplied the co-conspirators with information for the robbery of the doctor's office.

2. It was decided to "grab" the doctor at his home and the magistrate showed Messinger the doctor's home.

3. The robbers "went to get the doctor's house one time before that [the robbery] with Charley Smith. . . . We went up to get it, but there was too much activity in the house, so we backed off and decided to hit it in the daytime because there was too much activity that night."

4. On 11 September 1974 Messinger made a call from his motel room to a telephone number registered in defendant's name.

5. On 12 September defendant's confederates robbed Mrs. Wilhoit at her home.

6. From the sum of $1,000 taken from the doctor's home, the defendant received $200.00.

It appears, therefore, that the evidence was amply sufficient to carry the case to the jury on the charge of conspiracy to commit armed robbery on Mrs. Wilhoit.

Moreover, the evidence was sufficient to warrant findings that the men who robbed Mrs. Wilhoit were acting in furtherance of a common purpose, design, and unlawful conspiracy, originated by defendant, and that this conspiracy included the entering of Dr. Wilhoit's home and a division of the fruits of the robbery. They were at the doctor's house for the primary purpose of waiting for the doctor so they could obtain the combination of the safe and the means of entering his office. Witness Messinger testified:

> "I discussed how we were going to get the money from the doctor. We were going to take it from the office, but figuring there might be some people in there, somebody might get hurt. We decided to go to the house and do it that way."

Witness Rice testified that on the way back to High Point on the initial visit to Asheboro and in the company of defendant, they were told

> ". . . there would be somewhere between $1,000 and $1,500 in the freezer, as you walk in the back door, side door of the doctor's home, which we really weren't concerned about this, we were after the other. We were told the doctor had the combination of his safe inside his wallet, so if we could grab the doctor, we wouldn't have to go in and be able to crack the safe, we could open it with the combination."

The crimes are so interwoven as to constitute a continuing series of events. We hold that the evidence was sufficient to support the conviction of the defendant of the crime of conspiracy to commit armed robbery of Mrs. Wilhoit.

[2] There was also sufficient evidence to submit to the jury the question of the defendant's guilt as an accessory before the fact to the armed robbery of Mrs. Wilhoit. One is guilty as an accessory before the fact if he shall ". . . counsel, procure or command any other person to commit any felony. . . ." G.S. 14-5. The term "counsel" is frequently used in criminal law to "describe the offense of a person who, not actually doing the felonious act, by his will contributed to it or procured it to be done." *State v. Bass,* 255 N.C. 42, 51, 120 S.E. 2d 580, 586 (1961). The defendant originated the criminal activities disclosed in this case, and the facts tend to show that defendant induced Rice, Messinger and others to rob Dr. Wilhoit. He provided information to them regarding Dr. Wilhoit, and carried them to Asheboro and introduced them to the magistrate who provided further information and material necessary to carry out the robbery of Mrs. Wilhoit.

> "To render one guilty as an accessory before the fact, he must have had the requisite criminal intent; and it has been said that he must have the same intent as the principal. It is well settled, however, that he need not necessarily have intended the particular crime committed by the principal; an accessory is liable for any criminal act which in the ordinary course of things was the natural or probable consequence of the crime that he advised or commanded." 22 C.J.S. Criminal Law § 92, p. 271.

The State's evidence further tended to show that Rice, Messinger, and others did, in fact, rob Mrs. Wilhoit at gun point and that the defendant was not present at the time of the robbery.

Under the principles stated in *State v. Bass, supra,* and *State v. Sauls,* 291 N.C. 253, 230 S.E. 2d 390 (1976) we hold that there is sufficient evidence to withstand a motion for nonsuit on defendant's charge of accessory before the fact to armed robbery.

As to the charge of conspiracy to commit armed robbery—no error.

As to the charge of accessory before the fact of armed robbery—no error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, HAYWOOD-ATKINS TRUCKING, INC., AND HARPER TRUCKING, INC., APPLICANTS v. ESTES EXPRESS LINES, PROTESTANT

No. 7610UC819

(Filed 4 May 1977)

1. **Carriers § 3— common carrier authority — dormancy — application to transfer authority**

Where the issue of dormancy under G.S. 62-112(c) is raised in a proceeding to transfer a common carrier franchise authority and the Utilities Commission finds that the franchise is not dormant, it must then determine if the criteria of G.S. 62-111 for approval of the transfer have been met; if the Commission finds that the franchise is dormant, the application for transfer must be denied because approval would in effect constitute the granting of a new authority without satisfying the new authority test and other requirements of G.S. 62-262(e).

2. **Carriers § 2.10— common carrier authority — prima facie showing of dormancy — consideration of other factors**

Under G.S. 62-112(c) the failure to perform any transportation for compensation under the authority of a franchise for a period of 30 days is *prima facie* evidence that the franchise is dormant, and such evidence is sufficient to justify but not compel a finding that the franchise is dormant; upon such *prima facie* showing, the Utilities Commission may then consider other listed factors affecting the performance of such services and may find that evidence of one or more of those factors rebuts the *prima facie* showing of dormancy.

3. **Carriers § 2.10— common carrier authority — prima facie showing of dormancy — sufficiency of rebutting evidence**

Although there was *prima facie* evidence that a general commodities common carrier franchise was dormant because of the carrier's failure to haul under its franchise for a period of 30 consecutive days, evidence that the carrier continuously advertised its services, was ready, willing and able to haul both exempt and non-exempt commodities under its franchise and charged published tariff rates in hauling both exempt and non-exempt commodities was sufficient to rebut the *prima facie* evidence of dormancy and to support the refusal of the Utilities Commission to find that the franchise was dormant.

Utilities Comm. v. Express Lines

APPEAL by protestant Estes Express Lines from Order of North Carolina Utilities Commission entered 29 June 1976. Heard in the Court of Appeals 16 March 1977.

On 22 March 1976, Harper Trucking Company, Inc., (hereafter referred to as "transferee") and Haywood-Atkins Trucking, Inc., (hereafter referred to as "transferor") jointly filed an application with the Utilities Commission, under G.S. 62-111, seeking approval of the transfer of general commodities common carrier franchise authority.

The operating authority sought to be transferred was North Carolina Common Carrier Certificate No. C-73 authorizing the transportation of general commodities (excluding leaf tobacco and accessories), in truck loads, over irregular routes specified as follows:

"(1) Between points and places in Wake County,

"(2) From points and places in Wake County to points and places in North Carolina in and east of the counties of Stokes, Forsyth, Guilford, Randolph, Montgomery and Richmond,

"(3) From points and places in and east of the counties named in paragraph 2 to points and places in Wake County."

On 3 May 1976 Estes Express Lines (hereafter referred to as "protestant") filed a protest and motion for intervention, claiming that since the operating authority of transferor was dormant it was not the proper subject of transfer.

The evidence for transferor and transferee tended to show that transferor had held Certificate No. C-73 since 1946 or 1947. Transferor owns one tractor and four trailers and also leases one tractor. Transferor advertises its services in the yellow pages of the Raleigh Telephone Directory in a Jaycee newspaper, and in a law enforcement publication. It maintained a tariff and evidence of cargo and liability insurance on file with the Commission. It had never refused service to a shipper whom it was authorized to serve. For the period from 25 November 1975 through 31 May 1976 it received $28,000.00 in revenue from its trucking operations, but of this total $232.00 in revenue was derived from the transportation of non-exempt commodities (salt), and the remainder from the transportation of

exempt commodities (tobacco and lumber). In each instance the transferor charged its published tariff rate. In the event the proposed transfer was approved, transferor intended to remain in business for the transportation of exempt commodities.

The evidence for protestant tended to show that its total gross revenue for North Carolina operations during the year of 1975 was 3.2 million dollars, that its projected annual revenue from the type of shipments covered by the certificate in question would be $64,872.87, that protestant is not now operating to its capacity in the state, and that if the Commission were to grant the transfer sought, the protestant would lose approximately 10% to 12% of its total revenue.

The Commission ordered the approval of the transfer, making a finding under G.S. 62-111(e) that "such service has been continually offered to the public," but making no explicit finding on the issue raised under G.S. 62-112(c) of dormancy of the franchise. Protestant appealed.

Allen, Steed and Allen, P.A. by Thomas W. Steed, Jr., and D. James Jones, Jr., for protestant appellant.

Bailey, Dixon, Wooten, McDonald & Fountain by Ralph McDonald for applicant appellees.

CLARK, Judge.

This appeal presents the question of whether the Utilities Commission erred in failing to find that the common carrier franchise of transferor was dormant under G.S. 62-112(c) and in approving the transfer of the franchise.

The criteria for approval of the transfer of a common carrier franchise are set out in G.S. 62-111. But in the proceeding before us the protestant in its protest and motion for intervention confined its attack on the proposed transfer to the question of dormancy under G.S. 62-112(c), which provides:

> "The failure of a common carrier or contract carrier of passengers or property by motor vehicles to perform any transportation for compensation under the authority of its certificate or permit for a period of 30 consecutive days shall be *prima facie* evidence that said franchise is dormant and the public convenience and necessity is no longer served by such common carrier certificate or that the needs of a

contract shipper are no longer served by such a contract carrier. Upon finding after notice and hearing that no such service has been performed for a period of 30 days the Commission is *authorized* to find that the franchise is dormant and to cancel the certificate or permit of such common or contract carrier. The Commission *in its discretion may give consideration* in such finding to other factors affecting the performance of such service, including seasonal requirements of the passengers or commodities authorized to be transported, *the efforts of the carrier to make its services known to the public* or to its contract shipper, the equipment and other facilities maintained by the carrier for performance of such service, and the means by which such carrier holds itself out to perform such service. A proceeding may be brought under this section by the Commission on its own motion or upon the complaint of any shipper or any other carrier. The franchise of a motor carrier may be cancelled under the provisions of this section in any proceeding to sell or transfer or otherwise change control of said franchise brought under the provisions of G.S. 62-111, upon finding of dormancy as provided in this section. . . ." (Emphasis added.)

Protestant takes the position that transferor's franchise certificate was dormant and that, therefore, the test of "public convenience and necessity," which G.S. 62-262(e)(1) requires of a new applicant for franchise authority, must be met. In *Utilities Commission v. Coach Co.*, 269 N.C. 717, 153 S.E. 2d 461 (1967), the court held that the showing of public need required by G.S. 62-262(e)(1) is not applicable in a transfer proceeding under G.S. 62-111, and in effect supported the ruling of the Utilities Commission that "the statutory requirement referred to [G.S. 62-111(a)] is satisfied by a showing that the authority has been and is being actively applied in satisfaction of the public need theretofore found." *In re Comer Transport Service, N.C.U.C.* 266, 270 (1965); *accord, Utilities Commission v. Petroleum Carriers*, 7 N.C. App. 408, 173 S.E. 2d 25 (1970).

[1] Where the issue of dormancy under G.S. 62-112(c) has been raised, if the Commission finds that the franchise is not dormant, it must then determine if the criteria required by G.S. 62-111 for approval of the transfer have been met. If the Commission finds that the franchise is dormant under G.S.

62-112(c) the application for transfer must be denied because approval would in effect constitute the granting of a new franchise without satisfying the new authority test and other requirements of G.S. 62-262(e). Cf. *Utilities Commission v. Coach Co., supra.*

We have no precedent to guide us in interpreting the dormancy provisions of G.S. 62-112(c). In *Utilities Commission v. Petroleum Carriers, supra,* there was evidence that during 1963-1966 the transferor did not solicit business under its franchise, but that transferor did actively solicit business and haul under its franchise in 1967 and 1968, the last hauling season before the hearing. The Commission approved the transfer of the franchise, and the court affirmed the ruling. However, in that case the protest was not based on the dormancy issue under G.S. 62-112(c) but rather on the requirement of G.S. 62-111(e) that for approval of a franchise transfer the Commission must find "that service under said franchise has been continuously offered to the public. . . ."

[2] Under G.S. 62-112(c) the failure to perform any transportation for compensation under the authority of the franchise for a period of 30 days is *prima facie* evidence that the franchise is dormant. Such evidence is sufficient to justify but not to compel a finding that the franchise is dormant. See 2 Stansbury, N. C. Evidence § 203 (Brandis Rev. 1973). Upon such *prima facie* showing the Commission in its discretion *may* then consider other factors affecting the performance of such services, and G.S. 62-112(c) lists factors which may be considered. If the Commission in its discretion considers other factors it may find that the evidence relating to one or more of these factors rebuts the *prima facie* evidence of dormancy and that the franchise is not dormant. And if the evidence relating to one or more of these factors, as found by the Commission, is competent, material, and substantial, the finding will not be disturbed on appeal. G.S. 62-94(b)(5).

[3] In the proceeding before us there was *prima facie* evidence of dormancy under G.S. 62-112(c) because of the failure of transferor to haul under its franchise for a period of 30 consecutive days, and the Commission was authorized to so find and to cancel the franchise. But the Commission was not required to do so. It had discretionary authority, and did consider other factors, including the statutory listed factor of "the efforts

of the carrier to make its services known to the public." The evidence that transferor continuously advertised its services, that it was ready, willing, and able to haul both exempt and non-exempt commodities under its franchise, and that it charged published tariff rates in hauling both exempt and non-exempt commodities, was competent, material and substantial, and is sufficient to rebut the *prima facie* evidence of dormancy and to support the consideration by the Commission of one or more of the "other factors" listed in G.S. 62-112(c).

Although the Commission did not make an explicit finding on the issue of dormancy of the franchise under G.S. 62-112(c), nonetheless we conclude that the evidence, findings, and conclusions support the refusal of the Commission to find that the franchise was dormant.

The order of the Utilities Commission is

Affirmed.

Judges BRITT and HEDRICK concur.

PATRICIA HARRIS v. JOE H. CARTER; OLLIE CARTER AND EDDIE McNEIL

No. 7617SC733

(Filed 4 May 1977)

1. **Rules of Civil Procedure § 55— default entered against one defendant — liability of other defendants not determined thereby**

Trial court properly denied plaintiff's motion for summary judgment made on the ground that default had been entered against defendant McNeil, defendants Carter and defendant McNeil were partners, and therefore defendants Carter were liable, since, even if it had been conclusively established that a partnership existed between the Carters and McNeil, the entry of default against McNeil would not have barred the Carters from asserting all defenses they might have to defeat plaintiff's claim.

2. **Negligence § 30— injury in building — person with duty to maintain — genuine issue of material fact — summary judgment improper**

In an action to recover damages for personal injuries plaintiff received when she fell through a hole in the floor of a packhouse used for storing tobacco, there was a genuine issue as to the material facts bearing upon the true legal relationship between defendants Carter

and defendant McNeil where some of the evidence showed the relationship to be that of landlord and tenant while other evidence showed it to be a partnership.

3. Negligence § 35— contributory negligence — genuine issues of material fact — summary judgment improper

In an action to recover damages sustained by plaintiff when she fell through a hole in the floor of a packhouse used for storing tobacco, conflicting evidence as to plaintiff's knowledge of the defect in the floor raised a genuine issue of material fact on the question of whether she was contributorily negligent, and the trial court erred in granting defendants' motion for summary judgment.

APPEAL by plaintiff from *McConnell, Judge.* Orders entered 12 April 1976 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 15 February 1977.

In this action plaintiff seeks to recover damages from defendants Joe H. Carter, Ollie Carter, and Eddie McNeil for personal injuries she received when she fell through a hole in the floor of a packhouse used for storing tobacco. The two Carter defendants owned the farm on which the packhouse was located; defendant McNeil lived and worked on the farm. Plaintiff alleged in her complaint the following four alternative causes of action: (1) that plaintiff was employed in connection with the production of tobacco by the two Carter defendants who were negligent in failing to maintain the packhouse floor in a safe condition and in failing to warn the plaintiff of its unsafe condition; (2) that the plaintiff was employed by the three defendants, who were engaged in the business, as a partnership, of raising tobacco and that all three were negligent in failing to maintain the packhouse in a safe condition; (3) that plaintiff was employed by defendant McNeil, who was renting the farm from the Carter defendants under a rental agreement which provided that the Carters were to keep the farm buildings in proper repair, and that defendants were negligent in failing to keep the farm buildings in proper repair; (4) that the Carter defendants, as owners, were negligent in failing to keep the packhouse in safe condition knowing full well that plaintiff and others would be walking upon its floor. The Carter defendants answered denying all material allegations in the complaint except that they owned the farm, alleging that the relationship between them and defendant McNeil was that of landlord-tenant, and pleading contributory negligence as a bar to plaintiff's recovery. An entry of default was filed against defendant McNeil.

The Carter defendants moved for summary judgment on the grounds that a deposition which they had taken of plaintiff establishes her contributory negligence as a matter of law. Plaintiff responded to the motion asserting that the deposition excerpts defendants quoted were taken out of context, that other non-quoted portions of her deposition tend to contradict the quoted excerpts, that plaintiff misunderstood the questions asked, and that the depositions of other people support her position. Thereafter, plaintiff moved for summary judgment on the grounds that default had been entered against defendant McNeil and that testimony in depositions of McNeil, his wife, his son, and of plaintiff establishes that "Eddie McNeil, Ollie Carter, and Joe Carter, were engaged in business as partners" as a matter of law; thus, the Carter defendants are liable since defendant McNeil's liability had already been established by the entry of default against him. Defendants Carter filed a verified response to plaintiff's motion alleging that the relationship between them and McNeil was that of landlord-tenant rather than that of partners.

Plaintiff's motion for summary judgment was denied because it appeared to the court "that there is a genuine issue as to the material facts as to the relationship of the parties and that plaintiff is not entitled to Judgment as a matter of law on this issue." Defendants' motion for summary judgment was granted "on the grounds that by the plaintiff's own testimony as shown in her deposition she is contributorily negligent as a manner [sic] of law; that there is no genuine issue as to a material fact and that defendants Joe H. Carter and Ollie Carter are entitled to a Judgment as a matter of law." From these rulings, plaintiff appeals.

Bethea, Robinson, Moore and Sands by Alexander P. Sands III for plaintiff appellant.

Gwyn, Gwyn & Morgan by Allen H. Gwyn, Jr., for defendant appellees.

PARKER, Judge.

[1] Plaintiff first assigns error to the denial of her motion for summary judgment. Pointing to the entry of default against defendant McNeil, plaintiff's counsel state in their brief that "[i]t is the contention of the plaintiff that since liability has been established against one alleged partner, all that is neces-

sary to establish the liability of the remaining partners individually is to establish the partnership." They then point to certain facts stated in depositions of McNeil, his wife, his son, and of plaintiff which they assert establish the existence of a partnership between the Carters and McNeil, and from these premises they argue that plaintiff was entitled to have summary judgment entered in her favor against the Carters. We do not agree.

At the outset, we note that plaintiff's counsel misapprehend the effect of the entry of default against defendant McNeil. Long ago the United States Supreme Court dealt with this problem in the leading case of *Frow v. De La Vega,* 15 Wall. 552, 21 L.Ed. 60 (1872). In that case the Court said (p. 554):

> "The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notice in the cause, nor to appear in it in any way. He can adduce no evidence; he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all."

Default judgments in this jurisdiction are now groverned by G.S. 1A-1, Rule 55, which appears to be a counterpart of Rule 55 of the Federal Rules of Civil Procedure. Discussing the Federal Rule, the author of Moore's Federal Practice, after citing and quoting from *Frow v. De La Vega, supra,* said:

> "If, then, the alleged liability is joint a default judgment should not be entered against a defaulting defendant until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the non-defaulting defendant(s). If joint liability is decided against the defending party and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants—both the defaulting and non-defaulting defendants. If joint liability is decided against the plaintiff on

> the merits or that he has no present right of recovery, as distinguished from an adjudication for the non-defaulting defendant on a defense personal as to him, the complaint should be dismissed as to all of the defendants—both the defaulting and the non-defaulting defendants." 6 Moore's Federal Practice, 2nd Ed., Paragraph 55.06, pp. 55-81, 55-82.

This Court has already held that, absent any specific provision in our North Carolina rules or statutes governing the situation where a default is entered or a default judgment is obtained in a case in which there are multiple defendants, we would follow the federal practice in this regard. *Rawleigh, Moses & Co. v. Furniture, Inc.*, 9 N.C. App. 640, 177 S.E. 2d 332 (1970). Thus, even though it had been admitted or otherwise conclusively established that a partnership existed between the Carters and McNeil, the entry of default against McNeil would not have barred the Carters from asserting all defenses they might have to defeat plaintiff's claim. This would also be true had default judgment, as distinguished from a mere entry of default, been obtained against McNeil. *See United States v. Borchardt*, 470 F. 2d 257 (7th Cir. 1972).

[2] Even if we consider plaintiff's motion for summary judgment as having been made on a more limited basis, not to determine liability of the Carters but to determine the existence *vel non* of a partnership between them and McNeil, we still find no error in the trial court's ruling denying the motion. Summary judgment is proper only when the moving party has shown that there is no genuine issue as to any material fact and such party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). Here, although there is testimony in the depositions of McNeil, his wife, and his son which tends to show that a partnership existed between McNeil and the Carters, there is also evidence in this record to support the position of the defendants Carter that the true legal relationship between them and McNeil was that of landlord-tenant. Plaintiff herself alleged as much in her "Third Alternate Cause of Action" in her complaint. Moreover, plaintiff's evidence tending to show the existence of a partnership is contained primarily in the deposition of McNeil, and it is apparent from this record that McNeil, although nominally a defendant, is cooperating completely with the plaintiff in an attempt to further her cause against the Carters. Even so, there are portions of McNeil's deposition, as, for example,

where he speaks of having rented the house in which he lived on the farm, which tends to show a landlord-tenant relationship rather than a partnership. On this record we find there was a genuine issue as to the material facts bearing upon the true legal relationship between the Carters and McNeil. The trial judge properly denied plaintiff's motion for summary judgment.

[3] Plaintiff also assigns error to the court's allowance of the Carter defendants' motion for summary judgment. The Carter defendants based their motions on certain deposition testimony given by plaintiff in which plaintiff stated that she noticed, about a week before the accident, that when one walked on the floor of the packhouse "the planks would wobble, it was weak." Defendants also cite the following testimony of plaintiff from her deposition:

> "Q. Well, you didn't honestly feel that was unsafe did you?
>
> A. Yes, I would walk on anything like that and it is unsafe to me.
>
> Q. You did not think it was dangerous did you?
>
> A. Yes, I really didn't want to work back there.
>
> Q. Did you honestly feel it was dangerous?
>
> A. Dangerous, unsafe, that is the way I will put it, it was unsafe."

Although this testimony certainly constitutes some evidence upon which a finding of contributory negligence could be made, plaintiff in her verified response to defendants' summary judgment motion asserts that the excerpts of the deposition testimony used by defendant were taken out of context. In support of her position, plaintiff points out certain testimony adduced in the deposition in which plaintiff stated that she did not notice anything unusual about the floor before the accident on 7 October 1972, that there was nothing before that date to lead her to believe that the floor was actually unsafe, but that after the accident she noticed the floor was weak. Thus, plaintiff's verified response offers some evidence contradicting defendants' assertion that "plaintiff was aware of the defect in the floor and that it was dangerous" at least a week before the action. The conflicting evidence as to plaintiff's knowledge of the defect raises a genuine issue of material fact on the question of whether she was contributorily negligent. Therefore, the court erred in al-

lowing defendants' motion for summary judgment and in dismissing the action.

For the reasons stated:

The Order denying plaintiff's motion for summary judgment is

Affirmed.

The order allowing defendants' motion for summary judgment is

Reversed, and this cause is remanded to the Superior Court for further proceedings.

Chief Judge BROCK and Judge ARNOLD concur.

JOHN WATERS, JR. AND WIFE, ARLENE WATERS v. LEWIS HUMPHREY, FREDERICK HUMPHREY AND FREDERICK SWEETING

No. 764DC716

(Filed 4 May 1977)

1. **Rules of Civil Procedure § 52; Trial § 58— failure to state conclusions separately — absence of prejudice**

Plaintiffs were not prejudiced because of the court's failure to comply strictly with the directive of G.S. 1A-1, Rule 52(a)(1) to "state separately its conclusions of law" where some of the court's findings actually embody conclusions of law, the court's factual findings support the judgment entered in favor of defendants and could not support judgment favorable to plaintiffs, and the court's factual findings and legal conclusions, although not separately stated, are adequate to permit appellate review.

2. **Rules of Civil Procedure § 52; Trial § 58— failure to state conclusions separately — judgment as conclusion**

Where the court fully and completely sets out the facts found and renders judgment thereon, an exception that the court did not state its findings of fact and conclusions of law separately cannot be sustained since the judgment constitutes the court's conclusion of law on the facts found.

3. **Boundaries § 11— boundary dispute — agreement signed by plaintiffs' predecessor**

In an action to determine the true dividing line between two tracts of land, a boundary line agreement executed by plaintiffs'

predecessor in title three years after she conveyed her tract to plaintiffs was relevant as evidence tending to show where plaintiffs' predecessor in title considered the true location of the dividing line to be.

4. **Boundaries § 11; Evidence § 11.7— dead man's statute — signing of boundary agreement**

In an action to determine the true dividing line between two tracts of land, testimony by defendant that he saw plaintiffs' predecessor in title, who is now deceased, sign an agreement fixing the dividing line between the tracts violated the dead man's statute, G.S. 8-51; however, plaintiffs were not prejudiced by the admission of such testimony where defendant testified without objection that when he acquired title to his tract, plaintiffs' predecessor was living on the land which she later conveyed to plaintiffs and that she showed defendant a marked tree and told him that such tree marked the corner of the two tracts, and where there was ample competent evidence apart from the boundary line agreement to support the court's findings and judgment determining the location of the boundary line.

5. **Boundaries § 10.2— marks on tree as "old" — qualification of witness**

In an action to determine the true dividing line between two tracts of land, a witness was qualified to testify that marks he observed on a tree were "old," particularly when he went further and testified to the objective facts which caused him to characterize the marks as such.

APPEAL by plaintiffs from *Turner, Judge.* Judgment entered 22 April 1976 in District Court, ONSLOW County. Heard in the Court of Appeals 9 February 1977.

Civil action for trespass. The plaintiff, John Waters, Jr., and the defendant, Lewis Humphrey, own adjoining tracts of land. The location of the dividing line is in dispute.

Plaintiff, John Waters, Jr., acquired title to his tract by deed dated 20 September 1966 from Ida C. Matthews, widow, in which the disputed line is described as "running a straight line through the field a North Westwardly course to the head of a bottom, thence down and with said bottom to Howards Creek." Defendant, Lewis Humphrey, acquired title to his tract by deed dated 26 September 1942 in which the disputed line is described simply as running with the Ida C. Matthews line. The problem presented is to locate on the ground the point described in plaintiff's deed as "the head of a bottom" and to locate the line described as running from that point "down and with said bottom to Howards Creek."

The court appointed a surveyor to make a survey and map showing the contentions of the parties. On this map the line

contended for by plaintiffs is shown as running from point "A" to point "C" to point "D," while the line as contended for by defendants runs from "A" to "B" to "D." The area between these lines, consisting of approximately 1.5 acres of timber land, is the area in dispute.

The case was heard by the court without a jury. After receiving evidence presented by both parties, the court entered judgment making findings of fact and adjudging that the dividing line was the line as contended for by defendants. The judgment fixed and described this line by the same calls and distances as shown on the court surveyor's map as running from point "A" to point "B" to point "D." From this judgment plaintiffs appealed.

Ernest C. Richardson III for plaintiff appellants.

Billy G. Sandlin for defendant appellees.

PARKER, Judge.

[1, 2] Appellants first contend that the court erred in failing to make conclusions of law. G.S. 1A-1, Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The judgment appealed from contains detailed findings of fact, but it does not contain conclusions of law separately stated and denominated as such. However, some of the court's findings, though purportedly made as findings of fact, actually embody conclusions of law. For example, the court found that "the plaintiffs and the defendants should share the cost of the survey equally," which was clearly the court's legal conclusion rather than a finding of fact. Moreover, when the court made a finding which located and described by exact calls and distances the dividing line as ultimately determined by the court, it was stating a finding which embodied the court's conclusion of law. The court's factual findings support the judgment entered in favor of the defendants; they could not support judgment favorable to the plaintiffs. Although not separately stated, the court's factual findings and legal conclusions are adequate to permit appellate review. Under these circumstances, plaintiffs suffered no prejudice because of the court's failure to comply strictly with the directive of Rule 52(a)(1) to "state separately its conclusions of law."

Moreover, where the court fully and completely sets out the facts found and renders judgment thereon, an exception that the court did not state its findings of fact and conclusions of law separately cannot be sustained, since the judgment constitutes the court's conclusion of law on the facts found. *Dailey v. Insurance Co.*, 208 N.C. 817, 182 S.E. 332 (1935).

[3, 4] Plaintiffs next contend that the court erred in allowing defendants to introduce in evidence a boundary line agreement dated 10 June 1969 between Ida C. Matthews and the defendant, Lewis Humphrey, and in permitting the defendant, Lewis Humphrey, to testify concerning the execution of the agreement by Ida C. Matthews. This agreement fixed the dividing line generally as contended for by the defendants. At the time it was executed, Ida C. Matthews no longer owned any property which could be affected by the agreement, having conveyed her tract to the plaintiff, John Waters, Jr., some three years previously. Thus, the agreement, as such, could not be binding upon the plaintiffs. It was, however, relevant as evidence tending to show where Ida C. Matthews, plaintiffs' predecessor in title, considered the true location of the dividing line to be. If properly proved, it would have been admissible in evidence. It was error, however, for the court to permit Lewis Humphrey to testify that he saw Ida C. Matthews sign the agreement. At the time of the trial, Ida C. Matthews was dead, and the admission of testimony by Lewis Humphrey concerning her signing the agreement violated G.S. 8-51. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957). However, we do not think that the error in the admission of this testimony was sufficiently prejudicial to plaintiffs to justify a new trial. The defendant, Lewis Humphrey, had already been permitted to testify, without any objection from plaintiffs, that when he acquired title to his tract in 1942, Ida Matthews was living on the land which she later sold to John Waters, Jr., and that she then went with the witness, Lewis Humphrey, and showed him the big marked gum tree located at point "B" on the map and told him that that was the corner. In view of this testimony, which was admitted without objection, plaintiffs could hardly have been prejudiced by the subsequent admission of Lewis Humphrey's testimony concerning the execution of the boundary line agreement by Ida C. Matthews. Moreover, in a case tried before the judge without a jury, "the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason

that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent and consider that only which tends properly to prove the facts to be found." *Construction Co. v. Housing Authority,* 1 N.C. App. 181, 186, 160 S.E. 2d 542, 546 (1968). There was in this case ample competent evidence apart from the boundary line agreement to support the court's findings and its judgment determining the location of the dividing line. There is a presumption that if incompetent evidence was admitted, it was disregarded and did not influence the court's findings unless it affirmatively appears that the court was influenced thereby. *Reid v. Midgett,* 25 N.C. App. 456, 213 S.E. 2d 379 (1975); 1 Stansbury's N. C. Evidence (Brandis Rev.), § 4(a), p. 10. No such showing was made, and plaintiffs' assignment of error is overruled.

[5] Plaintiffs next assign error to the court allowing defendants' witness, George Humphrey, to testify as to the age of three chop marks on the corner tree located at the point shown on the map as point "B." The record reveals that the witness who is the son of the defendant, Lewis Humphrey, testified:

> "At point B you find a marked gum. When you are walking down this line and facing the gum at point B on the west side of it, there are three chops that are probably fifty (50) to eighty (80) years old."

The plaintiffs objected and the court sustained the objection. The witness then testified that "[t]here are three old marks on the tree," to which plaintiffs also objected. It is the overruling of this last objection which is the basis of plaintiffs' present assignment of error. We find no error. Aside from the fact that the record fails to disclose the question to which plaintiffs' objection was interposed and fails to show that any motion to strike was made, the witness was competent to testify that there were three "old" marks on the tree. The characterization of the marks as "old" was merely the witness's descriptive statement of what he saw, which was further amplified when, without any objection from plaintiffs, the witness testified that "[t]he chop marks are grown over and there is what you would call a healed place in the tree." The court properly sustained plaintiffs' objection when the witness attempted to testify that the marks were "fifty (50) to eighty (80) years old," since it was not shown that the witness was qualified to place such a

precise age on the marks. The witness was qualified, however, to testify simply that the marks were "old," particularly when he went further and testified to the objective facts which caused him to characterize them as such. It should also be noted that defendants' witness, Ida G. Campbell, who was seventy-three years old at the time of the trial and who had been raised on the land where plaintiffs live, testified that the chop marks on the marked gum tree "were put there when [her] oldest brother was small. The chops were put there for the line." This witness further testified that "[t]hey (referring to the chop marks) were put there before I was born—three of them, anyway. They were put there because it was a land line." The testimony of this witness, who is related to the feme plaintiff, fully supports defendants' contention and the court's ultimate determination as to the correct location of the dividing line.

Plaintiffs finally assign error to the court's finding of fact no. 8, which established the boundary line as contended by defendants, and to the rendering of judgment in favor of defendants. If supported by competent evidence, findings of fact made by the trial judge sitting without a jury are conclusive upon review in an appellate court, the weight and credibility of the evidence being for the trial judge. *Trust Co. v. Gill, State Treasurer,* 286 N.C. 342, 211 S.E. 2d 327 (1975). The competent evidence in the record fully supports the findings of fact and the judgment rendered thereon. Plaintiffs' final assignment of error is overruled.

Finding no error in the trial below, the judgment appealed from is

Affirmed.

Judges MARTIN and ARNOLD concur.

WILLIAM C. JOHNSON, SR., ADMINISTRATOR OF THE ESTATE OF WILLIAM C. JOHNSON, JR. v. BILLY T. GLADDEN, JR.

No. 7611SC876

(Filed 4 May 1977)

Automobiles §§ 66.2, 66.3— auto accident — identity of driver — circumstantial evidence — physical facts at accident scene

Evidence in a wrongful death action tending to show that defendant owned the automobile in question, that several hours earlier in the evening he was seen operating the vehicle with plaintiff's intestate riding as a passenger in the back seat, that the automobile was seen in operation on Highway 421 as late as 11:45 p.m. and shortly thereafter was observed parked with its headlights burning on the shoulder of Highway 421 at its intersection with Cool Springs Church Road with defendant under the steering wheel, and that within fifteen minutes thereafter the defendant's automobile had wrecked on Cool Springs Church Road approximately five miles from where it had been parked on the shoulder of the road, when considered together with the physical evidence at the accident's scene as to the condition and the position of the automobile, debris, and bodies was sufficient to permit the jury to find that defendant was operating his automobile at the time of the accident, that he was doing so in a negligent manner, and that such negligence was the proximate cause of the death of plaintiff's intestate.

APPEAL by plaintiff from *Clark, Judge.* Judgment entered 26 May 1976 in Superior Court, LEE County. Heard in the Court of Appeals 14 April 1977.

This is a civil action wherein the plaintiff, William C. Johnson, Sr., Administrator of the Estate of William C. Johnson, Jr., seeks to recover damages from the defendant Billy T. Gladden, Jr., for the alleged wrongful death of his intestate. Plaintiff alleged that Billy Johnson had been a passenger in an automobile which was owned by defendant Gladden and which was operated by defendant Gladden in a negligent manner causing the automobile to overturn and resulting in his son's death. Defendant answered and denied all material allegations, including the allegation that he was driving the car at the time of the accident.

At the close of plaintiff's evidence the defendant moved for a directed verdict on the grounds that plaintiff had introduced insufficient evidence "to establish that the defendant Gladden was the operator of the vehicle in which the plaintiff's intestate was allegedly a guest passenger . . . . " The court granted de-

fendant's motion "upon the grounds set forth in such motion . . . . "

Plaintiff appealed.

J. Douglas Moretz for plaintiff appellant.

Horton, Singer, Michaels & Hinton by Paul J. Michaels for defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether the trial court erred in directing a verdict for the defendant. The evidence at trial tends to show the following:

Gary Norris, saw his friends, Johnson, age sixteen, defendant, age nineteen, and Richard Neal, in Siler City at 9:30 p.m. on 13 March 1970 in defendant's green Dodge Charger. At that time defendant was driving, Neal was in the right front seat, and Johnson was in the back seat. Norris saw the car several other times during the evening, the last time being at 11:30 when it was headed out of Siler City south on Highway 421.

Ray Cotten was driving north on Highway 421 just south of Siler City around 11:30 or 11:45 p.m. of 13 March when he met defendant's Charger going south on Highway 421. Cotten turned around, proceeded back south on Highway 421, and came upon defendant's car with its headlights on sitting on the right shoulder of Highway 421 where it intersects with Cool Springs Church Road. As he passed, Cotten saw three people in the car with defendant in the driver's seat. Cotten then drove to the parking lot of the Fairview Dairy Bar. Fifteen minutes after he had seen defendant behind the wheel of his car parked beside the highway, he heard the ambulance go out. He followed the ambulance out Cool Springs Church Road to a field in which defendant's car had overturned some five miles from where he had seen the car parked beside the road.

At about midnight on 13 March, Willie K. Starling, who lives on Cool Springs Church Road, "saw a car coming around the curve. It left the shoulder of the road and was kicking up gravel. About 4 to 5 car lengths from the house it changed ends and Starling thought at the time that it was going to come into the house. He saw it first as it came around the second

curve, the real sharp one, and was attracted by its loud mufflers. When it came to the other curve, it left the shoulder and was coming sideways. It changed ends, and the headlights were pointed the opposite direction as at first, it then going backwards. It then impacted the dirt bank across from the Starling house and the headlights swung sharply up into the air and went out. Then all that was heard was just a bump, bump, bump much like a steel drum hitting the ground. Mr. Starling felt that the car was traveling from 80 to 90 m.p.h. at the time he observed it. . . . Starling turned on his porch light and saw Billy Gladden, the defendant, lying beside the road, but he was unable to see the car; so he turned on his truck headlights and swung them around until he spotted the car lying on its top up in the field near the church. The car was laying on its top. The Neal boy was under the front bumper of the car and Billy Johnson had been thrown way up in the wheat field, about half the length of the courtroom from the car. . . . Billy Gladden was lying right close to where the car hit the ditch bank. The car left the print of the gas tank and the bumper on it where it impacted and Gladden was laying to the right of these impressions as they are faced."

Trooper Bobby Price was called to the scene of the accident on Cool Springs Church Road. He testified that the automobile was lying upside down headed away from the road, that the vehicle had been damaged extensively, that the front and back windshields were broken but intact, that the door windows were out, that the driver's door was open and the passenger's door closed, that the driver's seat had been bent backwards and to the left, that there were 776 feet of marks on the road leading up to the point of impact with the ditch bank, that the car came to rest in the field 395 feet beyond the ditch bank, and that there were marks and debris in the field between the ditch bank and car. The trooper did not remember whether the passenger door would open.

The parties stipulated that plaintiff's intestate died on 17 March 1970 as a result of injuries sustained in the automobile accident.

This appeal presents the question of whether the evidence is sufficient to raise an inference that the defendant was operating his automobile at the time of the accident.

"Circumstantial evidence is not only a recognized and accepted instrumentality in ascertainment of truth, but it is essential, and, when properly understood and applied, highly satisfactory in matters of gravest moment." *State v. Brackville,* 106 N.C. 701, 710, 11 S.E. 284 (1890). Circumstantial evidence alone may be sufficient to prove that a particular person was operating an automobile at the time of an accident. *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968); *Pridgen v. Uzzell,* 254 N.C. 292, 118 S.E. 2d 755 (1961); *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115 (1958).

In this case, evidence tending to show that the defendant owned the automobile; that several hours earlier in the evening he was seen operating the vehicle with plaintiff's intestate riding as a passenger in the back seat; that the automobile was seen in operation on Highway 421 as late at 11:45 p.m. and shortly thereafter was observed parked with its headlights burning on the shoulder of Highway 421 at its intersection with Cool Springs Church Road with defendant under the steering wheel; and that within fifteen minutes thereafter the defendant's automobile had wrecked on Cool Springs Church Road approximately five miles from where it had been parked on the shoulder of the road, when considered together with the physical evidence at the accident's scene as to the condition and the position of the automobile, debris, and bodies is sufficient, to permit the jury to find that the defendant was operating his automobile at the time of the accident giving rise to this cause. *Pridgen v. Uzzell, supra; Stegall v. Sledge, supra; Bridges v. Graham,* 246 N.C. 371, 98 S.E. 2d 492 (1957).

Furthermore, the evidence is sufficient to permit the jury to find that the defendant was operating his automobile in a negligent manner at the time of the accident, and that defendant's negligence was the proximate cause of the death of plaintiff's intestate.

For the reasons stated the judgment directing a verdict for the defendant is

Reversed.

Judges MORRIS and ARNOLD concur.

IN THE MATTER OF CARLTON L. JACOBS

No. 768DC925

(Filed 4 May 1977)

1. **Indictment and Warrant § 9; Infants § 10— juvenile petition — allegation of caption of ordinance**

Respondent's motion to quash a juvenile petition which alleged a violation of "City Code 15-2" should have been allowed since the petition did not allege the caption of the city code as required by G.S. 160A-79.

2. **Arrest and Bail §§ 3.9, 6— warrantless arrest for misdemeanor — absence of probable cause — resisting arrest**

An officer did not have probable cause to believe (1) that respondent had committed a misdemeanor and (2) that respondent would not be apprehended unless arrested immediately or that he might cause physical injury to himself, others or property where the officer answered a call concerning a disturbance at a bus station; upon arrival at the station the officer was told that there were two boys inside causing a disturbance, that they were using strong language and did not want to leave, and that the station manager wanted to sign papers against them; the officer did not observe respondent conduct himself in any manner indicating disorderly conduct; and the officer did not investigate any further before asking the respondent to come with him. Therefore, the officer's warrantless arrest of respondent was illegal, and respondent committed no offense when he resisted the illegal arrest.

APPEAL by respondent from *Pate, Judge.* Order entered 3 September 1976 in juvenile session of District Court, LENOIR County. Heard in the Court of Appeals 12 April 1977.

By two separate juvenile petitions, respondent was charged with using language calculated to bring on a breach of the peace and annoy the public, in violation of "City Code 15-2," and with resisting an officer, in violation of G.S. 14-223. Before his hearing, respondent moved to quash the petition under the city ordinance on the grounds that the petition did not adequately plead the caption of the city ordinance and on the grounds that the city ordinance was unconstitutional. The motion to quash was denied.

The State presented Officer Hollowell who testified that on 14 July 1976 he responded to a call notifying him of a disturbance at a bus station; that he was met by a Mr. Creech at the bus station and advised by Creech that two boys were causing

a disturbance inside; that Creech told him the boys were using abhorrent language and were refusing to leave; that he entered and found respondent talking with a lady behind a counter; that he told respondent that he would have to go downtown with him and respondent said that he was not going; that he took respondent by the arm and respondent pulled away from him; that a struggle followed as he attempted to get respondent out of the bus station and into the police car; that respondent struck him several times during the struggle; and that another officer then arrived to help him.

The State then presented Creech who testified that he entered the bus station on the late afternoon of 14 July 1976; that a ticket agent was selling a ticket to respondent and respondent's brother; that respondent walked to a cigarette machine and began "to carry on"; that respondent claimed to have lost 45¢ in the machine and threatened to tear up the machine; and that respondent started "using every kind of language you have ever heard."

Respondent's evidence tended to show that he lost money in the cigarette machine and that he cursed Creech and told him that he wanted his "damn money back," but that he did not use any language stronger than that.

At the close of evidence, respondent moved for a directed verdict of the city ordinance charge on the grounds previously stated and for a directed verdict of the G.S. 14-223 charge on the grounds that the officer had no authority to arrest him at the time since no crime had been committed in the officer's presence. The motion was denied. An order was then entered finding that respondent had committed the alleged acts, finding that respondent was a delinquent, and placing respondent on probation for two years.

Attorney General Edmisten, by Assistant Attorney General William Woodward Webb, for the State.

Jones & Wooten, by William F. Simpson, Jr., for the respondent.

MARTIN, Judge.

[1] Respondent contends that the court should have granted the motion to quash the juvenile petition based on the city code since (1) the petition did not plead the caption of the city code

as required by G.S. 160A-79 and (2) the ordinance is unconstitutionally vague and indefinite.

G.S. 160A-79 provides that, in all civil and criminal cases, a city ordinance that has been codified in a code of ordinances in compliance with G.S. 160A-77 must be pleaded by both section number and caption while a city ordinance that has not been codified must be pleaded by its caption.

The record in the instant case contains neither a caption nor a copy of the city ordinance and there is no indication that the ordinance was proven at the trial. It is therefore questionable as to whether the ordinance was properly pleaded in the juvenile petition.

G.S. 160A-79(b) provides:

> "Any of the following shall be admitted in evidence in all actions or proceedings before courts or administrative bodies and shall have the same force and effect as would an original ordinance:
>
> (1) A city code adopted and issued in compliance with G.S. 160A-77, containing a statement that the code is published by order of the council.
>
> * * *
>
> (3) A copy of an ordinance as set out in the minutes, code, or ordinance book of the council certified under seal by the city clerk as a true copy (the clerk's certificate need not be authenticated)."

The ordinance was clearly not proven at trial and the record does not contain a caption. Respondent's motion to quash the petition based on violating "City Code 15-2" should have been allowed.

[2] Respondent next contends the court erred in denying the motion for a directed verdict at the close of all the evidence. He argues that the officer had no grounds to arrest without a warrant and that respondent therefore committed no offense when he resisted the illegal arrest. We agree.

G.S. 15A-401(b)(2) provides:

> "Offense Out of Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested."

If, as in the case at bar, an officer attempts to arrest someone without a warrant for committing a misdemeanor out of his presence, then G.S. 15A-401(b)(2)b. applies. This sub-section of the statute, as we interpret it, allows an officer to arrest without a warrant for a misdemeanor committed out of his presence *if* he has probable cause to believe (1) that the person has committed a misdemeanor *and* (2) that the person will not be apprehended unless he is immediately arrested *or* that the person may cause physical injury to himself, others, or property unless he is immediately arrested. Both of these probable cause requirements were lacking in the case at bar.

In regards to the first requirement, the record fails to reveal sufficient probable cause for the officer to believe that the respondent had committed a misdemeanor. The officer testified that he received a call concerning a disturbance at a bus station and, upon arriving, he was told by a Mr. Creech that ". . . there were two boys inside causing a disturbance"; that they ". . . were using strong language and did not want to leave"; and that he, Mr. Creech, wanted to ". . . sign papers against these two individuals for they would not leave, and for the fact that they were using this loud language." The officer further testified that his actions " . . . were based on information that Mr. Creech gave me when he told me that Carlton [respondent] had been disorderly and that he wanted to sign papers against Carlton." Other than these isolated portions of testimony, the trial record does not reveal any other evidence upon which the officer could have based probable cause to believe that the respondent had committed a misdemeanor. This testimony, without more, is not enough. In fact, the officer testified that when he arrived on the scene the respondent was merely involved in a conversation with the clerk working behind the counter; that he did not at any time observe the respondent conduct himself in any manner that would indicate disorderly conduct; and that he did not investigate any further before

asking the respondent to come with him. In light of this evidence, we conclude that the officer did not have sufficient probable cause, as required by the first requirement of G.S. 15A-401(b)(2)b., to believe that the respondent had committed a misdemeanor, and, therefore, he did not have grounds to arrest him without a warrant.

Even if we assume, *arguendo*, that the officer had probable cause to believe that the respondent had committed a misdemeanor, there still remains a second probable cause requirement which had to be fulfilled before he could make an arrest pursuant to G.S. 15A-401(b)(2)b. without a warrant. In order to effect a legal arrest under this sub-section of the statute, an officer must also have probable cause to believe that the respondent would not be apprehended unless arrested immediately *or* probable cause to believe that he would cause physical injury to the property, himself, or others unless arrested immediately. G.S. 15A-401(b)(2)b.1. and 2. There is nothing in the record to indicate that the officer had sufficient information to believe either part of this latter requirement. In fact, the officer's own testimony was to the effect that the respondent ". . . did nothing in my presence to indicate disorderly conduct" and that when he went into the bus station, the respondent ". . . was just engaged in a conversation with [a lady behind the counter]." Thus, the evidence is insufficient to satisfy the second probable cause requirement.

The testimony of M. E. Creech reveals sufficient evidence upon which the officer could have had probable cause to arrest the respondent without a warrant. However, there is no indication that Creech gave the officer all of the same information. Based on the testimony in the record before us, we must conclude that the information known to the officer was not enough to establish the probable cause required by G.S. 15A-401(b)(2)b. Hence, he did not have grounds to arrest the respondent without a warrant.

Reversed.

Judges BRITT and PARKER concur.

GARLAND L. KIGHT d/b/a NORFOLK MARINE COMPANY v. LANCE HARRIS AND WAHOO-SPORTSMAN, INC.

No. 761DC859

(Filed 4 May 1977)

Evidence § 29— verified statement of account — inadmissibility of items

In an action to recover for goods allegedly sold and delivered to defendant corporation and the corporation's sole shareholder, the trial court did not err in finding that certain invoices introduced by plaintiff did not show that any of the officers, directors or agents of defendant corporation purchased, charged or received any goods from plaintiff where some of the invoices were not signed or the signature was illegible; a second group of invoices was signed by a person who was neither an officer nor an employee of defendant corporation; and one invoice was signed by an employee of defendant corporation who had no authority to purchase or charge goods for the corporation.

APPEAL by plaintiff from *Beaman, Judge.* Judgment entered 13 July 1976 in District Court, DARE County. Heard in the Court of Appeals 13 April 1977.

This action was brought by plaintiff to recover $1,493.55, plus interest, for goods allegedly sold and delivered to defendants, Wahoo-Sportsman, Inc., and Lance Harris, the corporation's sole shareholder. Defendants denied all material allegations including receipt of the goods. At trial plaintiff introduced an exhibit, representing an itemized verified statement of account. This exhibit consisted of two verified pages from a ledger, listing credit entries by date and invoice number, and a large number of verified sales invoices which corresponded to all but three of the invoice numbers on the ledger.

Plaintiff also called defendant Harris as an adverse witness. Harris testified that he never authorized the purchase of any goods from plaintiff, and that he never authorized anyone to charge items either to his own account or to the corporate account. He testified that he incorporated Wahoo-Sportsman, Inc., about 1972, and that he became president of the company in 1974. Harris also said that he had no knowledge of what the previous officers of the company might have done before he became president, but that they were forbidden by the corporate by-laws to charge anything. Plaintiff rested. Defendants offered no evidence.

The case was tried without a jury. At the close of the evidence the court dismissed with prejudice the complaint against Harris. Then the court found that some, but not all, of the invoices proved debts owed by Wahoo-Sportsman, Inc., and judgment was accordingly entered in favor of plaintiff for $939.15, the total of the amounts of the invoices which the court determined to be admissible.

Numerous findings of fact were made by the trial court, including the following:

"6. The plaintiff sold and delivered to the defendant, Wahoo-Sportsman, Inc., various articles of merchandise for which the plaintiff has not been paid and which are evidenced by certain invoices as follows:

Date	*Invoice No.*	*Signed by*	*Amount*
1/28/74	41942	Bob Sullivan	$ 2.60
1/28/74	41941	Bob Sullivan	124.80
3/11/74	42520	Bob Sullivan	110.24
3/15/74	55919	Bob Sullivan	92.73
3/11/74	46634	Bob Sullivan	4.00
3/20/74	55820	Bob Sullivan	14.42
3/20/74	55811	Bob Sullivan	134.37
3/20/74	55810	Bob Sullivan	44.53
4/ 4/74	52939	James Curling	29.60
5/ 9/74	45897	Bob Sullivan	140.69
5/ 6/74	46799	Bob Sullivan	61.90
5/ 9/74	45898	Bob Sullivan	23.48
5/24/74	45960	Bob Sullivan	75.40
5/24/74	60356	Lance Harris	77.83
5/24/74	47761	Bob Sullivan	2.56
		Total	$939.15

7. The additional invoices introduced by the plaintiff do not indicate that any of the officers, directors or agents of the defendant, Wahoo-Sportsman, Inc., purchased, charged or received any items of merchandise.

8. No one other than the officers or directors of defendant, Wahoo-Sportsman, Inc., had authority to purchase or charge any merchandise with Norfolk Marine Company or plaintiff."

Plaintiff appealed.

McMullan & Knott, by Lee E. Knott, Jr., for plaintiff appellant.

Twiford, Seawell, Trimpi & Thompson, by Christopher L. Seawell, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that judgment should have been entered for the total amount represented by the statement of account, $1,906.97. He argues that the verified statement of account which was offered into evidence was unrefuted by any other evidence, and he relies on G.S. 8-45:

> "In actions instituted in any court of this State upon an account for goods sold and delivered . . . , a verified itemized statement of such account shall be received in evidence and shall be deemed prima facie evidence of its correctness."

In finding of fact number six the court found that plaintiff "sold and delivered" to Wahoo-Sportsman, Inc., various goods which the court listed by invoice numbers and which the court found were respectively signed by Bob Sullivan and James Curling, former officers of Wahoo-Sportsman, Inc., and one invoice signed by Harris, the sole stockholder. In finding number seven the court found that the additional invoices introduced by plaintiff did not show "that any of the officers, directors or agents of the defendant Wahoo-Sportsman, Inc., purchased, charged or received" any goods from plaintiff. And in finding number eight the court found that no one except officers or directors of the defendant corporation had authority "to purchase or charge" any merchandise with plaintiff.

The court's findings are supported by competent evidence, and they are thus binding on appeal.

An examination of the invoices indicates that all of the invoices contain a space for the "Customer's Signature" which also provides: "Order Received in Good Condition as Stated Above." In a large number of the invoices contained in plaintiff's exhibit there is either no signature in the space provided or the signature is illegible. Neither plaintiff nor any of plaintiff's employees testified, and there is no other evidence in the

record tending to show to whom the goods listed on these invoices were sold or delivered. The court properly disregarded this group of invoices. To make out a prima facie case under G.S. 8-45 the account not only must be properly verified and itemized, it must also be stated so as to show an indebtedness. *See Knight v. Taylor,* 131 N.C. 84, 42 S.E. 537 (1902).

A second group of invoices purporting to show that merchandise was sold and delivered to Wahoo-Sportsman, Inc., were all signed by one Throckmorton, who, according to the evidence in the record, was neither an officer nor employee of Wahoo-Sportsman, Inc. He was the employee of a person whose boat was at the time in storage at the Wahoo-Sportsman premises, and there is no evidence tending to show that Throckmorton had authority to order or accept goods for Wahoo-Sportsman, Inc. There is not even evidence to show that Throckmorton was held out to be an agent so as to raise the question of his apparent authority to buy or receive goods for Wahoo-Sportsman, Inc. Throckmorton's signature on this group of invoices provides no evidence that the goods listed on the invoices were sold or delivered to Wahoo-Sportsman, Inc.

A single invoice was signed by Randolph Thomas, an employee of Wahoo-Sportsman. However, evidence supports the finding that only officers and directors had authority to purchase or charge goods, and Thomas was neither an officer nor a director. The uncontradicted evidence, in fact, is that Thomas had no authority to purchase or charge goods for Wahoo-Sportsman.

The remaining invoices were signed either by officers of the corporation, Sullivan and Curling, or the sole stockholder, Harris. This is evidence supporting the finding that the goods itemized by the invoices signed by Sullivan, Curling and Harris were sold and delivered to Wahoo-Sportsman, Inc.

Plaintiff's second contention, that the court erred in dismissing the action against Harris, is untenable. Plaintiff argues that Wahoo-Sportsman, Inc. was the *alter ego* of Harris, who caused work to be done on his personal property by his solely owned corporation. However, there is no evidence to show that Harris treated Wahoo-Sportsman, Inc. as a mere *alter ego,* and dismissal of the action as to Harris was proper.

Judgment of the trial court is

Affirmed.

Judges MORRIS and HEDRICK concur.

MARJORIE J. PINNER v. RICHARD S. PINNER, JR.

No. 762DC833

(Filed 4 May 1977)

1. **Divorce and Alimony § 24.4; Parent and Child § 10— Uniform Reciprocal Enforcement of Support Act — registration and enforcement of foreign order**

Registration and enforcement of a foreign support order are separate procedures under the Uniform Reciprocal Enforcement of Support Act.

2. **Divorce and Alimony § 24.4; Parent and Child § 10— registration of foreign support order — jurisdiction over person or property**

Jurisdiction over the person or property of the obligor is not necessary for registration of a foreign support order under G.S. 52A-29.

APPEAL by defendant from *Ward, Judge.* Order entered 13 August 1976 in District Court, BEAUFORT County. Heard in the Court of Appeals 17 March 1977.

Plaintiff obtained a divorce from defendant in 1969 in Florida, where both then resided. Judgment was rendered wherein defendant was ordered to pay alimony in the amount of $450.00 per month until plaintiff remarried.

In May 1976, pursuant to G.S. 52A-29, plaintiff registered the Florida judgment with the Clerk of Superior Court, Beaufort County. In her affidavit plaintiff stated that she was a resident of North Carolina, that she believed defendant was a resident of Pennsylvania, and that defendant was $31,050.00 in arrears in alimony payments. Pursuant to G.S. 52A-29, the clerk sent notice of the registration to the address supplied by plaintiff for defendant. On 8 June 1976, pursuant to G.S. 52A-30(b), defendant petitioned that the registration be vacated on the grounds that the court lacked jurisdiction over the subject matter or over the person or property of defendant, that

service of process was defective, and that the Florida judgment was void because that court lacked jurisdiction over the parties and the subject matter.

At a hearing on 9 August 1976 plaintiff testified in support of registration; defendant presented no evidence. The court found that it had subject matter jurisdiction; that it had jurisdiction *in personam* and *in rem* over the defendant; that plaintiff and the clerk had complied with the procedures for registration and notice under G.S. 52A-29; and that the Florida judgment was not void for any reason alleged by defendant. The court concluded that the Florida judgment had been properly registered pursuant to G.S. Ch. 52A as a foreign judgment of this State.

Defendant appealed.

Blount, Crisp & Grantmyre by Nelson B. Crisp for plaintiff appellee.

McMullan & Knott by Lee E. Knott, Jr., for defendant appellant.

CLARK, Judge.

The sole issue presented upon appeal is whether jurisdiction over the person or property of a defendant-obligor is necessary in order to register a foreign support order under G.S. 52A-29.

G.S. Ch. 52A, the Uniform Reciprocal Enforcement of Support Act (hereinafter URESA), was first enacted in 1951, and was re-enacted with significant amendments in 1975. S.L. 1951, c. 317, s. 1; S.L. 1975, c. 656, s. 1. As re-enacted, G.S. Ch. 52A very substantially conforms to the 1968 revisions of URESA, which included a new procedure for the registration of foreign support orders. See 9C Uniform Laws Annotated, pp. 805-883 (1973). The provisions in the 1968 revision providing for the registration of foreign support orders have been adopted in twenty-four states, and were first enacted in North Carolina in 1975 as G.S. 52A-26 to G.S. 52A-30. 9C Uniform Laws Annotated, p. 383 (Supp. 1976). A review of the Uniform Laws Annotated reveals that there are no cases in any of the twenty-four states interpreting the sections providing for registration of foreign support orders.

G.S. 52A-29 provides that an "obligee" may register a foreign support order by furnishing certain specified documents to the clerk of court. G.S. 52A-30(a) provides that

> "Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by a court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner."

G.S. 52A-30(b) provides that "The obligor has 20 days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is confirmed." G.S. 52A-30(c) concerns the "hearing to *enforce* the registered support order." (Emphasis added.)

[1] We conclude that these provisions establish a two-step procedure: (1) registration of the order, and if required, a hearing on whether to vacate the registration or grant the "obligor" other relief; and (2) enforcement of the order. Under G.S. 52A-29, the obligee has the option to merely register the order or to register and enforce simultaneously. C. Kelso, Enforcement of Support, 43 Minn. L. Rev. 875, 882-884 (1959). This conclusion is supported by the definitions of "obligor" and "obligee." G.S. 52A-3(6) defines an obligee in pertinent part as "a person . . . that has commenced *a proceeding for enforcement* of an alleged duty of support *or for registration* of a support order . . . . " (Emphasis added.) G.S. 52A-3(7) defines an obligor in pertinent part as "a person . . . against whom a *proceeding for the enforcement* of a duty of support *or registration* of a support order is commenced." (Emphasis added.)

Having concluded that registration and enforcement are separate procedures, we consider whether jurisdiction over the person or property of the obligor is necessary for valid registration. Jurisdiction is the power of the court to decide a matter in controversy, and presupposes the existence of a duly constituted court with control over the subject matter and the parties. *Waters v. McBee,* 244 N.C. 540, 94 S.E. 2d 640 (1956). A judgment or order against a defendant who is not in court in some way sanctioned by law is void for want of jurisdiction. *Koob v. Koob,* 283 N.C. 129, 195 S.E. 2d 552 (1973); *Richards v. Nation-*

wide Homes, 263 N.C. 295, 139 S.E. 2d 645 (1965). In the present case we are not concerned with the limited judicial *power* of the Clerk of Court to render judgments or issue orders. See 3 Strong, N. C. Index, Clerks of Court § 1 (3d ed. 1976). Rather we are here concerned with the *duty* of the clerk to register a foreign judgment properly presented under G.S. 52A-29. "Unless otherwise specifically authorized by statute, the duty of the clerk of court to file papers presented to him is purely ministerial and he may not refuse to perform such duty except upon order of the court." 15A Am. Jur. 2d, Clerks of Court § 23, p. 158 (1976). The mere registration of a foreign support order presented by the obligee under G.S. 52A-29 is a ministerial duty of the clerk. By that act no court or agency of the state is purporting to exercise power over the obligor or his property. Registration does not prejudice any rights of the obligor; it merely changes the status of the foreign support order by allowing it to be treated the same as a support order issued by a court of North Carolina. G.S. 52A-30. Once the order is so treated the obligee or the obligor may request modifications in the order, and when the obligee attempts to enforce the order, the court must determine whether jurisdiction exists over the person or property of the obligor and what amount, if any, is in arrears. W. Brockelbank, *Interstate Enforcement of Family Support (The Runaway Pappy Act)*, pp 77-87 (Infausto ed. 1971).

[2] We conclude that jurisdiction over the person or property of the obligor is unnecessary for registration of a foreign support order, and that no error was committed in confirming the registration of the order in the present case.

In the present case, plaintiff seeks only to register the support order, not to enforce it. Since it was not necessary to determine whether jurisdiction over the person or property of the defendant existed, we declined to review that part of the order until the issue is properly presented. *Caudell v. Blair*, 254 N.C. 438, 119 S.E. 2d 172 (1961); 1 Strong, N. C. Index, Appeal and Error § 2 (3d ed. 1976).

The superfluous jurisdictional findings should not bind the defendant-obligor in any proceeding to enforce the support order. We note that G.S. 52A-22 provides that participation in any proceeding under the URESA "does not confer jurisdiction upon any court over any of the parties thereto in any

other proceeding." This provision, and our decision not to review the superfluous jurisdictional findings made by the trial court at the hearing on registration, should make it clear that this obligor may raise the defenses of lack of jurisdiction over his person or property at any proceeding on enforcement.

Affirmed.

Judges BRITT and HEDRICK concur.

DANIEL ALEXANDER MANESS, JR., ADMINISTRATOR OF THE ESTATE OF LARRY EDWARD MANESS v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

— AND —

DANIEL ALEXANDER MANESS, JR. v. RONALD CLYDE BULLINS AND CLYDE COLUMBUS BULLINS

No. 7619SC875

(Filed 4 May 1977)

1. **Evidence § 14— hospital records — privileged communication**

In an action to recover for damages sustained in an automobile accident where the jury found that plaintiff was contributorily negligent in riding with the defendant, knowing that defendant was intoxicated, the trial court did not err in refusing to allow into evidence the hospital emergency room record of the treatment of defendant driver and testimony of the attending emergency room physician, since the lack of any mention of intoxication in the hospital record was not relevant to the question of intoxication in this case and the privilege between physician and patient extends to entries in hospital records pertaining to information obtained by the physician in attending the patient.

2. **Evidence § 22— testimony at former trial — question and answer form best evidence**

Where the original plaintiff and one of plaintiffs' witnesses had died by the time of the fifth trial, the trial court did not err in refusing to allow the introduction of their testimony at a previous trial in the narrative form that had been prepared for a case on appeal, but instead properly allowed the introduction of their testimony in question and answer form as recorded in the transcript of a previous trial, since that was the most accurate form of the witnesses' testimony, and in this case was the best evidence.

3. **Trial § 14— reopening case for additional evidence — discretionary matter**

The trial court in its discretion may allow plaintiff or defendant to introduce further evidence after he has rested.

APPEAL by plaintiffs from *Lupton, Judge.* Judgment entered 10 June 1976 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 14 April 1977.

These actions arise out of a collision by an automobile with a utility pole which occurred on 4 June 1966. This appeal follows the fifth trial by jury had in the cases. For a brief history of the previous trials, *see Maness v. Bullins,* 27 N.C. App. 214, 218 S.E. 2d 507 (1975), where Judge Morris summarized the prolonged litigation resulting from this incident.

In their complaints, filed 31 October 1968, plaintiffs allege that the automobile was owned by defendant Clyde C. Bullins and operated by his son, defendant Ronald C. Bullins; that plaintiff Larry E. Maness was a passenger in the automobile at the time of the collision and at that time was a minor; and that he was injured as a result of negligence on the part of defendant driver. Plaintiff Larry E. Maness asked that he be compensated for his injuries and plaintiff Daniel A. Maness, Larry's father, asked that he be reimbursed for medical expenses incurred on behalf of his son.

In their answers defendants deny negligence and plead contributory negligence on the part of plaintiff Larry Maness. They allege that prior to the collision plaintiff Larry Maness and defendant Ronald Bullins were riding around drinking intoxicants together; that defendant Ronald Bullins became intoxicated and that plaintiff Larry Maness continued to ride with him, knowing that he was intoxicated.

Prior to the fifth trial plaintiff Larry Maness died from causes unrelated to this case and his administrator was substituted as plaintiff in his action.

The cases were consolidated for trial. At trial the primary contest was on the question of contributory negligence on the part of plaintiff Larry Maness. The jury answered the issue of negligence in favor of plaintiffs but answered the issue of contributory negligence in favor of defendants. From judgment denying plaintiffs any recovery and taxing them with the costs, they appealed.

Ottway Burton for plaintiff appellants.

Coltrane and Gavin, by W. E. Gavin, for defendant appellees.

BRITT, Judge.

[1] Plaintiffs contend that the trial court erred in refusing to allow into evidence the hospital emergency room record of the treatment of defendant driver, and in refusing to allow into evidence certain testimony of the attending emergency room physician. These contentions are without merit.

The hospital record in question was prepared by Dr. Paul H. Brigman very soon after the collision. It contains nothing relating to the patient's intoxication. Apparently, plaintiffs wanted to argue to the jury that the absence of any information in the hospital record concerning intoxication created a logical inference that defendant driver was not intoxicated. We do not think plaintiffs were entitled to introduce the record for that purpose. The lack of any mention of intoxication in the hospital record is not relevant to the question of intoxication in this case. Moreover, the privilege between physician and patient extends to entries in hospital records pertaining to information obtained by the physician in attending the patient. *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962). We hold that the trial court properly exercised its discretion in excluding the record.

The attending emergency room physician testified that he had no opinion as to whether defendant driver was under the influence of intoxicants when he was treated at approximately 2:25 a.m. on 4 June 1966. Plaintiffs argue that the court erred in refusing to allow Dr. Brigman to testify why he did not have an opinion. Dr. Brigman testified for the record that he did not recall the details of the accident and that his only recollection was recorded in the hospital record. We think this evidence was properly excluded from the jury, especially since plaintiffs were not entitled to have the hospital record admitted and the doctor's statement would have led to mere speculation and conjecture by the jury. The reason why Dr. Brigman had no opinion in this instance had no probative value and would not have been an aid to the jury.

[2] At the time of the fifth trial, the original plaintiff, Larry Maness, and plaintiffs' witness Bertha Lee Maness had died. Plaintiffs contend that the court erred in refusing to allow the introduction of their testimony at a previous trial in the narrative form that had been prepared for a case on appeal. Instead, the trial court allowed the introduction of their testimony in

question and answer form as recorded in the transcript of a previous trial.

We do not think the court erred in requiring the introduction of the transcript of the deceased witnesses' prior testimony. The prior testimony of a witness should be presented to the jury in the most accurate and complete manner possible. Certainly the question and answer form of testimony provided by the transcript is the most accurate and should be introduced when available. Furthermore, in this case it was the best evidence. 2 Stansbury, North Carolina Evidence (Brandis Rev. 1973), § 190 *et seq.*

Plaintiffs next contend that the court abused its discretion in allowing the defendants to reopen the case after both sides had rested and then read into evidence certain portions of a transcript of the cross-examination of the deceased, Larry Maness. This contention is without merit.

[3] The trial court, in its discretion, may allow plaintiff or defendant to introduce further evidence after they have rested. *Rose & Day, Inc. v. Cleary,* 14 N.C. App. 125, 187 S.E. 2d 359 (1972), *State v. Satterfield,* 207 N.C. 118, 176 S.E. 466 (1934). We fail to perceive any abuse of discretion by the trial court in the allowance of this testimony. In fact, the plaintiffs also introduced additional evidence after the case had been reopened.

Plaintiffs next contend that the court erred in its jury charge by putting undue emphasis on the defendants' evidence concerning the issue of the deceased plaintiff's alleged contributory negligence. Plaintiffs also argue that the court incorrectly charged on the issue of contributory negligence by giving more stress to the contentions of defendants than to those of the plaintiffs.

Obviously, the question of whether the intestate, Larry Maness, was contributorily negligent was a key issue in this case. We have carefully reviewed the charge of the court and conclude that it did not give undue emphasis to either the evidence or the contentions of defendants concerning the issue of contributory negligence.

Plaintiffs also contend that the court erred by giving the jury a written memorandum of the issues in the case. This contention is without merit.

Plaintiffs apparently concede in their brief that this may not have prejudiced them. We fail to perceive any prejudice to the plaintiffs by the submission of the memorandum to the jury. In fact, we think that in a personal injury case with multiple issues, the submission of a written memorandum of the issues can be a valuable aid to the jury.

We have carefully considered the remaining assignments of error and have found them to be without merit. We conclude that plaintiffs received a fair trial free from prejudicial error.

No error.

Judges PARKER and MARTIN concur.

LEE-MOORE OIL COMPANY v. TERRANCE V. CLEARY AND WIFE, LYNN L. CLEARY

No. 7611DC763

(Filed 4 May 1977)

Fixtures § 2; Bailment § 1— placing tanks and pumps on store premises — bailment

An agreement between plaintiff and a store owner that plaintiff would install gasoline pumps, underground storage tanks and an air compressor on the store premises for the purpose of distribution of plaintiff's gasoline products and that plaintiff could remove such equipment if the store owner stopped purchasing gasoline from plaintiff created a mere bailment of the equipment; therefore, plaintiff was entitled to remove the equipment when defendants, who purchased the store after the owner's death without notice of the agreement, stopped buying gasoline from plaintiff, but plaintiff is liable to defendants for any damages to the realty caused by removal of the equipment.

APPEAL by plaintiff from *Pridgen, Judge.* Judgment entered 21 April 1976 in District Court, LEE County. Heard in the Court of Appeals 17 February 1977.

This is a civil action brought by plaintiff Oil Company to recover $1,668.00 for the alleged conversion by the defendants of certain equipment including gasoline pumps, storage tanks, and an air compressor upon the premises known as "Marley's Store" in Chatham County. Plaintiff alleged that there was an agreement with the former land owner that if the operator of

Marley's Store stopped purchasing gasoline from plaintiff, then plaintiff could remove these items of equipment from the premises; that defendants subsequently purchased Marley's Store and stopped buying gasoline from plaintiff; and that defendants have refused to allow plaintiff to remove the pumps, tanks, and air compressor.

Defendants denied in their answer that plaintiff had entered into any agreement with the previous owner of the store as alleged in the complaint. They alleged that even if such an agreement existed, it was not binding on them since the pumps, tanks, and air compressor had been affixed to the real property which was purchased by defendants without notice of any such agreement.

Plaintiff offered evidence tending to show that it or its predecessor corporation had placed its own tanks, pumps, and air compressor upon the premises at Marley's Store; that in 1969 it entered into an agreement with Junius Marley, a former owner of the store to install two gasoline pumps, a storage tank, and an air compressor; that it bought and installed the equipment and retained ownership thereof; that Henry Kimbrell inherited the store upon the death of Marley and sold it to defendants; and that Kimbrell told defendant Terrance Cleary that the pumps and the tank belonged to plaintiff. Defendants subsequently stopped buying gasoline from plaintiff and defendants refused to allow plaintiff to remove the aforesaid items of fuel dispensing equipment from the premises. The storage tanks are buried under the ground. The gasoline pumps are not bolted down but rather are attached to a cement slab by means of an electrical hook-up and a suction line leading to the storage tanks. The air compressor just sits on the ground behind the building and has an electrical connection and one air hose which runs through a copper tube to the front of the building and lies "barely under the ground" and is not deeply buried.

At the conclusion of plaintiff's evidence, the court directed a verdict for defendants. Plaintiff appealed.

Gerald E. Shaw, for the plaintiff.

Ray F. Swain, for the defendants.

MARTIN, Judge.

Plaintiff contends that the trial court erred in granting defendants' motion for a directed verdict. It argues, first of all, that the pumps and the air compressor were not attached to the realty in such a way as to become a part of the realty. In any event, even if the equipment is deemed to have been annexed to the realty, the plaintiff argues that each item of equipment in question is still removable as a trade fixture.

> "The rule with respect to the right to remove trade fixtures which have been attached to the land is intended to cover those cases in which a tenant installs such fixtures for use during his occupancy with the understanding, express or implied, that they may be removed." *Stephens v. Carter*, 246 N.C. 318, 320, 98 S.E. 2d 311, 312 (1957).

Neither Kimbrell nor defendants ever occupied the land as tenants. The equipment was installed while Marley owned the real property. Plaintiff may have had the right to remove the equipment, pursuant to its oral agreement with Marley, while Marley possessed the property. However, at Marley's death, Kimbrell inherited the property and conveyed it to defendants by deed which contained no exceptions as to figures.

> " 'Real fixtures' consist of things, originally chattels personal, which have been annexed to land, or to things permanently attached to land, by the owner of the chattels or with his assent, and with the intention to make the annexation permanent. All other annexations are 'personal fixtures.' " Webster, Real Estate Law in North Carolina, § 12, page 16.

In the absence of clear evidence indicating a contrary intention, it is presumed in this State that an owner-vendor who has attached an item of personalty to his own land intends to make it a real fixture. Thus, the vendee of the real property will be entitled to have it conveyed to him by deed pursuant to the contract as a part of the realty. Webster, *supra*, § 18, page 22. However, in the instant case, the question of title does not arise between vendor and vendee. The agreement that the plaintiff would install the equipment on the premises of Marley's Store for purpose of distribution of plaintiff's products created a mere bailment of the equipment.

A case almost identical to this case is *Standard Oil Co. of New York v. Dolgin,* 95 Vt. 414, 115 Atl. 235 (1921). There plaintiff had entered into a written lease with Healy and Allen, which provided, among other things, that the title to the gas tank in question would remain in plaintiff but Healy and Allen could use it for a nominal rent in handling plaintiff's petroleum products. The tank was installed in a shallow excavation and dirt filled in over the tank to lessen fire hazard and protect the tank. Healy acquired Allen's interest in the premises and then conveyed the premises to defendant without reserving the tank. Defendant refused to allow plaintiff to remove the tank and plaintiff brought an action in replevin. The trial court rendered judgment for plaintiff and the Supreme Court affirmed, saying:

> "As between the parties to the lease, its character and ownership remained unchanged. The plaintiff has never parted with its title or consented to a change in the character of the property, unless such a result follows from the method of installation and subsequent conveyance of the real estate. The rule of law governing such cases is easily stated, though not always easily applied. It is this: The annexation by a bailee to his own real estate of personal property bailed, with or without the knowledge and consent of the bailor, does not change the character of the property, and the bailor may recover it of the bailee's grantee, even though the latter be an innocent purchaser, unless the annexation is of such a character that the identity of the chattel is thereby lost, and it cannot be removed without substantial injury to itself or the real estate. The purpose and intention of the installation are incidentally involved, but the ultimate tests are as above stated. . . .
>
> . . . If the identity of the property is lost, as where bricks are built into a building, stone laid in a wall or walk (citations omitted), it becomes a part of the real estate. In determining this question, the intention of the party in making the attachment and the damage involved in its removal are for consideration." *Standard Oil Co. of New York v. Dolgin, supra* at 415, 115 Atl. at 236.

The court further affirmed the trial court in submitting to the jury an issue on the amount of damages to which defendant was entitled as the result of removing the tank from the excava-

tion made when it was installed. The case of *Stephens v. Carter, supra,* cited by defendant in his brief is clearly distinguishable on its facts.

We hold that plaintiff is entitled to remove the tank in question but is liable to defendant for such damages as the jury might find defendant sustained in its removal. The same principle is equally applicable to the pumps and compressor.

Plaintiff seeks damages for the conversion of its property by defendant in refusing to allow plaintiff to remove the items sought to be recovered. It is entitled to those damages, if any there be.

Reversed and remanded.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. LARRY RAVON FLEMING

No. 7614SC865

(Filed 4 May 1977)

1. **Criminal Law § 162.6— objection on specific ground — review on appeal**

When a specific objection to evidence is made, the competency of the evidence will be determined on appeal solely on the basis of the ground specified, and the existence of another ground for objection is irrelevant for purposes of review unless the evidence is completely without purpose; however, the rule does not apply when the evidence is rendered incompetent by statute, and defendant could properly raise a violation of G.S. 8-54 for the first time on appeal.

2. **Criminal Law § 162.6— portions of evidence inadmissible — general objection insufficient**

Even if the introduction of portions of defendant's transcript from a former trial constituted a violation of G.S. 8-54, there were other portions which were properly admissible into evidence; therefore, since defendant failed to object to the specific parts of the transcript which were incompetent, he could not complain on appeal of their admission.

APPEAL by defendant from *Lee, Judge.* Judgment entered 12 April 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 April 1977.

Defendant was charged by indictment in proper form with armed robbery and entered a plea of not guilty. A jury convicted defendant on the charge, and judgment was entered thereon sentencing him to imprisonment for a term of 25 years.

The State introduced evidence which tended to show the following: On 3 April 1973, Martin Mangum and Charles Bailey were employed as sales clerks at the Durham County A.B.C. Store # 4. At approximately 8:45 p.m., defendant entered the store with Clintes Evoner Person and asked for a bottle of dark rum. Mangum left his sales window, picked up the rum and returned to a vacant sales widow, whereupon he saw defendant holding a gun. Defendant ordered Mangum to return to his own window, and Mangum complied. Person was waiting at Mangum's window and held a gun on the counter. He instructed Mangum, "Empty your register and put it in a bag." Mangum removed approximately $390 from the cash register and gave it to Person. Before leaving the A.B.C. store, Person warned Mangum that "if you ever identify me you are dead." Investigating officers subsequently discovered a latent fingerprint and palm print on the counter and identified them as matching those of Person. Mangum did not identify defendant as one of the robbers for some months until he saw defendant testify at another trial as an alibi witness for Person.

Claudia Johnson, who was acquainted with both defendant and Person, went to the A.B.C. Store # 4 at approximately 8:45 p.m. on 3 April 1973. As she approached the door, she recognized defendant standing at the counter and holding a gun. She also saw Clintes Person standing in the store beside defendant. Person turned and saw Johnson staring at him, and she fled.

Defendant called Detective Lorenzo Leathers of the Durham Police Department. He testified, *inter alia*, that Mangum picked defendant's photograph out of a group of 30-50 others and identified defendant as one of the men that robbed the store. Soon thereafter, defendant was put in a lineup at which time Bailey failed to identify defendant. Mangum did not attend the lineup, and charges against defendant were subsequently dropped. Defendant was not arrested until the summer of 1973 soon after he testified on behalf of Person, who was on trial for the robbery of a gas station which occurred the same night as the robbery of the A.B.C. store.

In rebuttal, the State introduced, over objection, the transcript of defendant's testimony at Person's trial. In it, defendant testified that he was with Person on the night of 3 April 1973; that they spent the evening playing cards at the house of a friend; that he had been arrested for the robberies of the A.B.C. store and the gas station; that he was not identified in subsequent lineups and was thereafter released from custody on the charges; and that he had previously served an active prison sentence for "[s]omething about receiving stolen goods or something."

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell, for the State.

Norma E. Williams and Kenneth B. Oettinger for defendant appellant.

MORRIS, Judge.

Defendant raises seven assignments of error but argues only two of them on appeal. He contends that the trial judge erred in admitting into evidence the transcript of defendant's testimony in the trial of Clintes Person and in subsequently overruling his motion to dismiss.

As a general rule, where a defendant testifies as a witness at a judicial proceeding, his testimony is admissible against him in a subsequent criminal trial. *State v. Farrell,* 223 N.C. 804, 28 S.E. 2d 560 (1944); *State v. Burnett,* 184 N.C. 783, 115 S.E. 57 (1922); *State v. Simpson,* 133 N.C. 676, 45 S.E. 567 (1903). Defendant argues, however, that because of the transcript " . . . contained statements and admissions by the defendant that he had been arrested and accused of another unrelated armed robbery, had previously been convicted of other crimes, had served an active prison sentence or sentences and contained statements by the district attorney which insinuated that the defendant had been one of the parties involved in the armed robbery which is the subject of the case at bar," it was therefore incompetent at his own trial. We cannot agree.

Following defendant's objection to the introduction of the transcript, counsel for defendant and the State approached the bench at which time the court asked defendant's attorney to

state the basis for his objection. Counsel told the court that the grounds for his objection were that the admission of the former testimony would violate defendant's constitutional right against self-incrimination. The district attorney asked defense counsel if self-incrimination was the sole basis for the objection and was informed that it was. The record states "[t]hat at the bench there was no discussion whatsoever with the district attorney or the defendant's attorney about the fact that the transcript sought to be entered into evidence contained some reference to defendant's prior criminal activity."

[1] It is well settled in North Carolina that when a specific objection to evidence is made, the competency of the evidence will be determined on appeal solely on the basis of the ground specified. The existence of another ground for objection is irrelevant for purposes of review unless the evidence is completely without purpose. *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972); *Pratt v. Bishop,* 257 N.C. 486, 126 S.E. 2d 597 (1962); *State v. Westmoreland,* 181 N.C. 590, 107 S.E. 438 (1921). But the rule does not apply when the evidence is rendered incompetent by statute. *Glenn v. Smith,* 264 N.C. 706, 142 S.E. 2d 596 (1965). Thus, defendant may properly raise a violation of G.S. 8-54 for the first time on appeal.

[2] However, even assuming *arguendo* that the introduction of portions of the transcript constitute a violation of G.S. 8-54, there were other portions which were properly admissible into evidence. *State v. Farrell, supra.* Defendant did not specify the objectionable portions. A general, broadside objection should be overruled if any part of the evidence is admissible. *Pratt v. Bishop, supra.*

> "The rule is well settled that general objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such case the objector must specify the grounds of the objection, and it must be confined to the incompetent evidence. Unless this is done he cannot afterwards single out and assign as error that part of the evidence which was incompetent." *State v. Hill,* 6 N.C. App. 365, 368, 170 S.E. 2d 99, 101 (1969).

Since defendant failed to object to the specific parts of the transcript which were incompetent, he may not now complain of their admission. These assignments are overruled.

No error.

Judges HEDRICK and ARNOLD concur.

EARNEST D. POTEAT, ADMINISTRATOR OF THE ESTATES OF ROBERT C. POTEAT, DECEASED, AND JANICE M. POTEAT, DECEASED v. SOUTHERN RAILWAY CO., WILLIAM E. ALLEN JR., AND FREDERICK A. THOMASSON

No. 7618SC860

(Filed 4 May 1977)

Venue § 8— motion for venue change — answer as prerequisite

The trial court had no authority to entertain a motion under G.S. 1-83(2) for a change of venue to promote the convenience of witnesses and the ends of justice prior to the time an answer was filed in the case.

APPEAL by plaintiff from *McConnell, Judge*. Order entered 8 September 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 April 1977.

This is a civil action wherein the plaintiff, Earnest D. Poteat, administrator of the estates of Robert C. Poteat and Janice M. Poteat, seeks to recover damages from the defendants, Southern Railway Co., a Virginia Corporation, William E. Allen, Jr., and Frederick A. Thomasson, residents of Rowan County, North Carolina, for the wrongful death of Robert C. Poteat and Janice M. Poteat, allegedly resulting from a collision in Rockingham County between an automobile in which the deceased were passengers and a train owned by defendant Southern Railway Co. and operated by its employees, defendants Allen and Thomasson, within the scope of their employment.

In his complaint plaintiff alleged that defendant Southern Railway "is domesticated in North Carolina, and maintains an office in Greensboro, North Carolina."

Defendants did not file answer, but moved that venue be changed from Guilford to Rockingham County. In support of their motion defendants offered the affidavit of their attorney that most of the witnesses involved were residents of Rockingham County and that he intended to request a jury view of the

scene of the accident in Rockingham County. Plaintiff responded with affidavit to the effect that the road from his home in Virginia to Greensboro is superior to the road to Wentworth and that he "would find it much more convenient and helpful if this matter were tried in Greensboro rather than in Wentworth, North Carolina."

On 8 September 1976 the court entered the following order:

"THIS CAUSE being heard by the undersigned Judge of Superior Court on motion of Defendants for change of venue, and it appearing to the Court that the plaintiff is a citizen and resident of Henry County, Virginia, and that the defendant Southern Railway Company is a railroad corporation and that the two individual defendants are employees of Southern Railway Company; and it further appearing to the Court that the accident the subject of this action arose in Rockingham County, North Carolina, and that G.S. 1-81 makes Rockingham County the proper county for the trial of this action; and it further appearing to the Court that with the exception of the parties and other employees of defendant railroad all presently known witnesses are residents of Rockingham County and that the convenience of the witnesses and the ends of justice will be promoted by removing the venue of trial of this action from Guilford County to Rockingham County and that the motion should be ALLOWED;

"IT IS THEREFORE ORDERED that this action be transferred to the Superior Court of Rockingham County, North Carolina."

Plaintiff appealed.

Turner, Enochs, Foster & Burnley by James H. Burnley IV for plaintiff appellant.

Griffin, Post, Deaton & Horsley by Hugh P. Griffin, Jr., Peter M. McHugh, and William F. Horsley for defendant appellees.

HEDRICK, Judge.

G.S. 1-83 in pertinent part provides

"The court may change the place of trial in the following cases:

(1) When the county designated for that purpose is not the proper one.

(2) When the convenience of witnesses and the ends of justice would be promoted by the change."

The plaintiff in the present case designated Guilford County as the place of trial. In his order changing the place of trial, Judge McConnell declared that " . . . Rockingham County [is] the proper county for the trial of this action . . . . " While the record may support the court's conclusion that Rockingham County is a proper venue, this conclusion does not support the order removing the case under G.S. 1-83(1), since the court did not find or conclude that Guilford County was *not* a proper place of trial. Indeed, on the record before us, Guilford County is a proper place of trial whether venue is determined under G.S. 1-81 or G.S. 1-82.

The trial court clearly has authority to change the place of trial of an action pursuant to the provisions of G.S. 1-83(2) to promote the convenience of witnesses and the ends of justice. However, our courts have consistently held that the court has no authority to entertain a motion under this section of the statute until an answer has been filed. *Thompson v. Horrell,* 272 N.C. 503, 158 S.E. 2d 633 (1968); *Lowther v. Wilson,* 257 N.C. 484; 126 S.E. 2d 50 (1962); *Indemnity Co. v. Hood, Comr.,* 225 N.C. 361, 34 S.E. 2d 204 (1945). Although this rule has been characterized as "hypertechnical," 1 McIntosh, North Carolina Practice and Procedure, § 834, n. 32 (Supp. 1970), we feel compelled to follow the rule and hold Judge McConnell erred in allowing defendants' motion for a change of venue to promote the convenience of witnesses and the ends of justice, since no answer has been filed in this case.

For the reasons stated the order appealed from is

Reversed.

Judge MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. BILLY BOOKER

No. 7615SC864

(Filed 4 May 1977)

Criminal Law § 7.1— entrapment — insufficiency of evidence — instructions surplusage

In a prosecution for possession of marijuana for the purpose of sale and sale of marijuana, evidence was insufficient to raise an issue of entrapment where it showed at most that an officer afforded defendant the opportunity to commit the offenses charged in that the officer provided the money to purchase the drugs and loaned defendant his car to get the drugs; therefore, the trial court's instructions with respect to entrapment were mere surplusage and could have in no way prejudiced the defendant.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 20 May 1976 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 6 April 1977.

Defendant, Billy Booker, was charged in a two-count bill of indictment, proper in form, with the felonious possession of marijuana for the purpose of sale and delivery and with the sale of marijuana to State ABC Officer, J. W. Leonard. Upon the defendant's plea of not guilty the State offered evidence tending to show the following:

On 31 January 1976 State ABC Officer, J. W. Leonard, and Ivan Chatman went to defendant's house in Burlington, North Carolina, where Leonard asked defendant if defendant could sell him some heroin and marijuana. Defendant stated that he knew where he could get some marijuana. Defendant directed Officer Leonard to give him $20 and told him that he would return in 15 to 20 minutes. Defendant returned 15 to 20 minutes later and gave Leonard a clear plastic bag containing marijuana and two tablets of Phencyclidine along with two dollars' change.

Defendant offered evidence tending to show the following:

On 31 January 1976 Leonard and Chatman, whom defendant did not know, came to his house and Leonard asked him if he could get him some marijuana. Defendant stated that he did not know because the town was "pretty dry." Leonard kept insisting that he needed some drugs, and defendant "kept telling him that he did not know where any was because the town was pretty dry and he had been all over town trying to find some

himself" for his personal use. Leonard stated he needed some because he just got out of jail and his mother had just died. Chatman stated that he was a junkie and needed some heroin or something. After they talked for 15 to 20 minutes, defendant finally agreed to try to find some of the drugs Leonard and Chatman wanted. Leonard gave defendant $20 to cover the purchase and loaned defendant his car. Defendant returned later with the drugs. Defendant had not ever sold any drugs before 31 January 1976.

Defendant was found guilty as charged and from a judgment imposing a prison sentence of five years, he appealed.

Attorney General Edmisten by Associate Attorney Jesse C. Brake for the State.

Allen, Allen, Walker & Washburn by Kent Washburn for defendant appellant.

HEDRICK, Judge.

Defendant's first assignment of error relates to the exclusion of certain testimony relating to the manner in which the undercover agent in this case had conducted himself in other similar drug arrests. Since the answers to the questions were not preserved for the record, we are unable to say whether the exclusion of the evidence is prejudicial. 4 Strong, N. C. Index 3d, Criminal Law § 169.6 (1976). Furthermore, a careful examination of each exception upon which this assignment of error is based reveals that each question called for irrelevant testimony.

Defendant's remaining assignments of error relate to the trial judge's instructions to the jury on the defense of entrapment and his failure to dismiss the action because the defense of entrapment was established as a matter of law.

Entrapment with respect to a particular crime exists when the intent to commit that crime originates from the inducement of a law enforcement officer or his agent, and the defendant would not have committed the crime but for such inducement. *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191 (1955); *State v. Stanback,* 19 N.C. App. 375, 198 S.E. 2d 759 (1973); *cert. denied,* 284 N.C. 258, 200 S.E. 2d 658 (1973); *cert. denied,* 415 U.S. 990, 39 L.Ed. 2d 887, 94 S.Ct. 1589 (1974). However there is no entrapment when the officer merely affords the defendant

the opportunity to commit the crime. *State v. Stanback, supra; State v. Hendrix,* 19 N.C. App. 99, 197 S.E. 2d 892 (1973).

> "Mere initiation, instigation, invitation, or exposure to temptation by enforcement officers is not sufficient to establish the defense of entrapment, it being necessary that the defendants would not have committed the offense except for misrepresentation, trickery, persuasion, or fraud."
>
> 4 Strong, N. C. Index 3d, Criminal Law § 7, p. 45 (1976).

The evidence of the defendant in the present case, in our opinion, is not sufficient to raise an issue of entrapment. The evidence at most shows that the officer afforded the defendant the opportunity to commit the offenses. The fact that the officer provided the money to purchase the drugs and loaned defendant his car to go get the drugs is not sufficient evidence to show inducement on the part of the officer. The court's instructions with respect to entrapment, therefore, were mere surplusage and could have in no way prejudiced the defendant. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974).

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. DANNY MONTGOMERY

No. 7614SC868

(Filed 4 May 1977)

1. **Criminal Law § 76.10— guilty plea — confession admitted — admissibility properly raised on appeal**

Defendant's argument that the trial judge erred in refusing to grant his motion to suppress his statements of confession could properly be made on appeal, though defendant entered a plea of guilty to the charge and never denied guilt. G.S. 15A-979(b).

2. **Criminal Law § 75.4— confession without counsel — waiver of right by defendant**

Evidence was sufficient to support the trial judge's findings that defendant understood and waived his right to have counsel present during interrogation.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 7 June 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 6 April 1977.

On 22 November 1975, defendant was arrested for the armed robbery of two persons and taken to police headquarters in Durham. Detectives read to him the so-called *Miranda* card then in use by the Durham Police Department which purported to list and explain the defendant's pertinent constitutional rights. After acknowledging that he understood his rights and after signing a written waiver, defendant confessed to the armed robbery. Later, on 2 February 1976, defendant moved to suppress these statements on the ground that he had not knowingly and voluntarily waived his right to have counsel present during questioning. A hearing was held on this motion, and, after taking evidence, the court entered an order denying the motion, which was supported by written findings of fact. Defendant came to trial on 16 March 1976, and at this time he pled guilty to the offenses charged. He was sentenced to from eight to ten years in prison.

Attorney General Edmisten, by Assistant Attorney General Claude W. Harris, for the State.

Paul, Rowan & Galloway, by Karen Bethea Galloway, for defendant appellant.

ARNOLD, Judge.

[1] Refusal by the trial judge to grant defendant's motion to suppress his statements of confession is assigned as error. Defendant entered a plea of guilty to the charge and he has never denied guilt. However, his argument is properly raised by this appeal.

> "An order finally denying a motion to suppress may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." G.S. 15A-979(b).

[2] Defendant contends that he did not understand his right to have counsel present during interrogation, and that therefore this right was not knowingly and voluntarily waived. He asserts that the *Miranda* card which was read to him by the officers contained an incorrect implication that counsel would not be appointed for him until his trial.

At the hearing on the motion to suppress, the officer who questioned defendant testified that he twice read defendant his constitutional rights as declared in *Miranda* from the card which defendant asserts to be defective. However, the record reveals that the officer testified he thereafter gave defendant further warnings:

> " . . . then I went back to him [defendant] and explained to him that he had the right to have a lawyer present before we asked him any questions and if [he] could not afford to hire one, one would be appointed for him before any questions would be asked. He said he understood."

The judge at the hearing on the motion to suppress evidence is the finder of fact. G.S. 15A-977(d). He must make written findings of fact and conclusions of law. G.S. 15A-977(f). In this case the judge made written findings and conclusions. Among these findings the judge found that all of defendant's evidence that he misunderstood his rights was unworthy of belief. Moreover, testimony of the police officer as hereinbefore set forth supports the finding that defendant was advised of his right to have appointed counsel present when he was questioned and that "defendant stated . . . that he did not want his appointed counsel present." Evidence supports the judge's findings, and these findings are binding on appeal. *State v. Arrington,* 27 N.C. App. 664, 219 S.E. 2d 791 (1975).

Defendant's contention that the judge erred in failing to make express findings that defendant knowingly and intelligently waived his rights is also unfounded. Findings by the judge set forth defendant's assertions that he misunderstood his rights and that he would not have confessed if he had understood them. The judge specifically found that there was no evidence worthy of belief to support a finding of fact in defendant's favor as to either of these assertions. This amounts to a finding that defendant understood his rights and knowingly waived them. The judge also found that the officers did not coerce defendant into confessing or induce him to do so with promises of leniency. This amounts to a finding that defendant's confession was voluntary.

The order denying defendant's motion to suppress is

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ALBERT REID GREENE

No. 7625SC919

(Filed 4 May 1977)

1. **Criminal Law § 146.4— constitutionality of statutes — failure to raise question in trial court**

The constitutionality of statutes allegedly violated by defendant will not be considered on appeal where the question of the constitutionality of the statutes was not raised in the trial court.

2. **Criminal Law § 102.9— district attorney's jury argument**

The trial court did not err in overruling defendant's objection made when the district attorney pointed his finger at defendant during his jury argument and asked the jury to observe the size and build of defendant and to recall the size and age of the State's fifteen-year-old witness, since the district attorney did not characterize defendant, and the argument was relevant in view of defendant's attack on the credibility and demeanor of the State's witness.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 27 July 1976, in Superior Court, CALDWELL County. Heard in the Court of Appeals 12 April 1977.

Upon pleas of not guilty defendant was tried upon charges of felonious (1) breaking and entering and (2) larceny.

The State's evidence tended to show that on 15 April 1976 defendant and Darrell Church, a 15-year-old boy who testified under subpoena for the State, broke into the home of Wayne Story in rural Caldwell County while Story was away and stole his collection of rifles, shotguns, and handguns having a value of $1,375.00. They hid the weapons in the woods behind the Story house. The weapons were found there by law officers the following day, after they talked to Church.

Defendant did not offer evidence.

Defendant was found guilty as charged and appealed from the judgment imposing consecutive sentences to imprisonment.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward for the State.

Bryce O. Thomas, Jr. for defendant appellant.

CLARK, Judge.

The defendant contends that G.S. 14-72(b)(2) and G.S. 14-54(a) are unconstitutional in that the two statutes elevate the crimes from misdemeanors to felonies in violation of the due process and equal protection clauses of the Federal Constitution and the State Constitution. G.S. 14-72(b)(2) makes the crime of larceny a felony if committed pursuant to a breaking or entering. G.S. 14-54(a) makes breaking or entering a felony if done "with intent to commit any felony or larceny therein . . . ."

It does not appear from the record on appeal that this question of constitutionality was raised in the trial court. When the State concluded its evidence and rested, defense counsel announced that he would "like to make the motions at this time." The motions, whatever they were, were denied.

The procedure for raising the question is found in G.S. 15A-954(a)(1) and (c), which provide that a motion to dismiss on the ground that the statute alleged to have been violated is unconstitutional on its face or as applied to the defendant may be raised at any time in the trial court. Though the motion may be made at any time, if made and heard before trial under G.S. 15A-952, an unnecessary trial may be avoided. If the motion is based on unconstitutionality of the statute on its face, hearing would be limited to a consideration of the record and the questioned statute. See *State v. Lee,* 277 N.C. 242, 176 S.E. 2d 772 (1970). If the motion is based on unconstitutionality of the statute as applied to the defendant, an evidentiary hearing may be necessary for the purpose of determining its discriminatory application to the defendant. See *Mobile Home Sales v. Tomlinson,* 276 N.C. 661, 174 S.E. 2d 542 (1970).

[1] It does not appear that defendant raised in the trial court the question of the constitutionality of the cited statutes, but appears that the question was raised for the first time on appeal. Ordinarily, an appellate court will not pass upon a constitutional question which was not raised and passed upon in the court below. *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129 (1955); N.C.R. App. P. 10; 1 Strong, N. C. Index, Appeal and Error § 3 (3d ed. 1976); 16 C.J.S., Constitutional Law § 96 (1956). Since the question of the constitutionality of the statutes, G.S. 14-72(b)(2) and G.S. 14-54(a), was not raised in the trial court, we decline to pass upon the question on this appeal.

[2] During his argument to the jury, the District Attorney pointed his finger at the defendant and asked the jury to look at the defendant, to observe his size and build, and to recall the size and age of the witness Church. Defendant's objection was overruled. It was stipulated that defense counsel argued to the jury that Church's demeanor was that of one lying and that the District Attorney argued that Church's demeanor was that of one afraid to testify. It is the general rule that argument to the jury must be supported by the evidence. *State v. Crawford,* 29 N.C. App. 487, 224 S.E. 2d 680 (1976). The District Attorney should not make characterizations of a defendant which are intended to prejudice him in the eyes of the jury when there is no evidence from which such characterization may legitimately be inferred. *State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975). But in the case before us the jury had the opportunity to observe the size and build of the defendant who was present during trial; the District Attorney limited his argument to these physical characteristics without characterizing the defendant. The argument was relevant in view of the attack on the credibility and demeanor of the State's witness. We find no abuse of discretion by the trial court in overruling defendant's objection to this argument.

We find that defendant had a fair trial, free from prejudicial error.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

BILLY RAY SWEAT, SR. v. MARY ANN BEESON SWEAT

No. 7621DC824

(Filed 4 May 1977)

Divorce and Alimony § 18.9— alimony pendente lite — opportunity to show living expenses

The trial court properly denied defendant's motion to set aside an alimony *pendente lite* order on the ground that he was not given the opportunity to present evidence of his living expenses where the court found that defendant was present in court with his attorney at the alimony *pendente lite* hearing and could have presented evidence of his

living expenses, and that the court considered living expenses in entering the order although no evidence was presented with respect thereto.

APPEAL by plaintiff from *Yeager, Judge.* Judgment entered 29 July 1976 in District Court, FORSYTH County. Heard in the Court of Appeals 17 March 1977.

Plaintiff filed this divorce proceeding seeking a divorce from defendant on the grounds of one year's separation. In her answer, defendant raised defenses and asked that plaintiff be denied a divorce and that she be granted alimony pendente lite, permanent alimony, and attorney's fees.

On 9 March 1976, a hearing was held on defendant's request for alimony pendente lite. An order was entered on 17 March which directed plaintiff to pay defendant $50 per week as alimony pendente lite. On 26 March, plaintiff moved to set aside the order of 17 March and to present additional testimony as to his living expenses. Defendant moved to hold plaintiff in contempt for his failure to make alimony payments pursuant to the 17 March order. Both parties' motions were heard together, and on 29 July 1976, the trial judge denied plaintiff's motion to set aside the previous order and held plaintiff in contempt. Plaintiff appealed from the order of 29 July.

Other relevant facts are set out in the opinion below.

H. Glenn Pettyjohn for plaintiff appellant.

Wilson and Morrow, by Harold R. Wilson, for defendant appellee.

MORRIS, Judge.

In his sole assignment of error, plaintiff contends that the trial judge erred in entering the order of 17 March on the grounds that ". . . plaintiff had no opportunity to present evidence of his expenses, debts and other support obligations, and that the court's order required the plaintiff to pay to the defendant alimony grossly in excess of the defendant's expenses." Thus, plaintiff's only assignment relates to the order of 17 March although this appeal is from the 29 July order.

Although the order about which plaintiff appellant complains was entered on 17 March 1976, the record indicates that the hearing was held on 9 March 1976, and only the testimony

of defendant appellee is included in the record. The order of the court, however, recapitulated some of the testimony of the plaintiff given at the hearing. The court found, from the evidence presented, that plaintiff was and had been employed as a driver for Anchor Motor Freight, Inc.; that during the year 1975 his earnings were in excess of $14,000; that for the week preceding the hearing he had an income in excess of $460. No exception was taken to those findings. The court further found that plaintiff did not present any evidence concerning his living expenses, but despite the lack of evidence, the court had taken into consideration the fact that plaintiff did have living expenses. Plaintiff, on this appeal, has excepted to that finding. In his motion to set aside the judgment, plaintiff noted that at the hearing, before presenting evidence of living expenses, he argued to the court that the defendant was not a dependent spouse, but the court overruled the argument and entered an order requiring plaintiff to pay defendant $50 per week alimony pendente lite. He further noted that his counsel had no time within which to present the necessary evidence because of the necessity of his appearing in Superior Court. However, the record does not disclose any request for a continuance nor any exception to the entry of the order.

The order entered upon the motion to set aside contains the following:

> "THIS CAUSE coming on to be heard and being heard before the undersigned, Judge Presiding over the District Court Division of the General Court of Justice of Forsyth County, North Carolina, at 2:00 p.m., on the 27th day of July, 1976, upon motion of the defendant for the plaintiff to appear and show cause as to why he should not be punished as for contempt of court and upon motion of the plaintiff that the order entered in this cause on March 17, 1976, be set aside and that he be able to present additional evidence and testimony as to his expenses;
>
> And it appearing to the court and the court finds that this cause was continued from July 8, 1976, at 2:00 p.m., until Tuesday, July 27, 1976, at 2:00 p.m., and that said plaintiff and his counsel had notice of said hearing;
>
> And it further appearing to the court and the court finds that the defendant and her attorney, Harold R. Wilson, were present in court upon the calling of this case for the

purpose of hearing said motions and that neither the plaintiff nor his attorney was present in court and that no one had informed the court as to why they were not present for the hearing of said motions;

And it further appearing to the court and the court finds that on the defendant's original motion for alimony pendente lite the plaintiff was present in court with his counsel and the defendant was present in court with her counsel and a full hearing was conducted on said motion for alimony pendente lite and that the plaintiff and defendant both had ample opportunity to produce and present evidence they deemed necessary at said hearing;"

No exception was taken to these findings. Plaintiff did except to the finding that the court, in entering the 17 March order, considered living expenses although no evidence was presented with respect thereto.

It seems abundantly clear that plaintiff was given every opportunity to present any and all evidence he had with respect to his living expenses. He comes too late at this point to complain about the lack of such evidence. Perhaps at the trial to determine permanent alimony he will not be so remiss.

Affirmed.

Judges VAUGHN and MARTIN concur.

STATE OF NORTH CAROLINA v. DONALD LEE BROTHERS

No. 769SC870

(Filed 4 May 1977)

Criminal Law § 166— necessity for argument in brief

A question must be presented and argued in the brief in order to obtain appellate review of it. Rule 28(a), Rules of Appellate Procedure.

APPEAL by defendant from *Braswell, Judge.* Judgment entered 22 July 1976 in Superior Court, PERSON County. Heard in the Court of Appeals 6 April 1977.

Defendant was tried upon charges of (1) felonious breaking and entering and (2) felonious larceny. He was found guilty by the jury of felonious breaking and entering and sentenced to a term of seven years as a committed youthful offender.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

Walter Ray Vernon, Jr., for the defendant.

BROCK, Chief Judge.

Defendant groups six assignments of error in the record on appeal. Two of these assignments of error are restated in defendant's brief as questions. However, defendant presents no argument and authority upon which he relies.

Rule 28(a) of the North Carolina Rules of Appellate Procedure provides in pertinent part:

> "The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned."

Under App. R. 10(a) review is normally limited to questions which are based on exceptions and assignments of error properly set out in the record on appeal. The proviso to App. R. 10(a) allows review of the questions, without exceptions or assignments of error, which were reviewed under the old rules by the appeal itself or an exception to the judgment (such as the legal sufficiency of the indictment, subject matter jurisdiction, the plea, the jury verdict, and the judgment). However, this proviso does not negate the requirement of App. R. 28 that a question must be presented and argued in the brief in order to obtain appellate review of it. *See State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553 (1976).

This appeal presents no question for review.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. THOMAS GARLAND HART

No. 7612SC907

(Filed 4 May 1977)

Criminal Law § 118.2— charge on State's contentions — no error

In a prosecution for possession of heroin the trial court's jury instruction that the State contended that heroin was found in defendant's hand was proper.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 3 June 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 April 1977.

Defendant was charged with the felony of possession of heroin (G.S. 90-89[b]) and with the misdemeanor of possession of a hypodermic syringe and needle (G.S. 90-113.4). By special indictment defendant was charged with one previous conviction of violation of the North Carolina Controlled Substances Act. In the absence of the jury defendant was arraigned upon the special indictment and admitted a previous conviction. In the presence of the jury evidence was offered only upon the two current charges of possession of heroin and the hypodermic syringe and needle.

The State's evidence tends to show the following: Pursuant to a search warrant, several police officers entered defendant's residence. They heard the sound of "running feet." An officer looked through the bathroom window and saw defendant standing with his back to the commode, which was flushing at that time. Another officer entered the bathroom from the hallway, shoved defendant aside, and retrieved a paper bag from the commode before it could flush away. The paper bag contained twenty-five foil packets of heroin. Two other foil packets of heroin were found—one in the hallway and the other on one of the beds. A hypodermic syringe and needle were found in

a cologne box on the coffee table in the living room. Two females were in the house with defendant. One of the females became angry because the officers interrupted her before she could give herself a shot of heroin.

Defendant was found guilty of possession of heroin, and a prison sentence of ten years was imposed on this second conviction of felonious violation of the Controlled Substances Act.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for the State.

DeMent, Redwine, Yeargan & Askew, by Russell W. DeMent, Jr., for the defendant.

BROCK, Chief Judge.

During his instructions to the jury, the trial judge stated "and the State further contends that the heroin was found in his hand." Defendant argues that this was a misstatement of a contention upon a material point which included an assumption of evidence unsupported by the record and that it must be held prejudicial notwithstanding the absence of a timely objection.

The principle of law argued by defendant is sound, but we do not agree that it is applicable to this case. From the evidence it can reasonably be inferred that when the officers announced their presence, defendant ran to the bathroom with the bag of heroin in his hand, threw the bag into the commode, and undertook to flush it down the drain. The bag was retrieved only by the alert action of the police officer. From this it was reasonable for the State to contend that defendant was caught with the heroin in his hand.

Although we perceive no prejudicial error, it seems appropriate to point out that this appeal is here only because the trial judge undertook to detail the contentions of the parties. It has been held many times that the trial judge is not required to state to the jury the contentions of the State and the defendant. It is in stating the contentions in criminal cases that error frequently occurs, and a detailed statement of contentions serves to expand the opportunity for error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM PRESTON LESLEY

No. 7619SC942

(Filed 4 May 1977)

Criminal Law § 155.1— time for filing record on appeal — case dismissed

Defendant's appeal is dismissed for failure to file the record in the Court of Appeals within ten days after certification of the record on appeal by the clerk of superior court. App. Rule 12(a).

APPEAL by defendant from *Barbee, Judge.* Judgment entered 22 July 1976 in Superior Court, ROWAN County. Heard in the Court of Appeals 14 April 1977.

Defendant, William Preston Lesley, was charged in a warrant, proper in form, with driving an automobile on a public highway while under the influence of an intoxicating beverage.

Defendant pleaded not guilty but was found guilty by the jury. From a judgment imposing a jail sentence of six months, suspended for three years upon conditions, defendant appealed.

Attorney General Edmisten by Associate Attorney Archie W. Anders for the State.

Robert M. Davis for defendant appellant

HEDRICK, Judge.

Appellate Rule 12(a) provides,

> "*Time for Filing Record on Appeal.* Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken."

The record on appeal in this case was certified by the clerk on 30 September 1976; however, the record was not filed in the Court of Appeals until 10 November 1976.

We think it appropriate to repeat what Chief Judge Brock said in *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E. 2d 836, 837 (1976):

"The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension.

"The North Carolina Rules of Appellate Procedure are mandatory. 'These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . .' App. R. 1(a)."

For defendant's failure to comply with the Rules of Appellate Procedure, the appeal is

Dismissed.

Judges MORRIS and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 APRIL 1977

GOOD v. BAXTER LABORATORIES No. 7625IC846	Indus. Comm. (Docket E-9838)	Appeal Dismissed
STATE v. AYTCH No. 768SC827	Lenoir (76CR5443)	No Error
STATE v. BENSON No. 7620SC880	Stanley (75CR5686)	No Error
STATE v. COATS No. 7610SC908	Wake (72CR35752) (72CR35753) (72CR35754) (72CR35755) (72CR35756) (72CR36824)	Affirmed
STATE v. GODETTE No. 763SC813	Craven (76CR4451)	No Error
STATE v. HARRIS No. 7614SC834	Durham (75CR8354)	No Error
STATE v. MARSH No. 7620SC848	Union (76CR2123)	No Error
STATE v. MEADOWS No. 7620SC940	Union (76CR1446)	No Error
STATE v. MIDDLEBROOKS No. 7618SC831	Guilford (75CR16293)	No Error
STATE v. MOORE No. 7618SC852	Guilford (72CR21527)	Affirmed
STATE v. PHILLIPS No. 7624SC890	Madison (76CR51)	No Error
STATE v. RIDDLE No. 7629SC773	McDowell (75CR4661)	No Error
STATE v. SUMRALL No. 7618SC853	Guilford (73CR1859)	Affirmed
STATE v. TAYLOR No. 7627SC887	Gaston (75CR24650)	No Error
STATE v. WALTON No. 7627SC835	Cleveland (75CR10022)	No Error
STATE v. WISHON No. 7625SC912	Catawba (75CR14117)	No Error

FILED 4 MAY 1977

DRUMMOND v. DRUMMOND No. 7620DC854	Moore (72CVD196)	Affirmed
HALLMAN v. REID No. 7626SC874	Mecklenburg (72CVS14187)	No Error
HICKS v. B.T.U. INC. No. 7618IC844	Industrial Comm. (Docket 62943)	Affirmed
HIGHER ED. ASSISTANCE CORP. v. ANDREWS No. 7618SC856	Guilford (75CVS3261)	Affirmed
McCOY v. POWELL, COMR. OF MOTOR VEHICLES No. 7626SC842	Mecklenburg (76CVS3665)	No Error
STATE v. BASS No. 7613SC867	Columbus (75CR11555) (75CR11556) (75CR11557)	No Error
STATE v. BEST No. 768SC895	Wayne (75CR12206) (75CR12469)	No Error
STATE v. HARRIS No. 7619SC866	Montgomery (76CR2173)	No Error
STATE v. HARRISON No. 7626SC926	Mecklenburg (75CR36929) (75CR36930)	No Error
STATE v. HOWARD No. 7626SC911	Mecklenburg (75CR68571)	No Error
STATE v. HUGGINS No. 7618SC896	Guilford (75CR76233) (75CR76234) (75CR76235)	No Error
STATE v. PARKER No. 764SC905	Sampson (76CR2297)	No Error
STATE v. PATTERSON No. 7626SC841	Mecklenburg (76CR14872)	No Error
STATE v. PATTERSON No. 7629SC927	McDowell (75CR2943) (75CR2944)	No error
STATE v. PERRY No. 7610SC932	Wake (76CR16121)	Affirmed
STATE v. RICHARDSON No. 7621SC850	Forsyth (76CR12644) (76CR12645)	No Error

PRODUCTIVE TOOL CORPORATION v. PILOT FREIGHT CARRIERS, INC.

No. 7627DC816

(Filed 18 May 1977)

1. **Appeal and Error § 24— absence of assignments of error — review of judgment**

Where there is no assignment of error in the record on appeal, the only question presented for review on appeal is whether the judgment is supported by the findings of fact and conclusions of law. Rule 10(a), Rules of Appellate Procedure.

2. **Carriers § 10— common carrier — liability for damage to goods**

A common carrier is liable for the loss of or damage to property accepted by it for carriage except for loss or damage due to an act of God, the public enemy, the fault of the shipper, or inherent defect in the goods shipped.

3. **Carriers § 10— time for filing claim against carrier**

The Interstate Commerce Act does not make it unlawful for a common carrier to provide a *longer* period than nine months for the filing of claims. 49 U.S.C. § 20(111); 49 U.S.C. § 319.

4. **Carriers § 10— common carrier — damage to goods — time for filing claim**

In this action to recover damages for injury to plaintiff's property while it was being transported by defendant common carrier by motor vehicle, defendant failed to establish that plaintiff was required, as a condition precedent to recovery, to file its claim within nine months after delivery of the property where defendant failed to offer evidence to support its contention that the bill of lading and National Motor Freight Classifications on file with the I.C.C. contained provisions requiring claims to be filed within nine months, and the court's judgment allowing recovery by plaintiff was supported by the court's findings of fact and conclusions of law.

APPEAL by defendant from *Ramseur, Judge.* Judgment entered 4 August 1976 in District Court, GASTON County. Heard in the Court of Appeals 16 March 1977.

This is a civil action in which plaintiff seeks to recover damages against defendant, a common carrier by motor vehicle, for injury to plaintiff's property caused while it was being transported by the defendant. The case was tried by the court without a jury. After hearing the evidence, the court entered

judgment making findings of fact and conclusions of law as follows:

"FINDINGS OF FACT:

That the plaintiff was, at all times herein-mentioned, a North Carolina corporation engaged in the business of tool and die making in the Town of Dallas, North Carolina; that at some time shortly prior to the 21st day of August, 1972, the plaintiff purchased a 3/D Bridgeport & Hydraulic machine from Jeffreys Engineering & Equipment Company of Greensboro, North Carolina; that at the time of purchase, said machine was located on the premises of General Tool & Die Company in Columbia, South Carolina; that General Tool & Die Company had purchased said machine from Jeffreys Engineering & Equipment Company, but because it did not meet certain specifications, General Tool & Die Company sold said machine back to Jeffreys Engineering & Equipment Company; that a representative of the plaintiff went to Columbia, South Carolina on the date of purchase where he inspected said machine and found the same to be in good working order and acceptable to the plaintiff; that at all times herein-mentioned, the defendant was a corporation engaged in the business of a common carrier transporting freight for hire in interstate commerce; that on or about the 21st day of August, 1972, the defendant accepted said machine in Columbia, South Carolina for delivery to the plaintiff; that on the 24th day of August, 1972, one of the defendant's trucks delivered said machine to the plaintiff's place of business in Dallas, North Carolina; that a representative of the plaintiff was present at the time of delivery when it was discovered that said machine had turned over inside the delivery truck; that the hydraulic system of said machine was extensively damaged; that said damage was apparent to the plaintiff's representative and to the driver of the delivery truck; that the driver of said truck left a delivery ticket with a representative of the plaintiff; that said ticket bore a notation over the signature of the driver of said truck that said machine had turned over inside the truck, damage amount unknown; that the plaintiff's representative immediately contacted the defendant's terminal office in Charlotte, North Carolina concerning the damage to said machine; that an inspector for the defendant came

to the plaintiff's place of business and personally inspected said machine while it was still on the truck; that said inspector completed a written report which contained the names of the shipper and the consignee and a desecription of said machine and it further set out that said machine had turned over inside the delivery truck; that said inspector took photographs of said machine; that the plaintiff thereafter disassembled said machine in order to remove it from the delivery truck and the same was placed in the plaintiff's place of business; that shortly thereafter, a representative of the plaintiff had several telephone contacts with the defendant's representative at its terminal office in Charlotte, North Carolina concerning the damage to said machine; that pursuant to said contacts, the plaintiff proceeded to cause such repairs to be made to said machine as were reasonably necessary in order to place the same in operating condition; that due to mis-shipment of certain parts and due also to other responsible delays in obtaining other parts to repair said machine, it was approximately eight or nine months before the plaintiff was able to have said machine put back in operating condition; that after the expiration of more than nine months after the date said machine was damaged, the defendant sent certain claim forms to the plaintiff for completion; that no bill of lading or other writing had been delivered or sent to the plaintiff except said inspector's report, until the claim forms were sent to the plaintiff by the defendant; that according to evidence of the defendant, the plaintiff completed said claim forms and returned them to the defendant in August of 1973; that the defendant notified the plaintiff by letter in October of 1973 that the plaintiff's claim for damages was denied on the grounds that the same was not filed within nine months from the date of loss as was required under the rules and regulations as promulgated by the Interstate Commerce Commission pursuant to the national motor freight carriers classification tariffs; that the plaintiff's representative testified that said machine cost between $6,000.00 and $7,000.00 when purchased from Jeffreys Engineering & Equipment Company; that in his opinion, said machine was not worth more than $150.00 upon delivery in the damaged condition; that it cost the plaintiff $1,303.54 to have said machine repaired; that said machine has not been restored to its full efficiency and operating condition; that the plain-

tiff still has said machine in its place of business but is using it for rough tool and die making only.

Based upon the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW:

That the defendant was under a duty to deliver said machine in as good condition as it was when the defendant accepted the same at the point of origin for delivery to the plaintiff; that said machine was damaged in the course of transit while on the defendant's truck and due to no fault of the plaintiff; that the plaintiff was under no duty to file any further notice of damage or claims without being notified by the defendant to do so; and that the plaintiff was entitled to expect action by the defendant to rectify the damages to said machine after having given the original notice through the inspector's report and the telephonic communications."

On the foregoing findings of fact and conclusions of law, the court adjudged that plaintiff recover of defendant $1,303.54 and that costs of this action be taxed against the defendant. Defendant excepted to the judgment and appealed.

William G. Holland for plaintiff appellee.

Hollowell, Stott & Hollowell by James C. Windham, Jr., for defendant appellant.

PARKER, Judge.

[1] The record on appeal contains but one exception, being the exception to the signing and entering of the judgment, and it contains no assignment of error. Rule 10(a) of the North Carolina Rules of Appellate Procedure is as follows:

"RULE 10

EXCEPTIONS AND ASSIGNMENTS OF ERROR IN RECORD ON APPEAL

(a) FUNCTION IN LIMITING SCOPE OF REVIEW. Except as otherwise provided in this Rule 10, the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the

record on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal."

There being no assignment of error in the record on appeal, the only question presented for our review by this appeal is the question, which was properly raised in appellant's brief, whether the judgment is supported by the findings of fact and conclusions of law. We hold that it is.

[2] A common carrier is liable for the loss of or damage to property accepted by it for carriage except for loss or damage due to an act of God, the public enemy, the fault of the shipper, or inherent defect in the goods shipped. *Merchant v. Lassiter,* 224 N.C. 343, 30 S.E. 2d 217 (1944). This rule applies to interstate as well as to intrastate shipments. *Cigar Co. v. Garner,* 229 N.C. 173, 47 S.E. 2d 854 (1948). In its brief, defendant does not challenge this rule nor does it question the court's conclusion of law based on the facts found in this case that defendant was under a duty to deliver plaintiff's machine in as good condition as it was when defendant accepted it for shipment. Additionally, defendant does not challenge the court's conclusion that the machine was damaged in the course of transit while on the defendant's truck. Thus, defendant does not question its initial liability as a common carrier for the damage to plaintiff's property which occurred while it was being transported by the defendant.

Defendant's sole contention is that, as a condition precedent to recovery, plaintiff was required to file its claim in writing with the defendant within nine months after delivery of the property, that plaintiff failed to do this, and that the court was in error in making its conclusion of law "that the plaintiff was under no duty to file any further notice of damage or

claims without being notified by the defendant to do so." The difficulty in defendant's position is that, on this record, it has failed to establish its major premise, i.e., that plaintiff was required, as a condition precedent to recovery, to file its claim within nine months after delivery of the property.

[3, 4] The Interstate Commerce Act, in 49 U.S.C. § 20(11), provides that it is unlawful for any common carrier "to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months." (Emphasis added.) [49 U.S.C. § 20(11) was made applicable to motor carriers by 49 U.S.C. § 319.] However, nothing in the Act makes it unlawful for a common carrier to provide a *longer* period than nine months for the filing of claims. In its answer defendant alleged that it accepted the machine from General Tool and Die Company in Columbia, South Carolina, pursuant to a bill of lading which was binding on the plaintiff as the consignee and that the bill of lading contained a provision making it a condition precedent to recovery that claims must be filed in writing within nine months after delivery of the property. These, however, were solely allegations. The court made no finding as to the contents of the bill of lading and, indeed, could not have done so since defendant failed to offer any evidence to show what provisions were contained in the bill of lading or even that any bill of lading was issued in connection with the shipment of the machine involved in this action.

In its brief, defendant cites a provision of the National Motor Freight Classifications, which defendant asserts was in effect and on file with the Interstate Commerce Commission, as establishing the requirement that plaintiff file its claim within nine months after delivery of the property. In the judgment appealed from, however, the court made no finding as to the contents of any such National Motor Freight Classification. The finding "that the defendant notified the plaintiff by letter in October of 1973 that the plaintiff's claim for damages was denied on the grounds that the same was not filed within nine months from the date of loss as was required under the rules and regulations as promulgated by the Interstate Commerce Commission pursuant to the national motor freight carriers classification tariffs" amounted to no more than a finding as to the date when defendant notified plaintiff it was denying plaintiff's claim and as to the grounds stated by defendant for doing so; it fell short of being a finding as to what provisions

were actually contained in any classification or tariff filed with and approved by the Interstate Commerce Commission. 49 U.S.C. § 16(13) provides that "copies of schedules and classifications and tariffs" filed with the Interstate Commerce Commission, when certified by the secretary of the commission under the commission's seal, "shall be received as prima facie evidence of what they purport to be for the purpose of investigation by the commission and in all judicial proceedings." No such copy of the National Motor Freight Classifications upon which defendant relies was offered in evidence by the defendant. Even if defendant had offered a properly certified copy showing the nine months provision which defendant contends was in effect, the lack of any assignment of error in this record would prevent appellate review of the court's failure to make a finding of fact with respect thereto. As previously noted, the only question presented for our review by the record on this appeal is whether the judgment appealed from is supported by the findings of fact and conclusions of law which were made. We hold that it is, and the judgment is

Affirmed.

Chief Judge BROCK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. HOWARD LEE ATKINSON

No. 7610SC871

(Filed 18 May 1977)

1. **Criminal Law § 75.7—Miranda warnings given — lapse of ten minutes — repetition of warnings unnecessary**

Where defendant and others were informed of their *Miranda* rights prior to any questioning and prior to any arrests, and defendant stated that he understood his rights and was willing to answer questions, officers who questioned defendant five to ten minutes later and prior to his arrest were not required to repeat the warnings after so short a lapse of time.

2. **Narcotics § 4— possession of heroin with intent to sell — constructive possession — sufficiency of evidence**

In a prosecution of defendant for possession of heroin with intent to sell and deliver, evidence was sufficient to be submitted to the jury where (1) constructive possession of heroin by defendant could be

inferred from the evidence which showed that heroin was found in a concealed place in his bedroom, that a needle and syringe were found in a man's coat in his closet, and that he admitted that he was a heroin user; (2) constructive possession over glassine bags and tape in a hallway closet near defendant's bedroom could be inferred from the evidence of defendant's tenancy plus evidence which showed that the heroin found in defendant's bedroom was undiluted and would produce, after cutting and packing, about twenty street dosages; and (3) evidence of the quantity of pure heroin and packing materials found in defendant's constructive possession was sufficient to raise an inference of an intent to sell or deliver.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 1 July 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 6 April 1977.

Defendant pled not guilty to a charge of possession of heroin with intent to sell and deliver.

The evidence for the State tended to show the following: About 10:10 p.m. on 24 January 1976, four officers of the Narcotics Division of the Raleigh Police Department arrived at defendant's apartment with a warrant to search the premises for marijuana. Detective Munday knocked on the door and identified himself to the person who came to the window. He waited a few minutes during which he heard scuffling noises, and then he kicked in the door. Several people were seated in the living room and adjacent kitchen area. Munday and Officer Glover proceeded through the living room down a hallway leading to the two bedrooms. Munday passed the left bedroom, where defendant was sitting on a bed, and entered the right bedroom, where he found defendant's brother, two other men, and some marijuana on a table.

The occupants of the bedrooms were ordered to the living room, were told to remain there and not move about; no one was arrested at that time. In the living room Munday read to the group their *Miranda* rights. Defendant stated that he understood his rights and that he was willing to answer questions. At some point defendant stated that he was the lessee of the apartment and that his brother had been sharing the apartment with him for a couple of months.

Munday then proceeded to search the right bedroom and Sergeant Watson went to the left bedroom where defendant had been found. Watson called Munday to the left bedroom to see

five aluminum packages of white powder that he had found under a chair. The chair sat flush to the floor, and the packages could not be seen unless the chair was raised. There were no coats on the chair. In the room Munday discovered letters addressed to defendant and had him brought to the room. About five to ten minutes after the *Miranda* warnings had been given, defendant was questioned about the packages, but denied any knowledge of them. Munday then searched the bedroom closet containing men's clothes, and in a man's coat he discovered a needle and a syringe. About ten to fifteen minutes after the *Miranda* warnings had been given, defendant was questioned and admitted that the needle and syringe were his, that he was a heroin user, and that he had used some that day. Defendant was then arrested.

Munday next searched a hallway closet across from defendant's bedroom. On the top shelf he found a brown handbag containing numerous small glassine bags and scotch tape. Detective Glover searched a storage space beneath the building and found five syringes in a brown paper bag.

Upon objection to the testimony on defendant's statements in the bedroom a *voir dire* was held. Munday testified that the *Miranda* warnings were given prior to the time anyone was arrested and were not given to defendant a second time in the bedroom. The court found that defendant had been advised of his *Miranda* rights and had waived them.

Chemical analysis of the powder found in defendant's bedroom revealed it was pure heroin, uncut for street use, and would produce about twenty dosages when cut.

Defendant's evidence tended to show the following: On 24 January 1976, he played basketball with Berkley Hodges and others from 11:00 a.m. to 3:00 p.m. From 3:00 p.m. to 5:00 p.m. he played cards and drank beer with Hodges and others at his apartment. From 5:00 p.m. to 10:00 p.m. defendant and Earl Barnes were shopping and visiting. When they returned to defendant's apartment about 10:00 p.m., several people, including defendant's brother, were there playing cards and listening to music. Defendant went to his bedroom, where he found the lights on and some coats on the only chair in the room. He was sitting on the bed when Munday and Glover first came by his room. He joined the others in the living room, was given the search warrant, and informed of his rights. Defendant said

there was nothing in his room. He accompanied Munday to his room when Munday was called to go there, and when questioned denied any knowledge of the five packages of white powder. When Munday opened the door to the bedroom closet, he noticed some girls' coats there; Munday found the needle and syringe in a suit coat that belonged to the brother of defendant's fiancee and that was hanging in the back of the closet apart from defendant's clothes. When questioned defendant denied that he used heroin or that the suit coat was his. The space in which the glassine bags were found was not a clothes closet but a space for the water heater. Defendant denied knowing anything about the bag found in this area. The space in which the bag was found containing the syringes was one of three such dirt areas under the building which could have been used for storage for the six apartments in the building. Defendant had never used it for storage and had never been under there. Among the people in the apartment when defendant returned that evening was a girl and her brother, who later appeared to be working with the police.

The jury found defendant guilty as charged. From judgment imposing imprisonment, defendant appeals.

Attorney General Edmisten by Associate Attorney William H. Boone for the State.

Harris, Poe, Cheshire & Leager by Randolph L. Worth for defendant appellant.

CLARK, Judge.

[1] Defendant first assigns error to the denial of his motion to exclude from evidence testimony by Detective Munday as to statements made by defendant in the bedroom prior to his arrest. Defendant contends that the officers were required to arrest defendant as soon as the packages were found and to warn him again of his *Miranda* rights. Under *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed. 2d 694, 706 (1966), the critical time at which the warnings must be given is not arrest, but during "custodial interrogation" which was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In the present case, defendant, along with others, was told to remain in the living room and not move around. With admirable

caution, Detective Munday then informed the group of their *Miranda* rights, prior to any questioning. Defendant was questioned by Detective Munday some 5 to 10 minutes after receiving the *Miranda* warnings and waiving his rights. It would be a triumph of technicality if the prudent officer were required to repeat the warnings after so short a lapse of time, and we decline to impose such a novel straitjacket upon diligent police officers. We find no merit in this assignment of error.

Defendant next assigns error to the denial of his motion for nonsuit. Defendant particularly contends that there was insufficient evidence that he possessed the glassine bags found in the hallway closet, and that without this evidence, there was insufficient evidence of an intent to sell or deliver.

It is well settled that upon motion for nonsuit the evidence must be considered in the light most favorable to the State. See cases cited in 4 Strong, N. C. Index, Criminal Law § 104 (3d ed. 1976). An accused has possession of contraband when he has both the power and the intent to control its disposition or use. *State v. Summers*, 15 N.C. App. 282, 189 S.E. 2d 807 (1972), *cert. denied*, 281 N.C. 762, 191 S.E. 2d 359 (1972). Such possession may be either actual or constructive. Constructive possession exists when there is no actual personal dominion over the material, but there is an intent and capability to maintain control and dominion over it. *State v. Crouch*, 15 N.C. App. 172, 189 S.E. 2d 763 (1972), *cert. denied*, 281 N.C. 760, 191 S.E. 2d 357 (1972). While it may not be necessary to show that the accused had exclusive possession of the premises where the contraband is found, where possession of the premises is nonexclusive, constructive possession of the contraband by the accused may not be inferred without other incriminating circumstances. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974); *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972); Annot., 56 A.L.R. 3d 948 (1974).

[2] In the instant case, constructive possession by the defendant of the heroin could be inferred from the evidence which showed that the heroin was found in a concealed place in his bedroom, that a needle and syringe were found in a man's coat in his closet, and that he admitted he was a heroin user. Constructive possession over the glassine bags and tape in the hallway closet near defendant's bedroom could be inferred from the evidence of defendant's tenancy plus evidence which showed

that the heroin found in defendant's bedroom was undiluted and would produce, after cutting and packaging, about twenty street dosages. Assuming *arguendo* that there was insufficient evidence to show constructive possession of the materials found beneath the apartment building, we conclude that evidence of the quantity of pure heroin and packing materials found in defendant's constructive possession was sufficient to raise an inference of an intent to sell or deliver. See *State v. Baxter, supra.* We find no error in the denial of defendant's motion for nonsuit on the charge of possession with intent to sell or deliver.

No error.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. ELLA HENRIETTA ROBERTS WOODS

No. 7614SC935

(Filed 18 May 1977)

1. **Criminal Law § 90— State's impeachment of own witnesses**

The trial court erred in permitting the private prosecutor to impeach two State's witnesses by asking questions about prior inconsistent statements made by the witnesses at a preliminary hearing where the prosecutor made no showing that the State was misled or surprised by testimony contrary to what the State had a right to expect, and the trial judge made no ruling defining the scope of the impeachment.

2. **Homicide § 27.1— confusing instructions on manslaughter**

Trial court's instructions on voluntary manslaughter which followed suggested instructions in the N. C. Pattern Jury Instructions for Criminal Cases were confusing.

APPEAL by defendant from *Lee, Judge.* Judgment entered 18 June 1976 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 April 1977.

Defendant was tried upon a charge of second degree murder arising from the fatal shooting of her husband on 3 March 1976. The jury found her guilty of voluntary manslaughter, and judgment of imprisonment was entered.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Alan S. Hirsch, for the State.

Chambers, Stein, Ferguson & Becton, by Charles L. Becton, for the defendant.

BROCK, Chief Judge.

On 2 March 1976 the deceased, R. B. Woods, and his wife, the defendant, Ella Woods, lived in their home in Durham County with five children born of the marriage. A family meeting was arranged for the night of 2 March 1976 to discuss family business. The discussion developed into a heated argument with cursing and threats between the deceased and the children. Finally fighting erupted between the deceased and two of the children, and the meeting culminated in the fatal shooting of deceased by defendant.

The children of defendant were the only eyewitnesses to what transpired before and immediately after the shooting. Two of the children, David Woods and Carolyn Woods, were called as witnesses by the State at the preliminary hearing and at the trial. At the preliminary hearing and at the trial the State's evidence and argument to the jury were presented by a privately employed prosecuting attorney.

[1] In presenting the testimony of David Woods, the private prosecutor asked questions, over objection, which tended to cross-examine the witness and impeach his testimony. In presenting the testimony of Carolyn Woods, the private prosecutor asked questions, over objection, which cross-examined the witness and tended to impeach her testimony. Much of the cross-examination of Carolyn Woods by the private prosecutor, to which objections were overruled, concerned her prior inconsistent statements at the preliminary hearing.

Much of the private prosecutor's argument to the jury, to which objections were overruled, was impeachment of the State's witnesses. An example of the private prosecutor's argument to the jury concerning the testimony of the State's witness David Woods is as follows:

> "Now, why would a young man 14 years old say something like that and then come in this courtroom and directly reverse himself? Why would he do that unless there is some-

thing to hide? No reason to tell something that is not true, if you have nothing to hide, but he did this, and so did his sister, 18 year old Carolyn."

An example of the private prosecutor's argument to the jury, to which objections were overruled, concerning the testimony of the State's witness Carolyn Woods is as follows:

"Now, I asked her again, or words to that effect, 'Was there any fighting or fussing going on, fighting after the first shot was fired.' She said 'Yes,' her father was still attacking her mother and doing that and doing this. I said 'Well, let me ask you what you testified to on March 23,' and I read it to her. Question, 'Was he fighting after the first shot was fired?' Answer: 'No.'"

Assuming without deciding that such arguments would be permissible had the impeaching cross-examinations been proper, permitting such argument following improperly permitted impeaching cross-examinations only served to compound the error of the improper cross-examination.

In the recent case of *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975), Chief Justice Sharp discussed the generally recognized exception or corollary to the anti-impeachment rule, that is, the corollary which allows impeachment where the party calling the witness has been misled and surprised or entrapped to his prejudice. Because of the applicability of that discussion to the situation presented by this case, we quote liberally from it:

"Our decisions, in holding that the State cannot impeach its own witness, also hold that the State is not bound by what the witness says. The State's attorney, therefore, may show by other witnesses or other competent evidence that the facts are different from those to which the witness has testified. The trial judge also has the discretionary power to permit a prosecuting attorney who has been surprised by the testimony of an evasive or hostile witness to call his attention to his prior inconsistent statements for the purpose of 'refreshing his memory' or 'awakening his conscience.' (Citations omitted.)

"In a situation where the witness has treacherously induced the State to call him by representing that he will give testimony favorable to its contentions and then sur-

prises the solicitor with testimony contra, cross-examination is not likely either to 'refresh his memory' or 'awaken his conscience.' In such instances the reason for the corollary to the anti-impeachment rule is demonstrated: 'It would be grossly unfair to permit a witness to entrap a party into calling him by making a statement favorable to that party's contention, and then, when he is called and accredited by that party and gives testimony at variance with his previous statement and against that party's interest, to deny the party calling him the right to show that he was induced to do so by a previous statement of the witness made under such circumstances as to warrant a reasonable belief that the witness would repeat the statement when called to testify.' (Citations omitted.)

"Surprise or entrapment, however, will not automatically invoke the anti-impeachment corollary. The State's motion to be allowed to impeach its own witness by proof of his prior inconsistent statements is addressed to the sound discretion of the trial court. The motion should be made as soon as the prosecuting attorney is surprised. He may not wait until subsequent 'surprises' follow. Further, surprise does not mean mere disappointment; it means 'taken (captured) unawares.' (Citation omitted.)

"Before granting the motion the court must be satisfied that the State's attorney has been misled and surprised by the witness, whose testimony as to a material fact is contrary to what the State had a *right* to expect. These preliminary questions are determined by the court upon a *voir dire* hearing in the absence of the jury in the manner in which the admissibility of a confession is ascertained after objection. If the trial judge finds that the State should be allowed to offer prior inconsistent statements, his findings should also specify the extent to which such statements may be offered. (Citations omitted.)

"The right to prove prior oral inconsistent statements is limited to statements made by the witness to the State's attorney or to some person whom he specifically instructed to communicate the statement to the attorney. (Citations omitted.) However, where investigating officers, whose duty it is to seek, find, preserve and analyze evidence of criminal offenses and turn it over to the prosecuting attor-

ney for ultimate legal action, have furnished him with formally prepared, signed or acknowledged statements of witnesses, he may rely on these statements unless he possesses other information which reasonably apprises him that they were false or that the witness making them intends to repudiate them. (Citations omitted.)

"While the cases cited in the preceding paragraph hold that the State's attorney can legitimately claim surprise in the instances above specified albeit he himself does not interview the witness before calling him to the stand, in our view the better practice, and the only safe rule, is 'never to call a witness to whom you have not talked.'

"Where the prosecuting attorney knows at the time the witness is called that he has retracted or disavowed his statement, or has reason to believe that he will do so if called upon to testify, he will not be permitted to impeach the witness. He must first show that he has been genuinely 'surprised or taken unawares' by testimony which differed in material respects from the witness's prior statements, which he had no reason to assume the witness would repudiate. (Citations omitted.)

"Testimony tending to show a witness's prior inconsistent statements is admitted only to show that the State was surprised by his testimony and to explain why the witness was called. Such statements 'are not probative evidence on the merits and are not to be treated as having any substantive or independent testimonial value.' (Citation omitted.) Their only effect is to impeach the credibility of the witness. (Citations omitted.)" *Id.* at 512-14, 215 S.E. 2d at 144-46.

The private prosecutor in the present case did not seek permission to impeach his witnesses with their prior inconsistent statements. The private prosecutor made no showing that the State was in fact misled and surprised by testimony contrary to what the State *had a right* to expect. There was no *voir dire* hearing upon the question, and the trial judge made no ruling defining the scope of the impeachment. In short, the justification for invoking the exception or corollary to the anti-impeachment rule was not demonstrated or found to exist. This improper impeachment by the State of its own witnesses constituted prejudicial error entitling defendant to a new trial.

[2] Defendant also assigns error to several portions of the trial judge's instructions to the jury. While we might suggest that these asserted errors are not likely to reoccur on a new trial, we feel it appropriate to make some brief observation. One of the challenged portions of the instructions is as follows:

> "If you do not find the defendant guilty of second degree murder you must then consider whether or not she is guilty of voluntary manslaughter. If you find from the evidence and beyond a reasonable doubt that on or about March third, 1976, the defendant Ella Woods intentionally and while not acting in her own proper self defense or in the proper self defense of her children David and Carolyn, shot R. B. Woods with a deadly weapon, a 32 caliber pistol, thereby proximately causing the death of R. B. Woods, if you find all of that beyond a reasonable doubt, *but the State has failed to satisfy you beyond a reasonable doubt that the defendant Ella Woods killed with malice because of heat of sudden passion aroused by adequate provocation, or if the State has failed to satisfy you that she was the aggressor without murderous intent in bringing on the dispute, or if the State has failed to satisfy you that although exercising the right of self defense that she used excessive force, it would be your duty to return a verdict of guilty of voluntary manslaughter.*" (Emphasis added.)

It seems reasonable to suggest that the foregoing language tends towards confusion. It was our original thought that error in the transcription of the charge may have distorted the spoken words. Nevertheless, when compared with the third paragraph of N. C. Pattern Jury Instructions for Criminal Cases, § 206.10, page 10, we find that the trial judge followed almost verbatim the suggested instruction. It appears that § 206.10 was extensively rewritten and distributed as "Replacement June 1976" in an effort to conform the instructions with the holding in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975). We recommend further study of § 206.10 for the purpose of clarifying the instructions quoted above and others of similar import contained in that same section. We suggest only that the present composition of the instructions undertakes to place more alternatives in one sentence than is desirable and also, that a more positive and a less negative approach can be taken to an explanation of the effects of the varying circumstances.

Because of the violation of the anti-impeachment rule, defendant is entitled to a

New trial.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. ROY TIMOTHY HOOTS AND MYRON BALE PACE

No. 7629SC1037

(Filed 18 May 1977)

1. **Kidnapping § 2— sufficiency of evidence**

Evidence was sufficient for the jury in a prosecution for kidnapping where it tended to show that defendants enticed the victims to go with them to a named place for the alleged purpose of drinking beer; the real purpose was to get them alone so that defendants' friends could question them concerning the whereabouts of stolen marijuana allegedly belonging to one of the friends; defendants watched over the victims to keep them from getting away and defendants otherwise assisted their friends by holding the victims at bay while the friends assaulted them and tied them up. G.S. 14-39(a).

2. **Kidnapping § 2— purpose of confinement or constraint of victim — obtaining information — jury instruction erroneous**

The trial court in a kidnapping prosecution erred in giving the jury an instruction which permitted them to find either of the defendants guilty of kidnapping if they found from the evidence that he confined, restrained, or removed from one place to another either victim for the purpose of obtaining information, since such a purpose is not one of the proscribed purposes set out in G.S. 14-39(a).

APPEAL by defendants from *Bailey, Judge.* Judgments entered 18 August in Superior Court, POLK County. Heard in the Court of Appeals 5 May 1977.

Each of the defendants, Roy Timothy Hoots and Myron Bale Pace, was charged in separate bills of indictment, proper in form, with the kidnapping of Wendell F. Gilbert and Stanley M. Johnson, in violation of G.S. 14-39. Upon the defendants' pleas of not guilty, the State offered evidence tending to show the following:

Several weeks prior to 15 January 1976, Frankie Revis, Stanley Case, and defendants had a discussion concerning

$6,000 of marijuana stolen from Revis. Revis believed that Stanley Johnson and Wendell Gilbert, both nineteen years of age, had stolen the marijuana and desired to recover it from them. On 15 January 1976 the four boys agreed to attempt to get Gilbert and Johnson alone so that they could try to make them tell the whereabouts of the marijuana. It was stated that Revis and Case would use physical violence, if need be, in order to get Gilbert and Johnson to talk. On the night of 15 January, Case and the defendants persuaded Gilbert and Johnson to meet them on Cove Mountain to drink beer. On the way up to Cove Mountain, Pace stopped and phoned Revis to tell him to meet them there.

All six boys were drinking beer and smoking marijuana in Johnson's car, parked on Cove Mountain, when Revis and Case pulled Johnson and Gilbert out of the car and began assaulting them. The defendants did not strike the victims, but they did position themselves so as to hem Gilbert between two cars while Revis assaulted him. During the assault defendant Hoots pretended to give Revis a knife so that he could feign stabbing Gilbert. Revis and Case threatened to torture the victims if they did not disclose the whereabouts of the marijuana. Revis tied Gilbert's hands behind his back with wire, and he and Case left to buy some rope to finish tying the victims, instructing defendants to watch them until they returned with the rope. During the five minutes that Revis and Case were absent, defendants remained with the victims but neither of them attempted to get away. Defendants did suggest to Gilbert and Johnson that they tell Case and Revis where the marijuana was located. Upon their return Revis and Case "hog tied" the victims, and with defendants' assistance loaded them into Revis' car. Defendants then left, and Revis and Case drove the victims over to Camp Creek where they tied them to a tree. Revis and Case then left, and shortly thereafter the victims escaped. Subsequently, Revis and Case with defendant Hoots and Hoots' wife returned to show her what they had done and discovered that the victims had escaped.

The defendants offered evidence tending to show the following:

Each defendant believed that the meeting with Gilbert and Johnson was merely for the purpose of talking with them about the stolen marijuana. Neither of them struck or tied up either

of the victims or helped load them into the car. They did not restrain the victims from leaving while Revis and Case had gone to buy the rope.

Each defendant was found guilty of the nonaggravated kidnapping of both Gilbert and Johnson. From the judgments of the court imposing upon defendants a prison sentence of five years in the case of kidnapping Gilbert, and a consecutive prison sentence of five years, suspended upon conditions, in the case of kidnapping Johnson, defendants appealed.

Attorney General Edmisten by Associate Attorney William H. Boone for the State.

Story, Hunter & Goldsmith by C. Frank Goldsmith, Jr., for defendant appellants.

HEDRICK, Judge.

Subsection (a) of G.S. 14-39, the kidnapping statute which became effective on 1 July 1975, provides:

> "Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person."

[1] Defendants contend the court erred in denying their motion for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. We hold that the evidence was sufficient to require the submission of the cases to the jury as to these defendants on the charges of kidnapping.

[2] Defendants excepted to and assign as error the following portions of the court's instruction to the jury:

> "In order for you to find any defendant guilty of aggravated kidnapping there are six things that the State must prove each beyond a reasonable doubt. . . . Third, that the defendant did this [unlawfully confined, restrained, or removed from one place to another either of the victims] for the *purpose of obtaining information* or terrorizing either Mr. Gilbert or Mr. Johnson, or both or neither (sic) . . . . Therefore, I charge you that if you find from the evidence and beyond a reasonable doubt that . . . Mr. Hoots or Mr. Pace unlawfully restrained Mr. Gilbert or Mr. Johnson or both or participated in the removal of either from Cove Mountain to another place for the *purpose of obtaining information* from Mr. Gilbert or Mr. Johnson, or for the purpose of terrorizing Mr. Gilbert or Mr. Johnson . . . it would be your duty to return a verdict of guilty as to that particular charge. . . . Therefore, I charge you that if you find from the evidence and beyond a reasonable doubt that . . . either defendant unlawfully restrained Mr. Gilbert or Mr. Johnson, or removed him or participated in the removal of him from Cove Mountain to a place where he was tied to a tree . . . and that he did this for the *purpose of obtaining information* or terrorizing either of these victims . . . then the defendants would be guilty of kidnapping." (Emphasis added.)

The challenged instruction permitted the jury in this case to find either of the defendants guilty of kidnapping if they found from the evidence that he confined, restrained, or removed from one place to another Gilbert or Johnson for the purpose of obtaining information, even though such a purpose is not one of the proscribed purposes set out in G.S. 14-39(a). For error in the charge defendants are entitled to a new trial.

It is not necessary that we discuss defendants' numerous other assignments of error.

New trial.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. VERNON WAYNE DAVIS AND WILLIE J. NESMITH III

No. 7626SC1009

(Filed 18 May 1977)

1. **Assault and Battery § 15.3— instruction that fractured skull is serious injury**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court properly instructed the jury that "A fractured skull is a serious injury" where the State's evidence with respect to the injuries was uncontradicted and the injuries could not conceivably have been considered anything but serious.

2. **Assault and Battery § 16.1— failure to instruct on lesser offense**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, the trial court did not err in failing to instruct on the lesser offense of assault with a deadly weapon where all the evidence showed that the victim was struck in the back of the head with a stick about two feet long; he was hospitalized for nine days; a neurosurgeon had to operate in order to repair the injuries to the victim's skull; fragments of bone had to be peeled back; and the victim's head is still indented from the injuries.

APPEAL by defendants from *Falls, Judge.* Judgment entered 20 July 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 May 1977.

Defendants were each indicted for assault with a deadly weapon with intent to kill inflicting serious injuries. Both defendants pleaded not guilty.

The State first presented June Howie, Sr., a sixty-three year old, who testified that at 8:00 p.m. on 20 December 1975 he went to a Park'N Shop store in Charlotte to make a purchase. He returned to his car, which was parked in the store's parking lot, at 8:15 p.m. and he stopped to unlock his car door. He did not recall anything after that until he awoke inside the store. An ambulance was called and he was taken to Charlotte Memorial Hospital where he remained for nine days. The injuries to Mr. Howie's head required surgery to peel back fragments of bone and he had surgical bills of $1,080 and hospital bills of $15,000.

Cheryl Ann Morgan, another State witness, testified that she was sitting in a friend's car in the parking lot when she

observed Mr. Howie come out of the store and walk up to his car. She then saw the defendants approach Mr. Howie and hit him from behind with a stick about two feet long. Ms. Morgan did not know which of the defendants struck the victim because the defendants were standing too close together. Later that night she identified both defendants as the assailants of Mr. Howie.

The State then presented the officers who investigated the case. Officer Stanton testified that he went to the Park'N Shop at 8:00 p.m. on 20 December 1975 and found Mr. Howie sitting in the manager's office. The officer observed Mr. Howie's bleeding head and found a trail of blood from the driver's side of Mr. Howie's car. Mr. Howie could not tell who had hit him. Officer M. N. Hunter testified that after speaking with Ms. Morgan, he picked up defendants and took them to the Park'N Shop where Ms. Morgan identified them as Mr. Howie's assailants.

Defendant Davis offered evidence tending to show that defendant Nesmith had telephoned him about 6:30 p.m. on 20 December to tell him that he was going to "make a lick" or rob someone but that he told Nesmith that he did not want anything to do with it. He went to the Park'N Shop by himself on the night of 20 December to purchase a pack of cigarettes for his mother. He testified that he saw Nesmith at the store as he was leaving but that he had never seen Mr. Howie before and did not see him that night. Defendant Nesmith's evidence tended to show that he did not mention robbing or assaulting anyone to Davis. He testified that he saw Davis at the Park'N Shop store on the night of 20 December and talked with him but that Davis was the one who hit Howie with a hammer and ran. He said that he ran because he was afraid.

Defendants were convicted of assault with a deadly weapon with intent to kill inflicting serious injury. From a judgment imposing a sentence of 20 years as to each defendant, both appealed.

Attorney General Edmisten, by Associate Attorney Jack Cozort, for the State.

Public Defender Michael S. Scofield, by Assistant Public Defender Richard D. Boner, for defendant Vernon Wayne Davis.

Peter H. Gerns for defendant Willis J. Nesmith III.

MARTIN, Judge.

[1] In his charge to the jury, Judge Falls instructed as to assault with a deadly weapon inflicting serious injury as follows:

> "And the third essential element, that the defendant inflicted serious bodily injury. Now, I have told you what the injury is, and you have heard what injuries he has received, and I shall not repeat that. That doesn't mean it isn't important. It is an essential element. *A fractured skull is a serious injury.*" (Emphasis added.)

Both defendants contend that the trial judge, by instructing that the victim's skull fracture was a serious injury, violated G.S. 1-180. They argue that the instruction was not only prejudicial but that it also invaded the province of the jury. We disagree.

In making their arguments concerning this assignment of error, defendants cite the case of *State v. Whitted*, 14 N.C. App. 62, 187 S.E. 2d 391 (1972). In that case, a new trial on a charge of assault with a deadly weapon with the intent to kill inflicting serious injury was granted because the trial judge instructed the jury that " . . . you will find that there was serious injury, if you believe the evidence as it tends to show here, no question about the serious injury. . . . " The case at bar is, however, distinguishable from the *Whitted* case because there the parties offered contradictory evidence concerning the seriousness of the injury.

The uncontradicted evidence in the instant case shows that the victim was struck in the head; that he was immediately taken to Charlotte Memorial Hospital where he stayed for nine days; that a neurosurgeon had to perform surgery; that the surgeon had to peel back fragments of bone in order to repair the skull; that the victim's head is still indented; and that he sustained surgical bills of $1,080 and hospital bills of $15,000. We hold that where, as in the case at bar, the State's evidence with respect to the injuries is uncontradicted and the injuries could not conceivably be considered anything but serious, then the trial judge may instruct the jury that if they believe the evidence as to the injuries, then they will find that there was serious injury. *State v. Springs*, 33 N.C. App. 61, 234 S.E. 2d 193 (1977). This assignment of error is overruled.

[2] By their next assignment of error, defendants contend that the trial court erred in failing to instruct on the lesser offense of assault with a deadly weapon. Again, we disagree.

It is clear that the trial court is not required to instruct on the issue of a defendant's guilt of a lesser offense of the crime charged unless there is evidence from which the jury could find that the lesser offense was committed. *State v. Griffin,* 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Williams,* 31 N.C. App. 111, 228 S.E. 2d 668 (1976). The presence of such evidence is the determinative factor and the " . . . contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks,* 241 N.C. 156, 160, 84 S.E. 2d 545, 547 (1954). In the case at bar, the evidence showed that the victim had been struck in the back of the head with a stick about two feet long; that he was hospitalized for nine days; that a neurosurgeon had to operate in order to repair the injuries to his skull; that fragments of bone had to be peeled back; and that his head is still indented from the injuries. On these facts, we are of the opinion that the defendants were not entitled to an instruction concerning assault with a deadly weapon. *State v. Turner,* 21 N.C. App. 608, 205 S.E. 2d 628 (1974); *State v. Brown,* 21 N.C. App. 552, 204 S.E. 2d 861 (1974). This assignment of error is therefore overruled.

Defendants received a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES FRANKLIN EDWARDS

No. 763SC1040

(Filed 18 May 1977)

Criminal Law § 95.1— evidence admissible for restricted purpose — failure to give limiting instruction — no error

The trial court did not err in failing to instruct the jury that evidence objected to was being admitted only as corroborative evidence, since defendant made only a general objection to the introduction of the testimony and did not request a limiting instruction.

State v. Edwards

APPEAL by defendant from *Martin (Harry C.), Judge.* Judgment entered 22 July 1976 in Superior Court, CRAVEN County. Heard in the Court of Appeals 10 May 1977.

Defendant was indicted for possession with the intent to sell and for the sale of phencyclidine, a controlled substance included in Schedule III of the North Carolina Controlled Substances Act. The defendant entered a plea of not guilty.

The State presented Martha Owens, an undercover SBI agent, who testified that a confidential informant introduced her to the defendant on the afternoon of 14 February 1976. When she informed the defendant that she was looking for some hard drugs, he left and shortly returned with a plastic bag containing several aluminum foil packets. Owens purchased two of the packets for $20 from the defendant and turned the packets over to Adcox, another SBI agent, later that afternoon.

Adcox testified that he met with Martha Owens on the afternoon of 14 February 1976. The defendant interposed a general objection when Adcox attempted to testify as to what Owens had told him on that occasion. At the time of defendant's objection, the district attorney asserted that he was offering the evidence for the purpose of corroboration. The trial judge, without additional comment, then overruled the defendant's objection. Adcox then proceeded to testify as to the statements Owens had made to him concerning her purchase of drugs and concerning the circumstances of the purchase.

The defendant chose not to introduce any evidence. The jury then returned a guilty verdict on both counts and defendant was given a combined sentence of three years. Defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General William A. Raney, Jr., for the State.

John H. Harmon, for the defendant.

MARTIN, Judge.

Defendant assigns as error the trial court's failure to give limiting instructions as to portions of Agent Adcox's testimony relating to his meeting with Agent Owens. He contends that the trial judge committed prejudicial error in not instructing the

jury that the evidence objected to was being admitted only as corroborative evidence. We disagree.

Agent Adcox's statements regarding what Agent Owens told him on the day in question were clearly admissible to corroborate Owens' version of the transaction involving the defendant. Moreover, the record reveals that the defendant made only a general objection to the introduction of the testimony and did not request a limiting instruction. In North Carolina, it is clearly settled that when evidence competent only for one purpose and not for another is offered, it is incumbent upon the objecting party to request the court to give limiting instructions. *State v. Lankford,* 31 N.C. App. 13, 228 S.E. 2d 641 (1976). Absent such a request, a judge is not required to give such instructions and his failure to do so is not error. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. den.* 410 U.S. 958, 35 L.Ed. 2d 691, 93 S.Ct. 1432 (1973); *State v. Lankford, supra; State v. Spain,* 3 N.C. App. 266, 164 S.E. 2d 486 (1968).

We note that defendant has cited *Brothers v. Jernigan* and *Skinner v. Jernigan,* 244 N.C. 441, 94 S.E. 2d 316 (1956) in making his argument that the judge here should have instructed the jury on corroborative evidence even in the absence of a request for such an instruction. The *Jernigan* case is, however, clearly distinguishable from the case at bar because there the trial judge made an erroneous statement concerning the admissibility of evidence. The trial judge in the instant case made no comment at all other than to overrule defendant's objection.

Defendant's assignment of error is overruled.

Defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. DAVID NEFF FALK

No. 768SC984

(Filed 18 May 1977)

1. **Criminal Law § 128.2; Jury § 5— witness not on list — recognition of jurors — motion for mistrial**

The trial court did not err in the denial of defendant's motion for mistrial made on the ground that defendant was prejudiced in the selection of the jury because of the State's failure to include in a list of its witnesses furnished to defendant the name of a witness who testified on cross-examination that he recognized two of the jurors.

2. **Criminal Law § 34.4; Robbery § 3— robbery case — offer to sell heroin**

The trial court in a robbery case did not err in permitting the victim to testify that defendant offered to sell him some "junk" or "smack" and that "smack" is heroin since the testimony was relevant as a part of the chain of circumstances leading up to the robbery.

3. **Robbery § 3— officer's use of gun and handcuffs — testimony not prejudicial**

The defendant in a robbery case was not prejudiced by the victim's testimony that an officer pulled out his revolver and handcuffed the defendant.

APPEAL by defendant from *Smith, Judge.* Judgment entered 2 July 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 4 May 1977.

Defendant, David Neff Falk, was charged in a bill of indictment, proper in form, with the common law robbery of Drewey Moore. Upon the defendant's plea of not guilty, the State offered evidence tending to show the following:

Between 8:30 and 9:30 p.m. on 5 March 1976, Drewey Moore was hitchhiking at the intersection of Highways 70 and 117 near Goldsboro, North Carolina, when a car containing defendant and three other boys stopped, and they offered him a ride. Moore got into the back seat with defendant. The defendant offered to sell Moore some heroin which he refused. The boys were at first rowdy, but then became quiet and began whispering among themselves. The driver suddenly pulled the car over into a field and stopped. The four boys pulled Moore out of the car, kicked and beat him, took his wallet, checkbook and knapsack which contained textbooks and papers, and then drove away.

Danny Buck, who was parked in the field with his girlfriend and who witnessed the entire incident in the field, drove his car over to Moore and gave him a ride. After they got back on the highway, they soon came upon the four boys who had been stopped by Officer J. S. Flowers of the Wayne County Sheriff's Department. Moore told the officer that the boys had robbed him. The officer pulled out his revolver and arrested the four boys. Moore's wallet, checkbook, knapsack, textbooks, and papers were found in the back seat of the four boys' car.

Defendant offered evidence tending to show that although he was a passenger in the car with the other three boys, he in no way participated in the robbery of Moore.

The jury found defendant guilty as charged, and from a judgment imprisoning defendant for 18 months as a committed youthful offender, he appealed.

Attorney General Edmisten by Assistant Attorney General William B. Ray and Deputy Attorney General William W. Melvin for the State.

Barnes, Braswell, & Haithcock by Michael A. Ellis for defendant appellant.

HEDRICK, Judge.

[1] Defendant first contends the court erred in denying his motion for a "mistrial." While defendant's counsel was cross-examining the State's witness Buck, the witness said that he recognized the faces of two of the jurors. The district attorney had not given Buck's name to the defendant along with the other names of the State's witnesses before the trial commenced. Defendant now argues, as he did before the trial judge, that the State's failure to include Buck in its list of witnesses prejudiced the defendant in the selection of the jury. We do not agree. Ordinarily a motion for a mistrial is addressed to the discretion of the trial court, and the judge's ruling thereon is not reviewable on appeal in the absence of a showing of an abuse of discretion. 4 Strong, N. C. Index 3d, Criminal Law § 128.1 (1976). Defendant has shown no abuse of discretion in the court's denial of his motion for a mistrial in the present case.

[2] Defendant contends the court erred in allowing Moore, over defendant's objection, to testify that defendant offered to sell him some "junk" or "smack," and that "smack" was heroin.

Defendant argues that the challenged testimony was irrelevant and prejudicial to his case in the minds of the jurors. We do not agree. Moore was merely allowed to describe what transpired in the automobile with respect to the defendant and the other occupants immediately before the robbery. We think that the challenged testimony was relevant as a part of the chain of circumstances leading up to the robbery and was competent to develop properly the evidence at trial. *State v. Jenerett,* 281 N.C. 81, 187 S.E. 2d 735 (1972); *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667 (1962).

[3] Finally defendant argues that the court erred in allowing Moore to testify that " . . . Officer Flowers had to pull out his revolver and handcuff the defendant. I don't know if he had handcuffed the defendant or not, but he handcuffed somebody." We recognize that the statement challenged by this exception was the conclusion of the witness, but we perceive no prejudice whatsoever in the court's failure to strike the testimony.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOHNNY RAY STATON

No. 764SC983

(Filed 18 May 1977)

1. **Rape § 5— defendant as perpetrator of crime — sufficiency of evidence**

Evidence was sufficient for the jury in a rape prosecution where it tended to show that the crime did occur; defendant's height and weight corresponded with the prosecuting witness's description; defendant's palmprint was found on a magazine in the victim's home which the rapist had allegedly moved; and police officers established a chain of custody of the magazine from the time of the crime until the time of the trial.

2. **Criminal Law §§ 34.4, 89— probation officer as witness — credibility — evidence of defendant's prior crimes**

The trial court in a burglary and rape prosecution did not err in allowing one of the State's witnesses, who testified concerning de-

fendant's whereabouts at the time of the crimes in question, to testify that he was a probation officer, since the witness's occupation was relevant in that it provided a standard for judging his credibility, and its tendency to show that defendant had previously committed a crime was slight.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 31 July 1976 in Superior Court, SAMPSON County. Heard in the Court of Appeals 4 May 1977.

The Sampson County Grand Jury indicted defendant for (1) first degree burglary with intent to commit rape and (2) first degree rape. At the close of the evidence, the court dismissed the charge of first degree rape. The case was given to the jury on proper instructions charging first degree burglary and second degree, or so-called "common law" rape, as well as lesser included offenses. The jury returned verdicts of guilty to non-felonious breaking and entering and second degree rape. Judgment was entered accordingly, and the defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Charles M. Hensey, for the State.

Paul, Rowan & Galloway, by Karen Bethea Galloway, and James V. Rowan, for the defendant appellant.

ARNOLD, Judge.

There was no error in the denial of defendant's motion for judgment as of nonsuit. It is fundamental that on a motion for judgment as of nonsuit the evidence is considered in light most favorable to the State, and the State benefits from every reasonable inference drawn from the evidence. *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974); *State v. Wright,* 27 N.C. App. 263, 218 S.E. 2d 511 (1975). If, when so considered, there is substantial evidence, whether direct, circumstantial, or both, of all the material elements of the crime charged the motion is to be denied and the case submitted to the jury. *State v. Stokesberry,* 28 N.C. App. 96, 220 S.E. 2d 214 (1975).

[1] Defendant concedes that there is evidence of the crime. However, he maintains that there is no evidence to connect him with the crime. We disagree.

The prosecuting witness, a resident of Clinton, testified that she was raped during the night of 1 June 1975, by a man

approximately six feet tall and weighing about 170 pounds with short hair and a dark complexion, perhaps black, perhaps white. The man broke into her home, raped her in the bedroom and, thereafter, forced her into the living room and raped her again. While in the living room her attacker moved a magazine which was lying on the sofa.

Defendant's height and weight corresponded to the prosecuting witness's description. Expert witnesses testified that defendant's palmprint was found on the magazine which the rapist had moved on the sofa. The postmaster from Clinton testified that no more than two postal employees would have touched the magazine while it was in the mail, and that defendant had never been employed by the Clinton post office. Police officers established a "chain of custody" of the magazine from the time of the crime until the time of the trial. This evidence is sufficient to support the jury's verdict that defendant committed the rape.

[2] Defendant also argues that the court erred in allowing one of the State's witnesses to testify as to his occupation, i.e., that he was a probation officer. This witness was called to testify that the defendant told him that he intended to go to Clinton at about the time of the rape and, further, that at that time the defendant had short hair. Defendant argues that the jury would infer that he had a criminal record from the fact that he had spoken to a probation officer, and that the evidence raising this inference violates the rule of *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954), which says, "[i]n a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused had committed another distinct, independent or separate offense." *Id.* at 173. We disagree. *McClain* provides that evidence of prior crimes is admissible if its relevance outweighs its prejudicial effect. In the present case the witness's occupation was relevant in that it provided a standard for judging his credibility, and its tendency to show that defendant committed a crime was slight. Moreover, those jurors who inferred from the witness's occupation that the defendant was a parolee would also infer from this that the witness had opportunity and reason to know and remember the defendant's appearance and plans to go to Clinton. All parties in a trial have the right to enhance their witnesses' credibility. In this case the State's attempt to support its witness was more relevant than

prejudicial. The court did not err in allowing the State's witness to testify that he was employed as a probation officer.

The defendant's trial was free of prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. RUSSELL ALBERT BELL

No. 763SC950

(Filed 18 May 1977)

Criminal Law § 149.1— verdict of not guilty — no appeal by State

The State had no right to appeal to the superior court from a general verdict of not guilty entered in the district court although the trial judge also found that the ordinance under which defendant was charged is invalid; therefore, the superior court acquired no jurisdiction of the case, and its quashal of the warrant was a nullity.

Chief Judge BROCK concurring.

APPEAL by the State from *Webb, Judge.* Judgment entered 27 October 1976 in Superior Court, CARTERET County. Heard in the Court of Appeals 3 May 1977.

Defendant was charged with consuming beer in public in violation of Ordinance G-14 of the Town of Atlantic Beach.

In District Court on 12 May 1976 the following judgment was entered: "VERDICT: NOT GUILTY. Court rules Ordinance invalid. Appealed."

In the Superior Court the defendant moved to quash the warrant on the ground that the ordinance under which he was charged was invalid. From judgment allowing the defendant's motion to quash, the State appealed.

Attorney General Edmisten by Assistant Attorney General James Wallace, Jr., for the State appellant.

A. B. Cooper, Jr., for defendant appellee.

CLARK, Judge.

The disposition of this case is governed by the principles of law declared in *State v. Harrell,* 279 N.C. 464, 183 S.E. 2d 638 (1971) (4-3).

The District Court entered a general verdict of not guilty, and the State has no right to appeal from this verdict. The Superior Court did not acquire jurisdiction of the proceedings, and the proceedings are a nullity. And this Court has acquired no jurisdiction by the purported appeal of the State from the Superior Court. See *State v. Gilbert,* 30 N.C. App. 130, 226 S.E. 2d 229 (1976).

Appeal dismissed.

Judge VAUGHN concurs.

Chief Judge BROCK concurring.

I feel that it is appropriate to point out the technical and practical reason for denying to the State a right of appeal after a general verdict of "not guilty," even though the trial court goes further and purports to rule a statute or ordinance invalid or unconstitutional. The general verdict of "not guilty" entitles the defendant to his discharge from the accusation. He cannot thereafter be prosecuted again under the same accusation or under another accusation charging the identical offense. The long-standing prohibition against double jeopardy would prevent such from being done. So far as the defendant is concerned, the charge against him has been terminated by the verdict of not guilty. Therefore, as a practical matter, what relief can the State hope to attain by appeal? There is no case upon which a new trial could be ordered, even if it should be determined that the trial judge was incorrect in his conclusion that the statute or ordinance was invalid or unconstitutional. Such an appeal would present only an academic question which would not resolve the rights of parties. This is not a proper function of the courts.

Obviously, if the trial court in the present case intended to discharge the defendant from the accusations solely on the grounds that the ordinance was invalid, it should have entered its order quashing the warrant on the grounds of the invalidity. In such case the defendant would not have been in

jeopardy, and if upon appeal the ruling of the trial court was reversed, defendant could be brought to trial upon the original accusation. However, in the present case, as in *State v. Harrell* and in *State v. Gilbert,* cited in the foregoing majority opinion, the trial court entered a verdict of "not guilty." Why this was done we do not know; we can only speculate. In any event it amounts to a judicial fact-finding determination that the State has failed to establish beyond a reasonable doubt that defendant violated the ordinance or statute. A court must have a justiciable controversy before its jurisdiction can be invoked. With a verdict of "not guilty" entered in a criminal case, there is no justiciable controversy left. In my view, after having entered the verdict of "not guilty," there was nothing further before the district court judge for resolution, and his statement "Court rules Ordinance invalid" is a nullity.

ALONZO M. MOORE, JR., WILLA GRAY BOYD, MARY GRAY KASTEN, JOYCE LASTOVICA, IRMA ROGERS HALL, JAMES EVERETT ROGERS, NAOMI ROGERS METZGER, HOWARD J. ROGERS, HERBERT A. ROGERS, JR., KATHERINE ROGERS BIGGS, BENJAMIN R. CRIGLER, AND SUSAN CRIGLER SMITH v. VENIE SMITH

No. 7710SC203

(Filed 1 June 1977)

Trusts § 6— unauthorized conveyance by trustee

Where testator's will devised real property to an individual as trustee, designated such individual as lifetime beneficiary of the trust, gave the trustee broad powers to dispose of the property for the purpose of supporting the trustee-beneficiary, and named plaintiffs as remaindermen of the trust property, a conveyance of the property by the trustee-beneficiary to defendant, whether a gift or a sale, was unauthorized and void since it was not necessary for the support of the beneficiary and it was not beneficial to the testator's "estate," which includes plaintiff remaindermen as well as the trustee-beneficiary.

APPEAL by defendant from *Herring, Judge.* Judgment entered 25 October 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 12 May 1977.

Plaintiffs brought this action for a declaratory judgment pursuant to Chapter 1, Article 26 of the General Statutes

(§§ 1-253 et seq.) asking that the status of title, ownership and rights of the parties with respect to certain real property located in Wake County be declared.

Jury trial was waived. After a trial at which plaintiffs and defendant presented oral and documentary evidence and certain stipulations, the court made findings of fact including the following which are pertinent to this appeal: (Stated verbatim unless otherwise indicated.)

4. J. H. Moore died on or about December 16, 1931 leaving a last will and testament which has been duly probated and recorded in the Office of the Clerk of Wake County Superior Court; and said will provided in part as follows:

(a) The residue of the decedent's estate was conveyed to Vannie Moore (later known as Savannah Hoy) and The Commercial National Bank of Raleigh, in trust.

(b) The trustees were instructed to "hold, handle, manage, invest, sell, dispose of and reinvest the same in such manner as they may deem to the best interest of my estate."

(c) Vannie Moore was not to make any investment without the approval of The Commercial National Bank of Raleigh.

(d) The Trustees were directed to pay so much of the net income (after payment of expenses) "as may be necessary" to Vannie Moore for her support and maintenance.

(e) In the event the net income was not sufficient for that purpose, the Trustees were authorized to "use so much of the principal as may be necessary for said purposes."

(f) In case the Trustees disagreed as to the amount to be used, the decision of the bank was binding, and the settlor requested that Vannie Moore consult the bank relative to any investments from her own individual funds.

(g) At the death of Vannie Moore, the settlor devised the house and lot located at 620 West Cabarrus Street to Willa Gray Boyd in fee simple, if she survived Vannie

Moore, and the remainder of said property to his children, A. M. Moore, Ida Moore Gray and Mollie Jane Moore Rogers, share and share alike, per stirpes.

(h) J. H. Moore further authorized his Executor and Trustees "to sell or otherwise dispose of any of my property, real, personal or mixed, at private or public sale at such price and upon such terms as they deem proper, without order or approval of the Court."

5. J. H. Moore was survived by his children, Vannie Moore, A. M. Moore, Ida Moore Gray and Mollie Jane Moore Rogers.

6. A. M. Moore predeceased Savannah Hoy (formerly Vannie Moore); he had one child, Alonzo M. Moore, Jr., now surviving.

7. Ida Moore Gray predeceased Savannah Hoy; she had the following children: (children named).

8. Mollie Jane Moore Rogers predeceased Savannah Hoy; she had the following children: (children named).

9. On February 6, 1932, A. D. Burrowes, Receiver of The Commercial National Bank of Raleigh, moved the Court to allow the bank to resign as Trustee and Executor because the bank had suspended business; on February 6, 1932 an Order was entered accepting the resignation of The Commercial National Bank of Raleigh as Executor and Trustee under the last will and testament of J. H. Moore.

10. Savannah M. Hoy was appointed Administratrix C.T.A. of the Estate of J. H. Moore; no Trustee was ever substituted to replace The Commercial National Bank of Raleigh.

11. As Administratrix C.T.A., Savannah M. Hoy filed a Final Account in the Estate of J. H. Moore which was approved on August 9, 1933.

12. As surviving Trustee under the will of J. H. Moore, Savannah M. Hoy filed an Inventory and First Account on May 29, 1940, a Second Account on July 29, 1941 and a Third Account on December 28, 1942.

13. No other documents have been filed in the Office of the Clerk of Wake County Superior Court either by

the personal representative of the Estate of J. H. Moore or by any Trustee under the will of J. H. Moore.

14. At the time of his death J. H. Moore owned in fee simple several parcels of real property located in Raleigh Township, Wake County, North Carolina, including the following described property: (lot on North Street in Raleigh particularly described).

15. On or about May 25, 1972, Savannah M. Hoy executed a deed purporting to reserve a life estate for herself in the aforesaid real property and to convey the remainder to defendant; said deed was recorded in Book 2074, Page 361, Wake County Registry.

16. The aforesaid deed to defendant is executed by Savannah M. Hoy, individually, and there is no indication in the deed that Savannah M. Hoy acted in her capacity as Trustee in making the conveyance; there are no findings in the deed as to the necessity of the transfer in order to provide support for Savannah M. Hoy; although the deed recites $10.00 and other consideration, there are no revenue stamps affixed to the deed.

17. At the time J. H. Moore executed his will on May 4, 1931, Savannah M. Hoy was about 59 years of age; at the time Savannah M. Hoy executed the aforesaid deed to defendant, on May 25, 1972, she was 100 years of age; at the time of her death Savannah M. Hoy was 103 years of age.

18. For about the last eight years of her life, Savannah M. Hoy resided in the home of defendant; defendant cared for Mrs. Hoy and provided her with the necessities of life in addition to her room; Mrs. Hoy paid the defendant for such services and provisions at a beginning rental of $160.00 per month; the rental was increased over the years, and at the time of her death Mrs. Hoy's rental to defendant was $284.00 each month.

19. At all times during Mrs. Hoy's residence with defendant, defendant expected the payment of monthly rental by Mrs. Hoy, and Mrs. Hoy expected to pay rental to defendant; however, during the last year or two prior to her death, Mrs. Hoy was not always able to pay the full amount of rental owing to defendant, and at the time

of her death, Mrs. Hoy was indebted to defendant for past due rentals in the total amount of $900.00.

20. Mrs. Hoy often told defendant that she had been as good as a mother to her, expressed her concern that she was unable to pay more to defendant for her support, and stated that she wanted defendant to have the aforesaid real property because she would not need it when she was gone.

21. Mrs. Hoy fell on her 100th birthday, and she required special attention from defendant for about a week thereafter; subsequently, sometime within the year prior to her death, Mrs. Hoy again fell and injured her hip and required special attention from defendant.

22. Defendant did not pay any actual money to Mrs. Hoy or forgive any indebtedness as consideration for the conveyance of the aforesaid real property.

23. On or about April 28, 1971 Attorney W. G. Parker visited Mrs. Hoy; pursuant to that conversation he prepared and witnessed a will for Mrs. Hoy which she executed on May 11, 1971; among other things, said will devised the aforesaid real property to defendant "for her many services and attentions to me."

24. Mr. Parker subsequently prepared the deed by which Mrs. Hoy conveyed the aforesaid property to defendant; at the time of his conversation with Mrs. Hoy, she was alert and able to assist him to obtain a legal description of the property.

25. On or about September 2, 1974 Attorney W. G. Parker wrote to plaintiff, Willa Gray Boyd, stating that Mrs. Hoy's income was approximately $277.00 per month while her indebtedness to defendant was $280.00 per month; Mr. Parker based those figures upon his conversation with Mr. Hugh E. Cherry, who was later appointed attorney-in-fact-for Mrs. Hoy.

26. Mrs. Hoy maintained regular contact with her niece, Willa Gray Boyd, by writing to her often; Mrs. Boyd was very attentive to the needs of Mrs. Hoy for many years during Mrs. Hoy's old age; by correspondence dated June 7, 1972 and September 15, 1972 Savannah Hoy wrote

to Mrs. Boyd that her only needs were rent and medicine, and she had enough money to meet those expenses.

27. The approximate value of the aforesaid real property is $10,000.00.

Upon the foregoing findings of fact, the court made the following conclusions of law: (Stated verbatim unless otherwise indicated.)

1. The will of J. H. Moore creates a trust in which Savannah M. Hoy is the surviving Trustee and lifetime beneficiary and plaintiffs are remaindermen with respect to property not disposed of during the lifetime of Savannah Hoy for the purpose of providing for her necessary support and maintenance.

2. There is no merger of title of the trust estate because the legal title of the Trustee and the equitable title of the life tenant and ultimate remaindermen are not coextensive and commensurate or identical as to quality and nature of tenure.

3. The real property hereinbefore described and known as 607 West North Street, Raleigh, North Carolina, was a part of the corpus of the trust estate created by J. H. Moore.

4. The conveyance of said property by Savannah M. Hoy to defendant by deed dated May 25, 1972 constituted a gift and was not such a conveyance or sale authorized under the terms of the trust created by J. H. Moore as was necessary to provide for the support of Savannah M. Hoy.

5. Said conveyance by Savannah M. Hoy to defendant was not necessary for her support.

6. The deed from Savannah M. Hoy to Venie Smith, defendant, dated May 25, 1972 and recorded in Book 2074, Page 361, Wake County Registry, is an improper and unauthorized conveyance, constitutes a cloud upon the title to the real property described therein, and should be declared null and void and of no force or effect.

7. The defendant, Venie Smith, owns no interest in the property hereinbefore described and known as 607 West North Street, Raleigh, North Carolina.

8. Said real property is owned by plaintiffs, free and discharged of the trust, as surviving heirs and remaindermen under the will of J. H. Moore, in the following proportions: (Names of remaindermen and respective interests set out.)

The court "ordered, adjudged and decreed" as follows: (Stated verbatim unless otherwise indicated.)

1. The deed from Savannah M. Hoy to Venie Smith dated May 25, 1972 and recorded in Book 2074, Page 361, Wake County Registry, is hereby declared to be null and void and of no force or effect to convey any interest in the real property hereinbefore described and known as 607 West North Street, Raleigh, North Carolina to the defendant, Venie Smith.

2. Said real property is owned by plaintiffs, in fee simple, discharged of the trust of J. H. Moore, in the following proportions: (Names of plaintiffs and respective interests set out.)

3. A copy of this Judgment shall be entered upon the records in the Office of the Wake County Register of Deeds, and a notation of the book and page of recording of the judgment shall be indicated upon the aforesaid recorded deed to defendant.

4. All costs of this action are taxed to defendant. Defendant appealed.

Tharrington, Smith & Hargrove, by J. Harold Tharrington, for plaintiff appellees.

Rafford E. Jones for defendant appellant.

BRITT, Judge.

Although defendant excepted to several of the findings of fact, she has brought forward and argued only her exception to finding 22. That being true, all findings of fact except 22 are assumed to be correct and supported by the evidence. 1 Strong, N. C. Index 3d, Appeal and Error § 28.1. Rule 10, Rules of Appellate Procedure, 287 N.C. 671, 698 (1975).

In finding 22 the court found as a fact that defendant did not pay any actual money to Mrs. Hoy or forgive any indebted-

ness as consideration for the conveyance of the real property in question. Defendant contends this finding is not supported by any evidence. We disagree with this contention. In her testimony (R p 73) defendant stated: "Neither I nor my husband actually paid any money to Mrs. Hoy for these conveyances. . . . " She further testified (R p 60): "When she deeded me the house she didn't owe me any money".

We hold that finding of fact 22 is fully supported by evidence.

Although defendant excepted to all of the trial court's conclusions of law except conclusion 3, she has not preserved her exceptions to conclusions 1 and 2; therefore, those exceptions are deemed abandoned. Rule 10, Rules of Appellate Procedure, *supra.*

Defendant contends that the trial court erred in making conclusions of law 4, 5, 6, 7 and 8. We find no merit in this contention.

The basic conclusions of law made by the trial court are that (1) the conveyance of the property to defendant was a gift, (2) the conveyance or sale was not authorized, and (3) the conveyance was not necessary for the support of Mrs. Hoy.

A voluntary conveyance of land from one person to another, made gratuitously, and not upon any consideration of blood or money or other thing of value, is a gift. Black's Law Dictionary, 817 (4th ed. 1951), citing 2 Bl. Comm. 440 and other authorities. Admittedly, Mrs. Hoy was not related by blood to defendant. As pointed out above, the finding of fact that defendant did not pay any money or forgive any indebtedness as consideration for the conveyance is amply supported by the evidence. Furthermore, the evidence is replete with the term "give" as illustrated by the following statement of defendant: " . . . she (Mrs. Hoy) said she would give me this house, says honey I know I'm not paying you enough, I don't need this house, I'm gonna give you this house, on North Street, I would rather you would have it than anybody else because I had been a mother to her."

Whether the conveyance in question is viewed as a gift or a sale, we think the evidence and the findings of fact support the trial court's conclusions of law that it was not authorized. In 76 Am. Jur. 2d, Trusts § 438, pp. 657-8, we find: "A power

of sale conferred upon a trustee does not in general authorize an alienation of any character other than a sale. Granting of the power to sell usually does not authorize a gift of the trust property. Nevertheless, it has sometimes been held that a gift of trust property by the trustee could be properly made where such gift was beneficial to the estate. . . . " *See also* Annot., 21 A.L.R. 3d 801 (1968). Since the "estate" in the case at hand included plaintiffs as well as defendant, it cannot be said that a gift of the subject property by Mrs. Hoy was beneficial to the estate of J. H. Moore.

"The relationship of a trustee to the cestui que trust is unquestionably a fiduciary one, requiring the trustee to administer the trust faithfully for the benefit of the cestui que trust. . . . " 76 Am. Jur. 2d, Trusts § 111, p. 356. Although in effect Mrs. Hoy was trustee for herself, plaintiffs were also cestuis que trust and Mrs. Hoy had a duty to them.

While the will in question granted Mrs. Hoy as trustee broad powers in the use of the subject property, her power was not unlimited. "However large may be the powers with which the trustee is invested, they are all to be exercised only for the purpose of effectuating the trust; and when it appears that such powers are perverted to the detriment of the *cestui que trust,* the court will promptly interpose its protective authority." *Lightner v. Boone,* 222 N.C. 205, 209, 22 S.E. 2d 426, 428 (1942), Chief Justice Stacy quoting from *Albright v. Albright,* 91 N.C. 220 (1884).

Although the facts in *Morris v. Morris,* 246 N.C. 314, 98 S.E. 2d 298 (1957), are quite different from those in the case at hand, we think the holding in that case provides some guidance here. In *Morris,* the testator left the following will: "Being of sound mind I hereby bequeath to my wife Phyllis Lee Morris all of (my) property both real and personal to provide for my son Richard Lee Morris and herself S/ Richard Morris, Dec. 30/1954." The Supreme Court held that the wife took an estate in trust for the benefit of herself and son and that she had no power to sell the real estate except as authorized by the court upon a showing that the personal estate and rents were insufficient to support the son and herself.

It is true that Mrs. Hoy was not required to obtain permission from the court to sell real estate belonging to the trust. Nevertheless, in making a sale, she had to consider beneficiaries

of "the estate" other than herself and the court is available to pass upon her action.

Jury trial having been waived, His Honor was the trier of the facts and we think his findings fully support his conclusions of law.

The judgment appealed from is

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. ARTHUR THOMAS SANDERS

No. 7610SC979

(Filed 1 June 1977)

1. **Constitutional Law § 43— show-ups — failure to provide counsel — no error**

Since defendant had not been formally charged with a crime at the time of two show-ups, it was not error to fail to provide defendant with counsel at the show-ups.

2. **Criminal Law § 66.10— show-ups — no suggestion leading to mistaken identification — testimony admissible**

Show-ups involving defendant, a robbery victim, and a witness to the robbery were not so unduly suggestive as to lead to a substantial likelihood of mistaken identification, and the principle of due process therefore did not require exclusion of the testimony concerning the show-ups.

3. **Arrest and Bail § 3.11— arrest without warrant — delay in taking defendant before magistrate — show-ups — evidence inadmissible**

Police officers who arrested defendant without a warrant violated G.S. 15A-501(4) by taking defendant to Cary for a show-up after they had first prepared to take him before a magistrate in Apex, and G.S. 15A-501(2) by failing to take defendant before a magistrate without unnecessary delay; such violations were substantial, and, pursuant to G.S. 15A-974(2), evidence obtained as a result of such violations was inadmissible against defendant. However, in view of the overwhelming evidence of guilt which was properly admitted, error in not suppressing evidence of the show-up was harmless beyond a reasonable doubt.

APPEAL by defendant from *McLelland, Judge*. Judgment entered 31 August 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 4 May 1977.

State v. Sanders

Defendant appeals from his conviction for armed robbery. Evidence taken on *voir dire* at two pretrial hearings on motions to suppress evidence, and in open court at the defendant's trial, tends to show the following: At about 11:00 p.m. on 31 March 1976, the Convenient Food Mart in Cary was robbed. According to the testimony of James S. Manness, Jr., the assistant manager, the robber was a black male, approximately 5'10" tall and of medium build, who had purchased beer in the store earlier in the evening. He was allegedly armed with a .32 caliber nickle-plated Clerke revolver, and he wore bright sports clothes. He put the stolen money and checks into a brown paper bag. A second witness to the robbery, Mr. Grady Allen, also described the robber. According to Allen, he had begun to enter the Convenient Food Mart when he saw the robbery in progress. Apprehending danger, he hid outside the store in a place where he could see the robber as he fled, and from his hiding place Allen saw the robber leave the store. According to Allen's description, the robber was a black man, 5'8" tall, wearing a blue outfit which appeared to be a leisure suit. Allen tesetified that he saw the robber's face in good light, but Allen's description did not include any of the robber's facial features. Allen described the robber's car as a brown or beige over yellow Monte Carlo hardtop.

At 11:45 p.m. police officers from Apex, North Carolina, stopped an automobile which matched the description of the one used in the robbery. The driver of the car, defendant, fit the description of the robber, and he was immediately arrested. The officers searched the car and discovered a .32 caliber nickle-plated Clerke revolver and a paper bag containing money and checks payable to the Convenient Food Mart in Cary. The police then took defendant to the Apex police station. While there officers called a local magistrate and asked him to come to the station. However, before the magistrate arrived the police officers took defendant to the police station in Cary.

Shortly after arriving in Cary, the police showed the defendant to James Manness, manager of the Convenient Food Mart, in a show-up, that is, a one-man identification procedure. It took place before the defendant appeared before a magistrate. According to Manness's testimony at the first *voir dire,* the police called him on the telephone and asked him to come down and try to identify a suspect. Whether the police suggested that they had arrested "the fellow who did it" or merely said that they had in

custody a person who fit the robber's description was left unresolved by Manness's testimony. Manness also said that he had been able to identify the defendant at the show-up but that he was no longer able to identify the defendant as the robber. Manness explained that he recognized the defendant as the man whom he had identified at the show-up, but his recollection of the robbery was entirely overshadowed by his recollection of the show-up, and he no longer had an independent memory of the robber.

On the night of the robbery, Grady Allen was also called to the Cary police station to identify the defendant. Testifying at the second *voir dire*, Allen said that he carefully identified the defendant at the show-up, that this identification was the result of his recollection of the robbery and not of any suggestions made by the police, and that he still had a vivid memory of the robbery and could identify the defendant as the robber based on that memory. Allen admitted that he had a clear recollection of the show-up and that this contributed to his ability to recognize the defendant, but he said at the *voir dire* that his ability to recognize the defendant was based on his recollection of the robbery itself.

At the close of the respective *voir dire* hearings, the judge made appropriate findings of fact and concluded that James Manness's in-court identification of the defendant would be inadmissible because it would not be based on his independent recollection of the robbery. The judge also concluded that Grady Allen's in-court identification and his testimony concerning his out-of-court identification of the defendant would be admissible at trial. The show-up, the judge found, was not impermissibly suggestive, nor was it substantially likely to lead to irreparable misidentification.

At defendant's trial Grady Allen identified the defendant and also testified that he had previously identified the defendant at the show-up. The jury convicted the defendant, and he appeals from judgment sentencing him to forty years in prison.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Marvin Schiller for defendant appellant.

ARNOLD, Judge.

Defendant contends that it was error for the court to admit testimony by the two witnesses, Manness and Allen, identifying him at the show-ups on the night of the robbery, and to allow the witness Allen to identify him in court. Three arguments in support of these contentions are set forth by defendant in an excellent brief prepared by his counsel. There is merit, however, in only one of his arguments.

[1] It was not error to fail to provide defendant with counsel at the show-ups. Nor was it error to fail to obtain a knowing and voluntary waiver of counsel from defendant. The constitutional right to counsel at an identification procedure does not attach until "the initiation of adversary *judicial* criminal proceedings whether by way of formal charge, preliminary hearing, indictment or arraignment." *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972) (emphasis added). *See, State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). Defendant had not been formally charged at the time of the show-ups and, therefore, had no right to counsel. Since defendant's right to counsel was not abridged, the testimony concerning the out-of-court identification need not be excluded for that reason.

[2] Nor does the principle of due process require exclusion of the testimony concerning the show-ups. The test for due process is whether the "totality of circumstances" surrounding the identification procedure was so unduly suggestive that it created a substantial likelihood of mistaken identification. *Stovall v. Denno,* 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *Neil v. Biggers,* 409 U.S. 188, 198, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972). The factors to be considered when making this test are the witness's opportunity to see the crime, his attentiveness, the accuracy of his prior description, the length of time between the crime and identification, and the degree of the witness's certainty. *Neil v. Biggers, supra,* at 199. The trial court paid appropriate attention to these factors in considering whether the show-ups were so likely to lead to misidentification that they violated due process. Findings of fact were made which fully support the judge's conclusions that the show-ups did not violate defendant's constitutional rights. Those findings are binding on this Court. *State v. Henderson, supra.*

For reasons just stated, it was not error for the court to allow Grady Allen to identify defendant in court. Since defendant had no right to counsel at the show-up, and since the show-up was not so suggestive as to violate due process, the in-court identification by Allen was untainted.

[3] We now consider defendant's third argument in support of his contention that the court erred in permitting witness Manness to testify concerning pretrial identification, and witness Allen to testify concerning pretrial and in-court identification. Defendant asserts that all identifications were made at the show-up prior to taking defendant before a judicial officer in violation of the Criminal Procedure Act, specifically G.S. Ch. 15A, Sections 15A-501 and 15A-974.

In pertinent part G.S. 15A-501 provides:

"Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:

. . . .

(2) Must, with respect to any person arrested without a warrant . . . , take the person arrested before a judicial official without unnecessary delay;

. . . .

(4) May, prior to taking the person before a judicial official, take the person to some other place if such action is reasonably necessary for the purpose of having that person identified; . . . . "

It is noteworthy that the General Assembly in the OFFICIAL COMMENTARY to G.S. 15A-501, has provided guidance for determining whether actions are "reasonably necessary" within the meaning of G.S. 15A-501(4). The OFFICIAL COMMENTARY says that subsection (4) is based on the American Law Institute's Model Penal Code of Pre-Arraignment Procedure, Tentative Draft No. 1, Sec. 3.09(1) (Alternate Provision), and the United States Supreme Court decision in *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967). Based on the OFFICIAL COMMENTARY provided us by the legislature we gather that the words "reasonably necessary" have a stricter meaning than we would ordinarily apply. Apparently only exigent circumstances, such as were present in *Stovall v. Denno, supra,* where the only eyewitness was critically injured, will suffice as

"reasonably necessary." *Compare,* ALI, Model Code of Pre-Arraignment Procedure, Tentative Draft No. 1, Section 3.09(1) (Alternate Provision) " . . . reasonably necessary for the purpose of having such person identified by a person in imminent danger of death or loss of faculties."

Arguments by the State that the Apex officers acted "reasonably" in view of the late hour, the difficulty in procuring a magistrate, and the benefits of a prompt identification are well taken. However, following the guidance which the legislature has provided we hold that the police officers violated G.S. 15A-501(4) by taking defendant to Cary for a show-up after they had first prepared to take him before a magistrate in Apex, and G.S. 15A-501(2) by failing to take defendant before a magistrate without unnecessary delay. Defendant had already been arrested under a showing of adequate probable cause, and it ill behooves the State to argue now that the magistrate may have been delayed or unable to come in the middle of the night. Under such circumstances G.S. 15A-501(2) would have permitted police to hold defendant until morning, take him before a magistrate, and then submit him for proper identification procedures.

G.S. 15A-974(2) requires that any evidence "obtained as a result of a *substantial* violation" of the Criminal Procedure Act be suppresesd if requested by timely motion (emphasis added). Whether a violation is "substantial" depends among other things on "(a) [t]he importance of the particular interest violated; (b) [t]he extent of the deviation from lawful conduct; (c) [t]he extent to which the violation was willful; (d) [t]he extent to which exclusion will deter future violations of [the Act]." Applying these tests we find that the violations of G.S. 15A-501(2) and (4) were substantial. It was error to admit the evidence.

Nonetheless, in view of the overwhelming evidence of guilt which was properly admitted we hold that the error in not suppressing evidence of the show-ups was harmless beyond a reasonable doubt. In *State v. Knight,* 282 N.C. 220, 227, 192, S.E. 2d 283 (1972), Justice Huskins, writing for the Court, stated:

> "In the factual context of this case, although the showing of only one photograph to the victim accompanied

by the statement 'we've got a man, is this the one' was impermissibly suggestive and evidence thereof incompetent, we hold its admission was 'harmless beyond a reasonable doubt.' [Citations omitted.] The unequivocal in-court identification of defendant by Mr. Garner, the presence of defendant's jacket in Mr. Garner's bedroom containing a letter addressed to the defendant, a certified birth certificate of defendant, and a Selective Service notice of classification bearing defendant's name, and the fact that the description of defendant's clothing given by Mr. Garner to the police was substantially similar to the actual clothing defendant was wearing when seen by Officer Poe about one hour after the burglary, constitutes evidence of guilt so overwhelming that, in our opinion, the impact of the photographic identification on the minds of the jurors was insignificant. Unless there is a reasonable possibility that the erroneously admitted evidence might have contributed to the conviction, its admission constitutes harmless error. [Citations omitted.]"

In addition to the positive in-court identification by the witness Allen, defendant matched the description of the robber given following the robbery; defendant's car matched the description of the robber's car; defendant had in his possession, within forty-five minutes of the robbery, a brown paper bag full of cash and checks payable to the Convenient Food Mart; defendant had in his possession a pistol identical to the one used by the robber. We are certain beyond a reasonable doubt that exclusion of the evidence would not have changed the verdict. *State v. Heard,* 20 N.C. App. 124, 201 S.E. 2d 58 (1973), *rev'd on other grounds,* 285 N.C. 167, 203 S.E. 2d 826 (1974); *see also,* 4 Strong's N. C. Index 3d, Criminal Law, § 169.1 (1976).

There are other contentions raised by defendant in this appeal which we do not find necessary to discuss. These contentions have been considered, and no prejudicial error is found.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. HOWARD F. WIGGINS

No. 7630SC985

(Filed 1 June 1977)

1. **Narcotics § 1— possession defined**

An accused has possession of marijuana within the meaning of the Controlled Substances Act when he has both the power and intent to control its disposition.

2. **Narcotics § 3— marijuana growing near defendant's residence — admissibility**

The trial court properly admitted evidence of marijuana found growing in flower pots in defendant's front yard 32 feet from defendant's mobile home and behind a television antenna connected to defendant's residence since the marijuana was within such close proximity to defendant's residence as to raise the inference that defendant had constructive possession of it; however, the court erred in the admission of evidence of marijuana found growing in a flower bed approximately 55 feet behind defendant's residence and marijuana found growing near a cornfield located 145 feet from the residence where there was no evidence as to whether the flower bed and cornfield were on defendant's property or otherwise under his control and no other evidence linking defendant to such marijuana.

3. **Narcotics § 4— intent to distribute — insufficiency of evidence**

Evidence of defendant's possession of 215.5 grams of marijuana, without more, was insufficient to withstand a motion for nonsuit on a charge of possession of marijuana with intent to sell and distribute.

4. **Narcotics § 4— manufacture of marijuana — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for manufacture of marijuana where it tended to show that stripped stalks of marijuana were found growing behind a television antenna connected to defendant's residence and that marijuana plants were found growing in flower pots in defendant's front yard 32 feet from his residence, the quantity of marijuana or the intent of the offender being immaterial.

Judge HEDRICK concurring in result.

ON *certiorari* from *Thornburg, Judge.* Judgment entered 21 October 1975 in Superior Court, CLAY County. Heard in the Court of Appeals 4 May 1977.

Defendant was charged by indictments in proper form with manufacture of marijuana, and possession of marijuana with the intent to sell and deliver. He entered pleas of not guilty to each offense and was convicted by a jury of both counts. Judg-

ment was entered thereon sentencing defendant to imprisonment for a term of two years.

The State introduced evidence which tended to show as follows: On 14 July 1975, Clay County Sheriff Hartsell Moore and Deputy Sheriff Robert Shelton went to defendant's residence pursuant to information they had received that marijuana was growing there. Defendant lived in a mobile home in a rural, mountainous area of Clay County. Moore told defendant that he had been informed that marijuana was growing on the premises and asked to look around, whereupon defendant gave the officers consent to search. Moore searched defendant's trailer but did not find any contraband inside. The officers then discovered green vegetable material growing in a flower bed approximately 55 feet behind defendant's trailer. They continued their search and found similar vegetable material growing near a cornfield located 145 feet from the trailer and stripped stalks of the material growing behind a television antenna connected to defendant's home. They also discovered the same vegetable material growing in flower pots on a table in defendant's front yard about 32 feet from the trailer.

Defendant stipulated at trial that the vegetable matter introduced by the State was marijuana but presented no evidence. He moved for a judgment as of nonsuit as to both charges, but the motions were denied.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, and Associate Attorney Al S. Hirsch, for the State.

Simpson, Baker and Aycock, P.A., by Gene Baker, for defendant appellant.

MORRIS, Judge.

Defendant contends that the trial court erred by admitting the marijuana into evidence and in denying his motions for nonsuit because there was no evidence which showed that the drug was in defendant's actual or constructive possession.

[1] An accused has possession of marijuana within the meaning of the Controlled Substances Act when he has both the power and intent to control its disposition. The possession may

be either actual or constructive. *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974). Constructive possession of marijuana exists when the accused is without actual personal dominion over the material, but has the intent and capability to maintain control and dominion over it. *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972). "Where [narcotics] are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledege and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972).

[2] Applying these principles to the present case, we must determine whether the marijuana discovered by Sheriff Moore and Deputy Shelton was "found on the premises under the control of an accused" so that possession by defendant could be reasonably inferred. We believe that the marijuana located in the flower pots 32 feet in front of defendant's trailer and beside defendant's television antenna was within such close proximity to defendant's residence as to raise the inference that defendant had at least constructive possession of it. Consequently, we hold that its admission into evidence was proper.

Problems arise, however, with respect to the admissibility of the marijuana discovered behind defendant's trailer. In *State v. Spencer, supra,* the defendant was charged with felonious possession of marijuana discovered in a pig shed located approximately 60 feet behind his residence. The Supreme Court, ruling on a motion for judgment as of nonsuit, noted that "[d]efendant had been seen on numerous occasions in and around the out-buildings directly behind his house. Thus, when considered with the fact that marijuana seeds were found in defendant's bedroom, this evidence raises a reasonable inference that defendant exercised custody, control, and dominion over the pig shed and its contents. . . . " *State v. Spencer, supra* at 129-30, 187 S.E. 2d at 784. In the case *sub judice,* there was no evidence concerning whether the flower bed and cornfield in which the marijuana was located were on defendant's property or otherwise under his control. Nor was there any evidence linking defendant to the marijuana other than the fact that it was growing near his trailer. The State cites three decisions by this Court, *State v. Salem,* 17 N.C. App. 269, 193 S.E. 2d 755, *cert. den.,* 283 N.C. 259, 195 S.E. 2d 692 (1973) ; *State v. Summers,* 15 N.C. App. 282, 189 S.E. 2d 807, *cert. den.,* 281 N.C. 762, 191

S.E. 2d 359 (1972); *State v. Crouch*, 15 N.C. App. 172, 189 S.E. 2d 763, *cert. den.*, 281 N.C. 760, 191 S.E. 2d 357 (1972). In each of these cases, however, as the State correctly concedes, either the contraband was found in defendant's home or there was additional evidence linking defendant to the drug. Again, there was no such evidence in the present case. Accordingly, the State did not show that the marijuana discovered behind defendant's trailer was found on premises under his control, and the admission of this marijuana into evidence constituted error.

In ruling upon defendant's motion for judgment as of nonsuit, the trial court was bound to consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and inference to be drawn therefrom. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973). Whether the evidence is direct, circumstantial, or both, if there is evidence from which the jury could find that defendant committed the offense charged, the motion for nonsuit should be overruled. *State v. Lindley*, 286 N.C. 255, 210 S.E. 2d 207 (1974). To withstand the motion, there must be substantial evidence of all material elements of the offense charged. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

Defendant was charged with (1) unlawful possession of marijuana with intent to sell and deliver, and (2) manufacture of marijuana. The State's evidence consisted of the testimony of the two officers who went to defendant's premises and discovered the marijuana and the SBI agents who chemically identified it. On cross-examination, Sheriff Moore stated:

> "When I went to the home of Mr. Wiggins I did not find any type of scales or weight devices for weighing small amounts. I did not find any rolling paper, as associated with the smoking of marijuana. I didn't see any. I did not find anything to my knowledge, in the trailer, as such that was related to the growing or the weighing or the rolling of marijuana. . . . "

[3] There was a stipulation that all of the marijuana found consisted of 215.5 grams, less than a half pound. There is nothing in the record which sheds any light on the amount found growing in each of the locations. Even so, this quantity alone, without some additional evidence, is not sufficient to raise an inference that the marijuana was for the purpose of distribu-

tion. *See State v. Baxter, supra; State v. McDougald,* 18 N.C. App. 407, 197 S.E. 2d 11, *cert. den.,* 283 N.C. 756, 198 S.E. 2d 726 (1973). Thus, even when the evidence is viewed in the light most favorable to the State, evidence of possession of the marijuana, without more, is not sufficient to withstand a motion for judgment as of nonsuit on a charge of possession with intent to sell and distribute.

[4] On the charge of manufacture, we reach a different conclusion. State's evidence, which we have held was admissible to show constructive possession, was that stripped stalks of marijuana were found growing behind a television antenna connected to defendant's residence and that marijuana plants were found growing in flower pots on a table in defendant's front yard 32 feet from his residence.

G.S. 90-95(a)(1), the statute under which this charge was brought, provides that it shall be unlawful for any person "[t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance" except as authorized "by this Article." By G.S. 90-87(15) " 'manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means, whether directly or indirectly, artificially or naturally. . . . " In *State v. Elam,* 19 N.C. App. 451, 455, 199 S.E. 2d 45, 48, appeal *dismissed and cert. den.,* 284 N.C. 256, 200 S.E. 2d 656 (1973), we said:

> " . . . We think the statutes make the manufacture of marijuana a felony, regardless of the quantity manufactured or the intent of the offender. . . . "

We are not unaware of *State v. Baxter,* 21 N.C. App. 81, 203 S.E. 2d 93, *rev. on other grounds,* 285 N.C. 735, 208 S.E. 2d 696 (1974), and *State v. Whitted,* 21 N.C. App. 649, 205 S.E. 2d 611, *cert. den.,* 285 N.C. 669, 207 S.E. 2d 761 (1974), nor of the statements contained therein with respect to interpretation of G.S. 90-87(15). Those cases are clearly distinguishable on the facts. That portion of G.S. 90-87(15) which allows "preparation or compounding of a controlled substance" for one's own use in certain instances has no application to the facts of this case.

Defendant's assignments of error Nos. 1, 2, 3, 8, 9 and 10 were not brought forward and argued in his brief and they are,

therefore, deemed abandoned. *Higgins v. Builders and Finance, Inc.*, 20 N.C. App. 1, 200 S.E. 2d 397 (1973), *cert. den.*, 284 N.C. 616, 201 S.E. 2d 689 (1974). The remaining assignments of error contest the court's denying defendant's motions for arrest of judgment, for a new trial, for a mistrial, and to set aside the verdict. These contentions have been answered.

The judgment in case No. 75CR5623 (possession of marijuana with intent to sell and distribute) is reversed.

In the judgment in case No. 75CR5624 (manufacture of marijuana), we find no error.

Judge ARNOLD concurs.

Judge HEDRICK concurs in the result.

Judge HEDRICK concurring in the result.

I vote to reverse the conviction of possession of marijuana with intent to distribute and to affirm the conviction for manuturing. I feel constrained, however, to point out that an incongruity is manifest by declaring that it was error to admit evidence of the marijuana growing in the flower bed 55 feet from the back of the trailer and in the garden 145 feet from the back of the trailer and at the same time to admit evidence of the marijuana growing in flower pots 50 feet from the entrance of the trailer (32 feet from the side) and of the "stripped" marijuana stalks near the TV antenna. In my opinion, all of this evidence was admissible under the circumstances of this case, and it was for the jury to determine whether defendant was in possession thereof and was growing it. The majority decision leaves the conviction of the felony of manufacturing supported only by the evidence that marijuana was growing in flower pots on a table, four feet square, near defendant's residence and that there was stripped marijuana stalks near the TV antenna. If it was error to admit the evidence of the marijuana growing in the flower bed and in the garden, as the majority opinion declares, it appears to me that such an error would be so prejudicial as to entitle defendant to a new trial in the manufacturing case. While I agree that the evidence of manufacturing was sufficient to take the case to the jury even without evidence of the marijuana growing in the

flower bed and the garden, I am convinced that the admission of this evidence tipped the scales for the State in the minds of the jury. The majority decision precludes the State from prosecuting the defendant for the possession of 215.5 grams of marijuana while it supports the conviction of defendant for having manufactured the same 215.5 grams of marijuana.

FORD MARKETING CORPORATION v. NATIONAL GRANGE MUTUAL INSURANCE COMPANY AND AETNA CASUALTY AND SURETY COMPANY

No. 7626DC869

(Filed 1 June 1977)

Insurance § 87— automobile liability insurance — driver not in lawful possession — no coverage under owner's policy

At the time of the collision giving rise to this action, the driver of a truck was not in lawful possession of the vehicle pursuant to G.S. 20-279.21(b)(2) and therefore was not covered under the truck owner's liability insurance policy where the evidence tended to show that the owner of the truck placed it in the possession of his employee who was his brother-in-law and put no restrictions on the employee's use of the truck; the employee had previously allowed his son-in-law to use the truck, which use was unknown to the owner but to which the owner subsequently stated no objection; there was a close family relationship between the employee and his son-in-law; and at the time of the collision the son-in-law was driving the truck without the employee's express permission or knowledge, the son-in-law having taken the truck for his own use from the employee's premises while the employee was on vacation.

APPEAL by defendant National Grange Mutual Insurance Company from *Saunders, Judge.* Judgment entered 7 October 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 13 April 1977.

The facts in this case are not in dispute, and the case was tried by Judge Saunders without a jury.

On August 27, 1973, William Kenneth Baucom was the owner of a 1967 Chevrolet pickup truck. The truck was bought by Baucom for use in his contracting business, and during the one year that he had owned the truck prior to August 27, 1973, the truck had always remained in the possession of one Robert

Marvin Harrington. Harrington was an employee of Baucom and was also a brother-in-law of Baucom.

During the year's time referred to, Harrington drove the truck to his home at the end of the working day and also drove it to his home on weekends. Baucom put no restrictions on Harrington's use of the truck, and there was never any conversation between Baucom and Harrington regarding the use of the truck by any third party. Harrington on occasion used the truck for personal purposes, which use was unknown to Baucom. Baucom does not now have any objection to such use by Harrington. Harrington had been employed by Baucom for eleven years, and Baucom had confidence in Harrington's judgment regarding the use of the truck, which Harrington kept at his home on a regular basis.

Sometime prior to August 27, 1973, and prior to Baucom buying the truck in question, Harrington had in his possession and kept on a regular basis at his home another truck likewise owned by Baucom.

Larry Neal Melton was a son-in-law of Harrington, having married Harrington's daughter some six years prior to August 27, 1973. At some time prior to August 27, 1973, and during the time that Harrington kept in his possession the other truck owned by Baucom referred to above, Melton and his wife and his wife's sister wanted to borrow this other pickup truck for the purpose of moving the sister's furniture. The three of them went to a job site where Harrington was working where he gave them permission to use the truck for this purpose. The truck was used by the three of them for this purpose, being driven by Melton, and it was returned to him by Melton at the job site later the same day.

During the six-year period that Melton was married to Harrington's daughter and prior to August 27, 1973, Melton and his wife lived approximately one and one-half or two miles from Harrington's residence. They had numerous occasions to see each other during this time. They visited in each other's homes on a regular basis and ate meals in each other's homes regularly. They also from time to time attended church together. Harrington and Melton hunted together, and on occasion Harrington loaned Melton one of his shotguns. Also during this period, Harrington's daughter, Ann, would borrow Harrington's personal automobile with his permission from time to time for

her own purposes, and Melton accompanied her on these occasions.

During such six-year period of time, Harrington never refused anything to Melton which Melton requested, and Baucom never at any time told Harrington not to let Melton drive the pickup truck.

On August 27, 1973, Harrington was away on vacation, which fact was known to Melton. Melton and his wife, Ann, wanted to move some paneling to their home. The only vehicle owned by them was a Volkswagen, which was too small to carry the paneling. Melton and Ann decided to go get the 1967 Chevrolet pickup truck. Melton was at first hesitant to do so, knowing that Harrington was away; but his wife, Harrington's daughter, said that her father would not mind.

Melton, his wife, and young son then drove their Volkswagen to Harrington's residence. No one was at home. Melton looked into the pickup truck and found the keys in the ashtray. His wife then returned home in the Volkswagen, and Melton, accompanied by his young son, drove away in the pickup truck for the purpose of buying the paneling to put in the home.

Shortly afterwards and while operating the truck for this purpose, Melton had an accident with an automobile owned by the plaintiff, Ford Marketing Corporation, which resulted in damage to the plaintiff's property. Thereafter an action was brought by the plaintiff herein against Larry Neal Melton in the District Court of Mecklenburg County. Judgment was entered on March 4, 1975, against Melton in the principal sum of $3,500.00. Execution on such judgment was thereafter issued in Union County, Melton's residence, and was returned by the sheriff of Union County unsatisfied, and the judgment remains unpaid.

The defendant, National Grange Mutual Insurance Company, on August 27, 1973, insured Larry Neal Melton under a liability policy. This policy insured Melton while operating a non-owned automobile.

The defendant, Aetna Casualty and Surety Company, on August 27, 1973, had in force and effect its policy of liability insurance which named Baucom's 1967 Chevrolet pickup truck as an insured vehicle. Under this policy the defendant Aetna provided coverage for its policyholder, William Kenneth Bau-

com, and any other person while using the pickup truck with Baucom's permission.

There was at the time of such collision a close family relationship existing between Melton and Harrington. Melton's use of the truck on this occasion, however, was entirely without the knowledge of either Harrington or Baucom. Harrington stated to Melton after the accident that had he been at home on such occasion, he would either have given Melton permission to use the truck for the intended purpose or he would have driven him himself. Harrington testified in this action, and the court found as a fact that Harrington now has no objection to Melton's use of the truck under the circumstances and on the occasion in question.

From the foregoing facts the trial judge concluded as a matter of law that Larry Melton was not using the pickup truck owned by William Kenneth Baucom with the express or implied permission of Baucom, nor was Larry Melton in lawful possession of the Baucom truck at the time of the collision in question on August 27, 1973. The trial judge further concluded that Baucom's liability carrier (Aetna Casualty and Surety Company) did not provide coverage for Melton on the occasion of the collision in question and that Melton's liability carrier (National Grange Mutual Insurance Company) did provide coverage for Melton on the occasion of the collision in question.

Judgment was rendered in favor of the plaintiff against National Grange Mutual Insurance Company.

Martin, Howerton, Williams & Richards, by Neil C. Williams, for the plaintiff.

Golding, Crews, Meekins, Gordon & Gray, by Rodney Dean and C. Byron Holden, for Aetna Casualty and Surety Company.

Wade & Carmichael, by R. C. Carmichael, Jr., for National Grange Mutual Insurance Company.

BROCK, Chief Judge.

Appellant makes no argument that the trial judge erred in concluding that Melton was not using the truck with the express or implied permission of Baucom. However, appellant does argue strenuously that the trial judge erred in concluding that Melton was not in lawful possession of the Baucom truck at the time

of the collision. Our discussion, threfore, is confined to the question of lawful possession.

In 1967 the legislature amended G.S. 20-279.21(b)(2) by adding to the persons insured under an owner's liability insurance policy "any other person in lawful possession" of the insured's vehicle.

In the case of *Packer v. Insurance Co.*, 28 N.C. App. 365, 221 S.E. 2d 707 (1976), this Court briefly reviewed the legislative and judicial history of the statutorily required liability coverage under an owner's liability insurance policy and made reference to two of the appellate cases which had dealt with the 1967 amendment. *See Insurance Co. v. Broughton*, 283 N.C. 309, 196 S.E. 2d 243 (1973), and *Jernigan v. Insurance Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972). *See also Insurance Co. v. Chantos*, 25 N.C. App. 482, 214 S.E. 2d 438 (1975), where the original permittee's permission to another to drive the car constituted lawful possession by the second permittee so as to afford coverage under the owner's policy, although there was no express or implied permission from the owner.

In *Packer, supra*, there was evidence that an employee of the owner of a truck was instructed to take the truck to his home over the weekend and to pick up other employees on Monday morning to transport them to the job site. The employee did not have permission to drive the truck for his personal use. On Saturday while driving the truck for his personal use, the employee negligently caused injuries to plaintiff. We held that this evidence was sufficient to support a jury verdict finding that the employee was in lawful possession of the truck and to support a judgment holding the owner's liability carrier liable.

Concerning the 1967 amendment, we stated in *Packer:* "Clearly the legislature intended a change in the [owner's] liability insurance coverage previously required by statute." In *Packer*, it was our opinion that the intent of the legislature was that North Carolina should follow no less than the liberal rule discussed in 5 A.L.R. 2d 600, 622, which is set out as follows:

> "The employee need only to have received permission to take the vehicle in the first instance, and any use while it remains in his possession is 'with permission' though that use may be for a purpose not contemplated by the assured when he parted with possession of the vehicle."

It is argued that by the 1967 amendment to the coverage requirement for an owner's liability insurance policy ("any other person in lawful possession"), the legislature intended that the owner's liability coverage should extend to cover any operator of the owner's vehicle except a thief. However, because of other North Carolina statutes, coverage of "any other person in lawful possession" does not seem to cause such a significant extension of coverage.

At the time of the 1967 amendment to G.S. 20-279.21 (b) (2), which added to those persons insured under an owner's liability insurance policy "any other person in lawful possession" of the owner's vehicle, we had in effect in this State G.S. 20-105 which provided in pertinent part:

> "Any person who drives or otherwise takes and carries away a vehicle, not his own, without the consent of the owner thereof, and with intent to temporarily deprive said owner of his possession of such vehicle, without intent to steal the same, is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person."

Although G.S. 20-105 was repealed by Session Laws 1973, Chapter 1330, Sec. 39, effective January 1, 1975, Sec. 38 of the same Chapter 1330 enacted what now appears as G.S. 14-72.2, also made effective January 1, 1975. General Statute 14-72.2(a) and (b) provide:

> "(a) A person is guilty of an offense under this section if, without the consent of the owner, he takes, operates, or exercises control over . . . a motor vehicle . . . of another.
>
> "(b) Consent may not be presumed or implied because of the consent of the owner on a previous occasion . . . given to the person charged or to another person."

The current criminal statute, like its predecessor, presents a formidable obstacle to finding a person to be in lawful possession without some prior consent of the owner. We recognize that the current statute (G.S. 14-72.2) has been declared void for vagueness *(State v. Graham,* 32 N.C. App. 601, 233 S.E. 2d 615 (1977); nevertheless, the current statute, like its predecessor, shows a clear legislative intent to make it unlawful for

a person to take or operate the motor vehicle of another without the consent of the owner, and the consent of the owner on a prior occasion does not presume or imply consent on a later occasion.

In the present case it is clear that Melton did not have the consent of either Baucom or Harrington for Melton to take and operate the truck at the time that he did so and at the time of the collision in question. It is now obvious that neither Baucom nor Harrington would have caused Melton to be prosecuted for a violation of the criminal statute. Nevertheless, does Harrington's after-the-fact statement that he would have given Melton permission to use the truck keep Melton's conduct at the time he took and drove the truck from being in violation of the provisions of the criminal statute? It is argued that the close kinship and social ties between Melton and Harrington and the family purpose of the use of the truck by Melton mitigate against Melton's possession of the truck being in violation of the criminal statute, and particularly so in the light of Harrington's after-the-fact expression of consent to Melton's use.

In determining the legislature's intent when it enacted the "any other person in lawful possession" amendment to G.S. 20-279.21(b)(2), we cannot overlook the intent of that same body in its enactment of the popularly called "temporary larceny" and "unauthorized use" statutes (G.S. 20-105, repealed effective 1 January 1975; and G.S. 14-72.2, enacted effective 1 January 1975). Although Melton may not have possessed *mens rea* and although his conduct may not have been *malum in se*, nevertheless, his act was *malum prohibitum* by legislative enactment. The very conduct which constituted the violation of a criminal statute cannot be said to have placed Melton "in lawful possession" for purposes of liability insurance coverage. If the legislature wishes to extend the owner's automobile liability insurance coverage of "any other person in lawful possesson" to encompass the facts of this case, it will have to adapt its criminal statutes to that intent.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL McKOY

No. 7610SC1041

(Filed 1 June 1977)

1. **Constitutional Law § 50— speedy trial — violation of right — factors to consider**

The determination whether the constitutional right to a speedy trial has been violated involves four main factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy trial; and (4) prejudice resulting to the defendant from the delay.

2. **Constitutional Law § 54— speedy trial — absence of witness — no abridgement of right**

Defendant's contention that he was prejudiced by the twenty-two month delay of his trial for the reason that an allegedly crucial witness became unavailable is without merit, since defendant stated a desire to have as witnesses either four or five people who were present at or about the time of the killing; all of those witnesses except one were present at the trial and it is doubtful that the missing witness's testimony would have helped defendant; and there was no showing that the witness was available seven months after the date of the crime or at any time thereafter.

3. **Criminal Law § 91— setting of trial date — oral requests insufficient**

Oral requests for the setting of a trial date made by defendant's counsel to the district attorney were not sufficient to entitle defendant to a dismissal under the provisions of G.S. 15-10.2(a), since that statute requires that such requests be sent to the district attorney by registered mail.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 11 August 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1977.

In a bill of indictment returned in February 1975 defendant was charged with the murder of James Franklin Lee (Lee) on 12 October 1974. He was placed on trial for second-degree murder and pled not guilty.

Before the case was called for trial, the court conducted a hearing on defendant's motion to dismiss for failure of the State to provide him with a speedy trial. The court denied the motion and further facts pertaining thereto are hereinafter set forth.

Evidence presented by the State is summarized in pertinent part as follows:

Edmond Gibson testified: Around 11:00 or 12:00 o'clock on the day in question he, defendant, Lee and several others were at defendant's apartment in Raleigh. An argument developed between defendant and Lee; defendant slapped Lee after which Lee went to his girl friend's house and returned with a gun. While Lee was gone defendant borrowed a gun. When Lee returned to defendant's apartment defendant ordered him to halt and to leave by the count of ten. Anna Wright began counting and when she reached eight or nine, defendant shot Lee. Gibson could not see whether Lee, before he was shot, attempted to draw his gun out of his waistband where it was hidden under his shirt.

Charles Goodwin testified: He saw the shooting, did not see Lee attempt to draw his gun, and saw Lee's gun still in his waistband after he fell.

Mary Virginia Justice Watson testified: When Lee reentered defendant's house, defendant said he would blow Lee's head off and told Anna Wright to start counting. When Anna reached eight, she (Watson) ran out of the room and did not see the shooting.

Detective D. R. Turnage testified: He heard the witnesses Watson and Goodwin make statements regarding the shooting soon after it occurred and their statements made then were the same as those given at trial. Anna Wright was also indicted for murder but the charge against her was dismissed.

Dr. Gordon LeGrand testified that the victim died from a gunshot wound to his head; that the victim was wearing a turtleneck shirt at the time his body was examined the day after the shooting.

Defendant presented no evidence.

The jury found defendant guilty of voluntary manslaughter and from judgment imposing prison sentence of 18 years, he appealed.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Ragsdale, Liggett & Cheshire, by Joseph B. Cheshire V and William J. Bruckel, Jr., for defendant appellant.

BRITT, Judge.

By the first assignment of error argued in his brief defendant contends the trial court erred in denying his motion to dismiss because of the State's failure to afford him a speedy trial.

On the question of speedy trial, the record discloses:

The alleged offense occurred on 12 October 1974 and indictment was returned in February 1975. A warrant was issued for defendant on 12 October 1974 and he was arrrested six days later. At the time of the alleged offense, defendant was on parole from a sentence previously imposed following his conviction of involuntary manslaughter. Shortly after his arrest on 18 October 1974 his parole was revoked.

In a letter to the Clerk of the Superior Court of Wake County, from the supervisor of combined records at Central Prison, dated 25 April 1975 and acknowledging receipt of a detainer on defendant, the court was advised that the approximate release date of defendant from the 7-10 year sentence he was then serving would be 6 April 1979. The letter further stated that defendant had an additional sentence of three years which would terminate on 19 May 1981.

On 22 January 1976 defendant's present counsel filed an affidavit and a motion to dismiss, the contents of which are summarized in pertinent part as follows: He was appointed to represent the indigent defendant in November 1974. The case was scheduled for trial on 2 June 1975 but was continued on motion of the State. Defendant's counsel made oral requests to the district attorney for a new trial date on three occasions in June 1975, on two occasions in July 1975, and again in August, September, October and December of 1975. Defendant's parole in a former case had been revoked because of his arrest in this case and he has done nothing to delay the trial of this case. Defendant's counsel has been unable to locate four material witnesses, namely, Charles Goodwin, Edmond Gibson, Mary Virginia Justice and Clare Jones. Defendant has been prejudiced

by the delay of his trial and asks that the charges against him be dismissed or, in the alternative, that if his witnesses can be located that he be given an early trial.

On or about 19 February 1976 defendant filed a motion for a material witness order for the four witnesses named above and for Anna Wright. At the same time he filed a request and motion for voluntary discovery and a motion for examination of witnesses. On 27 February 1976 Judge McKinnon entered an order granting most of the relief requested in these motions.

On 3 March 1976 Judge McKinnon entered an order denying defendant's motion to dismiss but "without prejudice to the defendant's right to show new circumstances when the case is calendared for trial." He further ordered that the case be calendared for trial at or before the 3 May 1976 session of the court.

On 8 June 1976 defendant filed another motion to dismiss or, in the alternative, for a speedy trial.

On 9 August 1976 Judge McLelland conducted a hearing on defendant's motion to dismiss, following which he entered an order summarized in pertinent part as follows: The case was calendared for trial on 12 April 1976 but was not called, defendant's counsel not being available for trial. During the month of June, Judge McKinnon extended the time for trial specified in his order of 30 (sic) March 1976. The trial was next calendared for the 9 August 1976 session and all of the witnesses alleged to be material, except Anna Wright, are available. Although Anna Wright is regarded by defendant as a material and crucial witness, there is no showing that she was not available at the 12 April 1976 session and there is no sufficient showing that she is a crucial witness. Judge McLelland concluded that Judge McKinnon's order regarding a trial date had not been violated, that the delay in defendant's trial date had not been unreasonable, and that defendant had not been prejudiced by the delay; he denied the motion to dismiss.

[1] It is now firmly established that the determination whether the constitutional right to a speedy trial has been violated involves four main factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to speedy trial; and (4) prejudice resulting to the defendant from the delay. *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659

(1972); *State v. O'Kelly*, 285 N.C. 368, 204 S.E. 2d 672 (1974). *See also Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972).

[2] While the length of delay in absolute terms is never *per se* determinative, admittedly a delay of 22 months, as in this case, could contravene the right to a speedy trial under some circumstances, and such delay should be avoided if possible. *State v. Brown, supra.* It appears that defendant's primary contention is that he was prejudiced by the delay of his trial for the reason that Anna Wright, a crucial witness, became unavailable.

It is noted that in his 22 January 1976 motion to dismiss defendant did not list Anna Wright as a witness material to his defense. He did include her name in his February 1976 motions.

At the hearing on his motion to dismiss before Judge McLelland defendant called as a witness Attorney Wade Smith who represented defendant for several months following his arrest. Mr. Smith testified that he talked with Anna Wright during that time and that she told him she was living with defendant on the day of the shooting; that when Lee returned to defendant's apartment "the word was out" that he had a gun; that defendant gave Lee ten seconds to get out of his apartment and told her to start counting; that while she was counting, Lee "stuck his hands up in his coat" and defendant shot him.

The State countered Smith's testimony with that of Detective Turnage. He testified that he talked with Anna Wright on the day of the killing and again on 21 October 1974. On the former date she gave him very little information. On the latter date she stated, among other things, that while she was counting as directed by defendant and reached eight or nine, defendant shot Lee; that defendant then threw the gun he had on the couch and left; that she at no time stated that she saw Lee "stick his hand up in a coat as if to get a gun." Turnage further testified that he went to the scene of the killing immediately after it happened; at that time he found Lee lying on his face in a pool of blood directly under his head; that Lee did not have a coat on his person at that time and there was no coat in the immediate vicinity of the body.

We think Judge McLelland's conclusion that defendant failed to show prejudice by the unavailability of Anna Wright

at the trial is fully supported by the evidence. Furthermore, the record indicates that Anna Wright could not be located in May 1975 or at anytime thereafter.

Defendant relies very heavily on *State v. O'Kelly, supra.* We think the facts in that case clearly distinguish it from the case at hand. In *O'Kelly,* in September 1972 the defendant, who was charged with felonious housebreaking and larceny, filed a written petition asking for a trial at the October 1972 session of the court. As grounds for a speedy trial, the petition alleged that four witnesses material to the defense were then available; that they were itinerant workers and their continued availability was extremely doubtful. The State failed to call the case for trial as requested and on 5 June 1973 defendant filed a motion to dismiss for failure of the State to afford him a speedy trial. At the hearing on his motion defendant offered evidence tending to show that the four witnesses in question were very material to his defense and were no longer available. The trial court denied the motion to dismiss, defendant was placed on trial in July 1973, none of the four witnesses could be found and defendant was convicted. The Supreme Court held that the trial court erred in not granting the defendant's motion to dismiss.

In the case at hand defendant stated a desire to have as witnesses either four or five people who were present at or about the time of the killing. It appears that all of those witnesses except Anna Wright were present at the trial and that it is very doubtful that her testimony would have helped defendant. Furthermore, there was no showing that Anna Wright was available in May of 1975 or at any time thereafter.

[3] By the other assignment of error argued in his brief defendant contends the trial court erred in denying his motion to dismiss when the trial was held more than 16 months after the detainer was filed and more than 14 months after demand for speedy trial was made upon the district attorney, in violation of G.S. 15-10.2.

G.S. 15-10.2(a) provides in pertinent part:

> "Any prisoner serving a sentence or sentences within the State prison system who, during his term of imprisonment, shall have lodged against him a detainer to answer to any criminal charge pending against him in any court within the State, shall be brought to trial within eight

months after he shall have caused to be sent to the district attorney of the court in which said criminal charge is pending, *by registered mail,* written notice of his place of confinement and request for a final disposition of the criminal charge against him; . . . . " (Emphasis added.)

The record does not disclose that defendant ever made a request for trial "by registered mail" as required by the quoted statute. In *State v. White,* 270 N.C. 78, 153 S.E. 2d 774 (1967), the defendant did not make his request for trial by registered mail to the district attorney but instead he sent a letter to the clerk of the superior court. The Supreme Court held that there was not sufficient compliance with the statute to entitle the defendant to a dismissal. *See also Farrington v. State of North Carolina,* 391 F. Supp. 714 (M.D.N.C. 1975).

We hold that the oral requests which defendant's counsel in the case at hand made to the district attorney were not sufficient to entitle defendant to a dismissal under the provisions of the quoted statute. We hold that the trial court did not err in denying defendant's motion to dismiss.

In defendant's trial and the judgment entered, we find

No error.

Judges PARKER and MARTIN concur.

JOHN HENRY KEY, EMPLOYEE v. WAGNER WOODCRAFT, INC., EMPLOYER AND IOWA NATIONAL MUTUAL INSURANCE COMPANY, CARRIER

No. 7618IC884

(Filed 1 June 1977)

1. Master and Servant § 90— workmen's compensation — failure to give written notice of accident — reasonable excuse — absence of prejudice

The evidence supported the Industrial Commission's determinaion that plaintiff employee was reasonably excused from giving written notice to his employer within thirty days after the alleged accident and that the employer was not prejudiced by the absence of written notice where it showed that the employer's plant manager heard of plaintiff's injury about ten minutes after it occurred; plaintiff told his foreman on the next work day that he had been having pain since

moving some lumber the preceding work day and was being put in the hospital; plaintiff related details of the occurrence to the plant manager while in the hospital some two weeks later; and plaintiff was hospitalized, put in traction and operated upon before returning to work four months later.

2. Master and Servant § 65— workmen's compensation — ruptured disc — accident

A ruptured disc suffered by plaintiff when he attempted to help a fellow employee lift a heavy piece of unfinished lumber resulted from an accident within the meaning of the Workmen's Compensation Act where plaintiff's usual job was operating a variety saw; on the date in question plaintiff was requested to help a fellow employee straighten some scrap pieces of lumber; and when plaintiff took hold of one end of a heavy board he felt a stinging sensation in his neck.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 13 August 1976. Heard in the Court of Appeals 10 May 1977.

Plaintiff seeks compensation from his employer and its compensation carrier for an alleged injury by accident arising out of and in the course of his employment. A hearing was held before Commissioner Vance after which he made the following "Findings of Fact":

"1. Plaintiff is a thirty-six year old married, male employee with three children. He had worked with the defendant employer eleven or twelve years prior to this alleged injury by accident.

"2. His title with the company was machine operator full time on the variety saw. He also operated other machines in the department trimming and finishing furniture.

"3. During the period of this alleged injury all employees were on short time due to the lack of orders. Many employees were asked to deviate from their normal tour occasionally in order to get in their hours. Plaintiff hardly ever moved any rough lumber. On rare occasions he had but it had been some time since this had been the case prior to April 30, 1975.

"4. On April 30, 1975 plaintiff had work in his line of work on the machine to do, but about 2:15 p.m. his foreman, Pete Rush, asked him to go help Bill Canaham, another machine operator in the machine room, to straighten up some scrap pieces of lumber on a wagon so a load of

new lumber could be unloaded and stacked on the wagon. This wagon was approximately knee high.

"5. Approximately ten minutes prior to quitting time at 2:30 p.m. Bill Canaham was trying to raise a large piece of lumber up so some scraps could be moved from underneath it. The piece of lumber was between two and three inches thick, thirty inches wide and eighteen feet long. He could not come up with it alone. Plaintiff took a hold of one end and tried to help him raise the board. When the board was about at a sixty degree angle plaintiff felt a stinging sensation in his neck. He thought a bee had stung him. He asked Bill Canaham to look and see if he could see where a bee had stung him. His neck kept stinging and about thirty minutes later there was a pain down his left arm. He was off work and home by this time. The pain continued to get worse until he was operated on. He had never had this much neck discomfort and pain prior to April 30, 1975.

"6. Plaintiff went to High Point Memorial Hospital on May 4, 1975 and was seen by Dr. Michael B. Hussey complaining of pain in the neck, left shoulder and arm and stated he had had these symptoms four days. He was seen by Dr. Johnson and Dr. Wood on May 5, and admitted to the hospital for a myelogram. He was operated on May 15, 1975 for a large, soft disc between the sixth and seventh cervical vertebra.

"7. It was unusual for plaintiff to handle any heavy lumber in the course of his normal duties as a machine operator.

"8. Plaintiff went to shop on Monday, May 5, 1975 and told Pete Rush, his foreman, he had been having trouble since moving the lumber and was going to have to be put in the hospital. A company supervisor overheard in the break room, from another employee within ten minutes of this incident, that plaintiff had gotten hurt. Mr. David Simpson, plant manager, visited plaintiff while in the hospital and delivered some money to him that had been taken up by his fellow employees. Plaintiff told Mr. Simpson what had happened on that occasion.

"9. Plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on April 30, 1975 and was temporarily totally disabled from May 1, 1975 to the date he reached maximum improvement on August 27, 1975. He sustained a 15% permanent partial disability to the back as a result of his injury by accident.

"10. Plaintiff's employer had knowledge of the injury by accident on April 30, 1975 per notification by plaintiff to his supervisor at the shop and the plant superintendent at the hospital which is a reasonable excuse for not giving written notice. Furthermore the undersigned is satisfied that the employer has not been prejudiced thereby."

The hearing commissioner concluded that plaintiff sustained an injury by accident arising out of and in the course of his employment; that plaintiff was temporarily totally disabled from 1 May 1975 to 27 August 1975 and is entitled to compensation for this period; that as a result of the injury plaintiff sustained a 15% permanent partial disability to his back; and that defendants are responsible for payment of such medical expenses incurred by plaintiff as are approved by the Industrial Commission.

From an award to plaintiff, defendants appealed to the full commission. The full commission adopted as its own and affirmed the opinion and award of Commissioner Vance. Defendants appealed to this court.

Gardner and Tate, by Raymond A. Bretzmann, for plaintiff appellee.

Henson & Donahue, by Perry C. Henson and Richard L. Vanore, for defendant appellants.

BRITT, Judge.

[1] First, defendants contend that the commission erred in determining that plaintiff was reasonably excused from giving written notice to his employer within thirty days after the alleged accident and that the employer had not been prejudiced thereby. We find no merit in this contention.

G.S. 97-22 provides in part that no compensation shall be payable to an employee unless written notice is given within

thirty days after the occurrence of the accident, "unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." The commission determined that plaintiff was reasonably excused from not giving written notice since the "employer had knowledge of the injury by accident on April 30, 1975 per notification by plaintiff to his supervisor at the shop and the plant superintendent at the hospital . . . . " The commission also determined that the employer had not been prejudiced by the lack of written notice.

We think there is competent evidence to support the commission's determination. The statute requires that reasonable excuse must be made to the satisfaction of the commission and that it must be satisfied that the employer has not been prejudiced thereby. Obviously, the commission was satisfied by plaintiff's evidence and we agree. Evidence presented at the hearing indicates that on the date of the injury, 30 April 1975, the plant manager heard of the alleged injury by accident about ten minutes after it occurred. During plaintiff's hospitalization in May, 1975, the plant manager, Mr. Simpson, visited plaintiff who related the details of the occurrence to him. After the alleged accident plaintiff returned on the next work day, 5 May 1975, and told his foreman, Pete Rush, that he had been having pain since moving the lumber the preceding Wednesday and that he was being put in the hospital. Plaintiff also went to the office and told the owner, Mr. Wagner, that he was being sent to the hospital. The evidence shows that plaintiff was hospitalized, put in traction and operated upon before returning to work four months later. Since the evidence is sufficient to support the commission's findings that reasonable excuse for not giving the required written notice was shown, and that the employer was not prejudiced by the failure to give written notice, the findings are conclusive on appeal. G.S. 97-86; *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971).

[2] Defendants next contend that the commission erred in finding that the plaintiff sustained an injury by accident arising out of and in the course and scope of his employment. We find no merit in this contention.

To be compensable under our Workmen's Compensation Act, G.S. 97-1, *et seq*, an injury must result from an accident

which is to be considered as a separate event preceding and causing the injury, and the mere fact of injury does not of itself establish the fact of accident. *Jackson v. Highway Commission,* 272 N.C. 697, 158 S.E. 2d 865 (1968); *Bigelow v. Tire Sales Co.,* 12 N.C. App. 220, 182 S.E. 2d 856 (1971).

> "To sustain an award of compensation in ruptured or slipped disc cases the injury to be classed as arising by accident must involve more than merely carrying on the usual and customary duties in the usual way. . . . Accident involves the interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. . . . " *Harding v. Thomas & Howard Co.,* 256 N.C. 427, 429, 124 S.E. 2d 109, 111 (1962).

In *Bigelow v. Tire Sales Co., supra,* this court affirmed the commission's determination that a 48-year-old employee, who had worked with his employer for 20 years and sustained a ruptured disc while he was attempting to put a 900-pound tire on a tractor hub, sustained an injury by accident within the meaning of the Workmen's Compensation Act where the position of the tractor on a hillside prevented the employee from following his customary work routine in installing the tire.

In *McMahan v. Supermarket,* 24 N.C. App. 113, 210 S.E. 2d 214 (1974), the plaintiff had been employed as a stock clerk and bag boy for some three months prior to the alleged accident. On the date in question, he had been stocking shelves in the stockroom when he was asked to deliver a case of dog food to a customer's car. When he reached down to pick up the case of dog food, he felt a stinging pain in his left groin which later was diagnosed as a hernia or rupture. The commission found that plaintiff's duties were to stock the stockroom, load, unload and bag, and that the handling of the case of dog food constituted an interruption of his usual work routine resulting in an injury by accident. This court affirmed the determination of the commission.

In *Keller v. Wiring Co.,* 259 N.C. 222, 130 S.E. 2d 342 (1963), the claimant suffered a ruptured disc when he picked up and removed a rock from a ditch he was digging. The removal of the rock necessitated a twisting movement which increased the stress on the vertebrae. The Supreme Court approved a finding of the commission that claimant had sustained an injury by accident.

In *Davis v. Summitt,* 259 N.C. 57, 120 S.E. 2d 588 (1963), claimant suffered an injury when he attempted to elevate and hold a cabinet, weighing approximately 175 pounds, in place while another employee fastened it to the wall. The task of elevating and holding the cabinet in place was usually assigned to two men, but in this instance claimant was performing it by himself. This evidence was held sufficient to support the commission's finding that claimant suffered a compensable injury by accident arising out of and in the course of his employment.

In *Edwards v. Publishing Co.,* 227 N.C. 184, 41 S.E. 2d 592 (1947), plaintiff was required to lift a plate weighing between 40 and 50 pounds from the floor and twisting to his right, hand it to a pressman. When he did so, he felt a severe pain in the lower part of his back which was subseqently diagnosed as a ruptured disc. The court held that, "[t]he evidence of the sudden and unexpected displacement of the plaintiff's intervertebral disc under the strain of lifting and turning as described lends support to the conclusion that the injury complained of should be regarded as falling within the category of accident, rather than as the result of inherent weakness, or as being one of the ordinary and expected incidents of the employment." For similar results, see also *Searcy v. Branson,* 253 N.C. 64, 116 S.E. 2d 175 (1960); *Dunton v. Construction Co.,* 19 N.C. App. 51, 198 S.E. 2d 8 (1973); *Moore v. Sales Co.,* 214 N.C. 424, 199 S.E. 605 (1938).

In the present case plaintiff had worked as a machine operator for most of his eleven years on the job. While he could operate all of the machines his usual job involved operating the variety saw. He handled finished lumber almost exclusively, in trimming out the furniture and finishing it up. Although he seldom handled heavy pieces of unfinished lumber, on the date in question he was requested to help a fellow employee straighten some scrap pieces of lumber. The fellow employee was attempting to raise a large piece of lumber so some scraps could be moved from underneath it. When plaintiff took hold of one end of the heavy mahogany board he felt a stinging sensation in his neck as though a bee had stung him. The pain continued and his injury was subsequently diagnosed as a ruptured disc.

The commission concluded that plaintiff sustained an injury by accident arising out of and in the course of his employ-

ment. We think the evidence is sufficient to support the conclusion that it was an injury by accident in that the evidence shows that plaintiff was not carrying out his usual and customary duties, and that the circumstances involved an "interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Harding v. Thomas & Howard Co., supra.*

The award of the Industrial Commission is, therefore,

Affirmed.

Judges PARKER and MARTIN concur.

STATE OF NORTH CAROLINA v. JAMES L. McNEILL

No. 7612SC1006

(Filed 1 June 1977)

1. **Searches and Seizures § 2— warrantless search of apartment — authority of lessee to give consent**

The lessee of an apartment who paid the rent was a person authorized to give consent to a search of the premises, including a bedroom which she shared with defendant, even though defendant occasionally gave her money which she used to pay the rent. G.S. 15A-222(3).

2. **Criminal Law §§ 75.10, 75.15— confession — voluntariness — defendant not under influence of drugs**

Evidence was sufficient to support the trial court's findings that defendant was advised of and waived his rights before voluntarily and understandingly making statements to the police and that defendant was not under the influence of drugs and understood what he was doing when he made the statements, and such findings will not be disturbed on appeal.

3. **Criminal Law § 40.2— motion for free transcript — denial not prejudicial**

Defendant was not prejudiced by the denial of his motion for a free transcript of evidence at his first trial which ended in a mistrial where such denial did not limit his ability to cross-examine one witness concerning her identification of defendant and her identification of the gun allegedly used in the commission of the crime; furthermore, defendant could have subpoenaed the court reporter who took the transcript at the first trial to testify from her notes at his second trial, but he elected not to do so.

4. Criminal Law § 40.2— retrial of indigent after mistrial — transcript provided defendant

If the State intends to retry an indigent defendant after a mistrial, the defendant, upon his timely request, should be provided with the effective use of the trial transcript.

APPEAL by defendant from *Herring, Judge.* Judgment entered 1 July 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 4 May 1977.

Defendant was indicted and convicted of armed robbery. Judgment was entered imposing a prison term of 30 years.

Attorney General Edmisten, by Associate Attorney James E. Scarbrough, for the State.

Carter & Cogswell, by Robert C. Cogswell, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's first assignment of error is that the trial court erred in denying his motion to suppress the introduction of the shotgun that was seized as a result of a search of a room occupied by defendant on 18 December 1975. Defendant's contention on this issue is twofold. He first argues that Margaret Smith was not in a position to give a valid consent to the search of the room within which he was residing on the date of the search and wherein the sawed-off shotgun was discovered by police officers. His second argument against the admission of the shotgun into evidence at his trial is, assuming that there was not a valid consent given to search the apartment, the search and seizure of the item was actually made incidental to his arrest and as such any search should have been limited to the immediate vicinity or control of defendant and beyond that area the police officers were bound by the "plain view doctrine."

[1] During the pre-trial hearing on defendant's motion to suppress the shotgun, evidence for the State tended to establish the following: Margaret Smith, the lessee of the apartment at which defendant was residing, testified that she leased and paid the rent on the apartment in question. Defendant did give her money from time to time which she used to pay the rent, and he had been living with this witness for approximately three weeks. On the morning of 18 December 1975, the police came

to her apartment and at her invitation they entered the premises. The police asked her if she knew the defendant. By this time defendant had come into the living room and the police asked him for some identification. The police officers asked defendant to be seated in the living room and requested that Miss Smith step into the kitchen for further questioning. She told the police that she had seen a shotgun in the apartment a few weeks earlier, and that she had requested the defendant to remove it from the premises. The police after ascertaining that she paid the rent and had leased the apartment, requested and received her permission to search the apartment. During this search the shotgun was found in the bedroom shared by defendant and the witness.

Defendant offered evidence tending to show that he had on occasion given Margaret Smith money to pay the rent and other household expenses and that it was his understanding that he had exclusive control over the bedroom that he shared with Miss Smith and that she could only enter the room without first obtaining his permission in order to get her clothing that was stored therein.

Based on this evidence the trial judge made the appropriate findings of fact and concluded as a matter of law:

> "That the sawed-off shotgun found under the bed in a bedroom at 2106 Arthur Street, Apartment D, on December 18, 1975, in the City of Fayetteville, North Carolina, was discovered as a result of a search by a police officer with the permission and consent of the lessee of the apartment who was a person reasonably apparently entitled to give consent, and was in fact entitled to give or withold consent to a search of the premises, and was not a search incident to an arrest."

Because there is competent evidence to support the findings of fact and conclusion of law set forth above, they are conclusive on appeal. Margaret Smith was a person authorized to give consent to a search of the premises. G.S. 15A-222(3).

[2] Defendant's second assignment of error is that the trial judge erred in denying his motion to suppress all incriminating statements made by him, both oral and written, after his arrest on 18 December 1975. Defendant made an oral statement on the morning of 18 December 1975 to the effect that on Wednesday,

10 December 1975, a Thomas Whitley came to the apartment where defendant was staying and stated that he didn't have any money. Whitley asked if defendant had a gun and defendant told him that he was holding a weapon for someone else. Defendant stated that it was Whitley's idea to rob the Little Giant on Pamalee Drive that night. Defendant thought it over and decided to participate. They went to the Little Giant and waited outside until the customers left. When the clerk on duty went to the back of the store, they went inside and opened the cash register. At this point the clerk came back. Whitley held a gun on the clerk while they emptied the cash register. Before they left the store they put the clerk in the storage room. After they divided the money, they went their separate ways. Defendant took the shotgun back to Margaret Smith's apartment. Defendant's handwritten statement tends to corroborate the oral statement but defendant refused to sign a typewritten version. Defendant testified that he did not deny making the statements but that he was under the influence of drugs when he made them.

In his brief, defendant contends that since there was "just as much sufficient evidence to support those findings not entered by the Court as there . . . [was] to support those findings entered by the Court" then the trial court could have just as easily rendered "a finding that the statement was involuntary just as easily as the Court rendered its opinion that the statement was voluntary." This contention has no merit. Following a properly conducted voir dire hearing on the admissibility of defendant's in-custody statements, the court found facts with respect to defendant being fully advised of and waiving his rights and concluded that he freely, knowingly, voluntarily waived his rights and made statements to the police. The court found that defendant was not under the influence of drugs and that he understood what he was doing when he made the statements. The trial court's findings are supported by competent evidence, and will not be disturbed on appeal. *State v. McAllister,* 287 N.C. 178, 214 S.E. 2d 75.

[3] During defendant's first trial, it appears that his grandmother tried to talk with several of the jurors and persuade them that defendant was not guilty. Thereafter, defendant moved for a mistrial and the motion was allowed. On the same day he moved for a free transcript of the testimony given by Mary Henry, the clerk in the store where the robbery occurred,

and Detective Pearson, one of the investigating officers. The motion was denied. The denial of that motion is the subject of defendant's third assignment of error.

It has long been settled that, as a matter of equal protection, the State must provide indigent defendants with the basic tools of an adequate defense on appeal, when they are available for a price to other defendants. "While the outer limits of that principle are not clear, there can be no doubt that the State must provide an indigent defendant with a transcript of prior proceeding when that transcript is needed for an effective defense or appeal." *Britt v. North Carolina,* 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431. In *Britt* the Court again considered two factors it had previously deemed relevant in determining whether the transcript was needed for an effective defense (1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript.

The only argument defendant advances on appeal to sustain his contention that he was prejudiced is that it limited his ability to cross-examine the witness, Mary Henry. In his brief he says that the only reason he requested the transcript was for the purpose of impeaching her as to her identification of defendant and her identification of the gun.

With respect to Mary Henry's identification of defendant as being one of the robbers, the thrust of defendant's cross-examination was that the witness had failed to identify defendant in a lineup conducted about two weeks after the robbery. At both trials, Mary Henry frankly admitted that she could not identify defendant as being anyone she had seen in a lineup. At both trials she said that if she had ever seen defendant in a lineup she did not recognize him. We have examined the record of both of the transcripts that defendant brings forward and conclude that there was nothing more that defendant could have elicited on that point if he had had the first transcript. We must note also that, although defendant testified in his own behalf, he offered no evidence that he was ever placed in a lineup. There was no evidence from either the State or the defendant that defendant was in a lineup viewed by Mary Henry.

Defendant's counsel also cross-examined the witness about her identification of the shotgun. While being examined by the State at the first trial, the following took place:

"Q. What type of gun was it?

A. It appeared to be a shotgun.

MR. COGSWELL: Objection. Move to strike.

COURT: Overruled.

Q. Can you describe the shotgun?

A. Well, I was very frightened and I'm not sure that I can describe the gun. I mean I'm just not sure."

At the second trial defendant cross-examined the witness as follows:

"Q. Mrs. Henry, do you recall testifying previously in this matter that you couldn't identify that gun when you saw it in the previous matter?

A. (pause)

Q. You being here previously and testifying?

A. No.

Q. You were shown that gun but you said you couldn't identify it, do you recall that?

MR. ANDERSON: Objection.

COURT: Overruled.

A. No, sir.

Q. You don't recall sitting on that stand and saying I'm not sure that I can identify that gun?

A. I don't remember whether I said that or not, I mean it's similar.

Well, I mean I only saw it for a few seconds. He had the gun. I can't be absolutely sure. I didn't have my hands on that gun, he did. I have seen the gun once before I came here and testified and now. The second time I have seen it was here today."

Again, we fail to see how defendant's cross-examination could have been aided by a transcript.

The mistrial was ordered on 19 May 1976. Defendant was called for trial on the same charge on 1 July 1976. He was tried before the same judge and was represented by the same attorney. In his brief he admitted that the court reporter who took the transcript at the first trial could have been subpoenaed and called to testify from her notes at his second trial. Almost the same circumstances existed in *Britt* except that in that case the Court noted that the court reporter was friendly with the lawyers and would have read his notes to counsel well in advance of trial if counsel had requested him to do so. Our record is silent on what the court reporter might have done in advance of trial. Defendant well knew, however, that he could call the reporter to testify and elected not to do so. We conclude that the record before us affirmatively discloses that the transcript was not needed for an effective defense of the defendant at his second trial. Moreover, if there was error in the denial of the motion, it was harmless beyond a reasonable doubt and does not require a new trial.

It is our notion, however, that this is one of those rare cases where, after the fact, an appellate court can determine with certainty, that there was no prejudice in the denial of a transcript of the first trial. The utility of a transcript needs no explanation to those lawyers whose abilities are tested regularly in the crucible of a trial courtroom.

[4] Free transcripts are now routinely provided for indigents in order to allow them to prepare for the direct appeals to which they may be entitled as a matter of right. In the event of a new trial, the State and the defendant have had the benefit of that transcript. We see no reason why the same routine should not also be followed in the relatively few instances where a mistrial has been ordered. The benefits of the availability of a transcript of the first trial, to the State as well as the defendant, are manifest. No longer should the appellate courts be called upon to consider the casuistic arguments advanced to justify the absence of what has come to be a common tool in preparation for an appeal or retrial. Henceforth, if the State intends to retry an indigent defendant after a mistrial, the defendant, upon his timely request, should be provided with the effective use of the trial transcript.

Defendant has brought forward a number of other assignments of error. All of them have been carefully considered. We conclude that they fail to disclose prejudicial error.

No error.

Chief Judge BROCK and Judge CLARK concur.

STATE OF NORTH CAROLINA v. IRENE BOOMER, CLEVELAND ROBERTS, AND ERVING ROBERTS

No. 764SC917

(Filed 1 June 1977)

1. **Larceny § 7— larceny of hogs — identification of hogs — sufficiency of evidence**

In a prosecution for felonious larceny of three hogs having a value of $225, evidence was sufficient to show that two feeder pigs identified by the owner and his hand at a livestock market to which defendants sold the pigs were the same feeder pigs allegedly stolen where the evidence tended to show that that particular livestock market did not normally have feeder pigs on its lot because of higher prices prevailing elsewhere; the employee of the market testified that he put the pigs sold by defendants in a separate pen segregated from the other stock; the pigs identified by the owner and his hand were scratched and bruised; tracks on the owner's land indicated that the pigs had been dragged away; the owner's farm hand specifically identified one of the pigs from a peculiar rupture associated with its castration; and the employee of the livestock market had noted the ruptured incision on the castrated pig when defendants claimed the pig was a boar and tried to explain the rupture.

2. **Larceny § 7— larceny of hogs — possession of recently stolen property — sufficiency of evidence**

The issue of felonious larceny of three hogs having a value of $225 was properly submitted to the jury under the doctrine of possession of recently stolen property where the evidence tended to show that within a span of less than three hours and fifteen minutes, one top hog and two feeder pigs were taken from the owner's hog pen, dragged some eleven hundred yards to a tobacco barn, enclosed in the tobacco barn some period of time, subsequently loaded into an automobile, and driven to a livestock market where the two feeder pigs, valued between $120 and $130, were sold by defendants. The fact that the top hog, valued at $100, was not actually seen in defendants' possession did not preclude a verdict of guilty of felonious larceny, since G.S. 14-72 requires the State to prove the value of the "property taken," not the property possessed by the accused, to be in excess of $200.

3. Larceny § 4— larceny of hogs — sufficiency of description in indictment

In a prosecution for felonious larceny the description of the stolen property in the indictment as "three hogs" was sufficiently certain, and it was not required that the property be described as one top hog and two feeder pigs.

APPEAL by defendants from *Lanier, Judge.* Judgment entered 8 June 1976 in Superior Court, JONES County. Heard in the Court of Appeals 12 April 1977.

Defendants were indicted for the felonious larceny of three hogs having a value of $225.00. They were also indicted for feloniously receiving the said hogs, knowing them to have been stolen.

At trial the State presented evidence which tended to show the following: Ward Parker owned and raised for market forty hogs which he kept at various places on his farm. On the morning of 9 March 1976 at about 9:30 a.m., Parker and an employee went to one of the locations to feed and chcek on the animals. The particular location consisted of approximately an acre of land enclosed by an electrified fence which also contained a pen. At the morning feeding there were eight feeder pigs weighing approximately one hundred pounds each in the pen. Within the fenced area there were nine top hogs, each weighing around two hundred pounds.

Parker went back to the pen between 1:00 p.m. and 2:00 p.m. of the same day. He noticed that two feeder pigs and one top hog were missing. It had been raining intermittently during the day, and because of the condition of the ground, Parker could discern tracks indicating the animals had been dragged away. The sheriff was notified. When the deputy sheriff arrived at the scene, he discovered three distinct sets of tracks of a type that would be made if animals were being pulled or dragged. He followed the tracks some eleven hundred yards along a railroad track, across a marsh to a tobacco barn. Inside the barn he observed hoof prints. Outside the barn he found tire marks indicating that a car had been backed up to the barn. The tobacco barn was some three hundred yards away from the defendants' residence.

At approximately 12:45 p.m. on 9 March 1976, the defendants pulled up to the pens of the Trenton Livestock Market in a dark colored Chevrolet with a cream colored top. One of the

male defendants asked an employee of the market what price top hogs were bringing. Upon receiving an answer, the two male defendants opened the trunk which contained two feeder pigs in bruised and battered condition. The employee of the livestock market informed defendants that their animals were not top hogs but were feeder pigs. He told them that they could get twice as much money as he was authorized to pay if they sold the animals at a feeder pig sale. The defendants sold the pigs to Trenton Livestock Market. The feeder pigs weighed a total of one hundred seventy-five pounds. The employee became suspicious when the defendants told him one of the pigs was a boar, even though it had been castrated. He put the pigs in a separate pen and wrote down the license number of defendants' car. At trial the employee identified the defendants as the persons who had sold him the pigs. Further evidence revealed that the car was registered to defendant Boomer.

On 10 March 1976 Parker, his farm hand, and the deputy sheriff went to the Trenton Livestock Market, and Parker and his hand identified the two feeder pigs. The top hog was never found. The State introduced further evidence that tended to show that the market price for top hogs was in the vicinity of fifty cents per pound. Parker was of the opinion that his missing top hog weighed two hundred pounds, thus giving it a fair market value of $100.00. The market price for feeder pigs over fifty pounds was from seventy to seventy-five cents a pound, thus giving them a fair market value of between $120.00 and $130.00.

At the close of the State's evidence the trial court dismissed the count of receiving. Defendants moved for nonsuit. Their motion was denied. Defendants did not put on evidence. The case was submitted to the jury under instructions for both felonious larceny and misdemeanor larceny. The jury returned a verdict of guilty of felonious larceny, and judgment imposing imprisonment was entered.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Brock & Foy, by Louis F. Foy, Jr., for the defendants.

BROCK, Chief Judge.

Defendants have brought forward their sixth, seventh, and ninth assignments of error in three arguments. In the first

of these they argue that the trial court erred in denying their motion for nonsuit as to felony and misdemeanor larceny; in the second they maintain that there was insufficient evidence to submit an issue of felony larceny to the jury; and in the third they contend that there was insufficient evidence to support a verdict of guilty of felony larceny. These three variously worded assignments of error present but one question—whether the State's evidence was sufficient to withstand motion for nonsuit. If it was, it constituted substantial evidence warranting submission of the issue to the jury on the one hand and sufficient evidence to support the verdict on the other.

[1] Defendants argue that their motion for nonsuit as to any charge of larceny should have been granted because the State's evidence was insufficient to show that the two feeder pigs identified by the owner and his hand at the livestock market were the same feeder pigs allegedly stolen. We disagree. The State's evidence tended to show that the Trenton Livestock Market did not normally have feeder pigs on its lot because of higher prices prevailing elsewhere. The employee of the market testified that he put the pigs in a separate pen segregated from other stock. Testimony showed that the pigs identified by Parker and his hand were scratched and bruised. Parker's farm hand specifically identified one of the pigs from a peculiar rupture associated with its castration. The employee of the livestock market had noted the ruptured incision on the castrated pig when one of the defendants claimed the pig was a boar and tried to explain the rupture. Taken in the light most favorable to the State, the evidence identifying the feeder pigs as the ones stolen was sufficient to submit to the jury.

[2] Next defendants contend that even if the evidence is sufficient to identify the two feeder pigs as the ones stolen, the evidence is nevertheless insufficient to show felonious larceny. They argue correctly that the State had to, and did in fact, rely on the theory of possession of recently stolen property. Defendants go on to argue that if larceny was shown at all through the possession, it could only be misdemeanor larceny because of the $120.00 value of the feeder pigs. We disagree. It is well settled that all of the essential elements of larceny must be established by sufficient, competent evidence; and the essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture. *State v. Delk,* 212

N.C. 631, 194 S.E. 94 (1937); 6 Strong, N. C. Index 3d, Evidence, § 21, p. 60. Before the presumption of guilt stemming from possession of recently stolen property can attach, the State must show by positive or circumstantial evidence a *prima facie* larceny of the goods. 50 Am. Jur. 2d, Larceny, § 149, p. 330.

At trial the State offered evidence to the effect that Parker owned the hogs; that at 9:30 a.m. on 9 March 1976, Parker and his hand accounted for all the hogs; that at 1:00 p.m. the same day, three were missing; and that three distinct sets of drag marks led from the pen area to a tobacco barn some eleven hundred yards away, wherein hog tracks were observed. The latter is circumstantial evidence of taking and asportation. It is also substantial evidence in that it raises a logical inference of taking and asportation of three animals rather than a mere conjecture or surmise.

In their tenth assignment of error defendants maintain that the only evidence of possession showed actual possession not of "the three hogs," but of only two of the hogs—the two feeder pigs. Possession of a part of the recently stolen property under some circumstances warrants the inference that the accused stole all of it. The inference of guilt is not always repelled by the fact that only part of the recently stolen property is found in the possession of the accused. The evidence in this case tends to show that within a span of less than three hours and fifteen minutes, one top hog and two feeder pigs were taken from Parker's hog pen, dragged some eleven hundred yards to a tobacco barn, enclosed in the tobacco barn some period of time, subsequently loaded into an automobile, and driven to the Trenton Livestock Market where the two feeder pigs were sold. This evidence supports a strong inference that the top hog and the two feeder pigs were taken from Parker's hog pen at the same time by the same persons, dragged to the tobacco barn at the same time by the same persons, enclosed in the tobacco barn at the same time by the same persons, and loaded into one vehicle at the same time by the same persons. Such evidence also supports a strong inference that the persons who possessed and sold the two feeder pigs are the same persons who stole and possessed the top hog and the two feeder pigs. The only thing left to conjecture is how and where the persons disposed of the top hog. We hold, therefore, that the issue of

felonious larceny was properly submitted to the jury under the doctrine of possession of recently stolen property.

The State further produced competent evidence showing the fair market value of the three hogs to be in excess of $200.00. General Statute 14-72 requires the State to prove the value of the "property taken," not the property possessed by the accused, to be in excess of $200.00. Taken together, the evidence substantially showed all the elements of felonious larceny.

What is substantial evidence is for the court to decide, but what the evidence proves or fails to prove is for the jury, it being the jury's province to pass on circumstantial evidence and determine whether it excludes every other reasonable hypothesis. *State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100 (1968). The jury was instructed on both felonious larceny and misdemeanor larceny. The evidence before it was substantial on all material elements of both offenses, and its determination was consonant with that evidence.

[3] In defendants' eleventh assignment of error brought forward in their final argument, defendants contend that the trial court erred in denying their motion to arrest judgment. They argue that the indictments against them were fatally defective in that the description of the property stolen was not sufficiently certain. The indictments described the property taken as "three hogs" rather than one top hog and two feeder pigs. This argument is without merit.

"A motion in arrest of judgment on the ground of a defective indictment will not be granted unless it is so defective that judgment cannot be pronounced on it." *State v. Martin,* 13 N.C. App. 613, 186 S.E. 2d 647 (1972). Whether the description of property in a larceny indictment is sufficient or so defective as to be void depends on the certainty educed by the description. The property alleged to have been taken must be described with "reasonable certainty." 50 Am. Jur. 2d, Larceny, § 124, p. 300.

Reasonable certainty is attained when the description reasonably informs the accused of the transaction meant, when it protects the accused in the event of subsequent prosecutions for the same offense, when it enables the court to see that the property described is the subject of larceny, and when it enables the jury to say that the article proved to be stolen is the same

as the one described. *State v. Caylor*, 178 N.C. 807, 101 S.E. 627 (1919). When describing an animal, it is sufficient to refer to it by the name commonly applied to animals of its kind without further description. A specific description of the animal, such as its color, age, weight, sex, markings or brand, is not necessary. 50 Am. Jur. 2d, Larceny, § 127, p. 303. The general term "hogs" in the indictment sufficiently describes the animals taken so as to identify them with reasonable certainty. The motion in arrest of judgment was properly denied.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. MICHAEL EUGENE TRAVIS

No. 7625SC920

(Filed 1 June 1977)

1. **Criminal Law § 92.1— consolidation of charges against two defendants — attorney as witness**

Defendant was not prejudiced by the consolidation for trial of identical charges against defendant and a codefendant because one of his witnesses was the attorney who appeared in the case representing the codefendant where, at the time the testimony was given, the charges against the codefendant had been dismissed on his motion for nonsuit made at the close of the State's evidence, and there was ample additional evidence of the fact to which the attorney testified.

2. **Criminal Law § 43.2— photographs — accuracy**

Where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating his testimony relative and material to some matter in controversy.

3. **Criminal Law § 43.2— photographs — obscene writings**

Photographs of obscene writings on the walls and mirrors of a home were properly admitted for the purpose of illustrating an officer's testimony as to what he saw in the home where the officer testified that the photographs accurately showed the obscene writings about which he testified.

4. **Criminal Law § 60.1— photographs of obscene writings — comparison with handwriting**

The trial court properly permitted a handwriting expert to use a photograph of obscene handwriting on the walls and mirrors of a home for the purpose of comparing the handwriting shown therein with known samples of defendant's handwriting and to testify that

it was highly probable that defendant was the author of the handwriting on the photographs.

5. **Criminal Law § 60.3— handwriting — expert testimony — basis for opinion**

The trial court did not err in permitting a handwriting expert who compared the writing in question with samples of defendant's handwriting to give his opinion that defendant wrote the questioned writing without giving the facts upon which his opinion was grounded, since the court has the discretion to allow an expert to give his opinion and leave the facts to be brought out on cross-examination.

6. **Criminal Law § 86.5— impeachment — conduct when a juvenile**

The trial court did not err in permitting the impeachment of defendant on cross-examination by questions eliciting evidence of bad conduct committed by defendant when he was a juvenile.

7. **Burglary and Unlawful Breakings § 7— failure to submit misdemeanor breaking and entering**

In this prosecution for felonious breaking and entering, the trial court did not err in failing to submit an issue as to defendant's guilt of misdemeanor breaking and entering where the State presented uncontradicted evidence that a home was broken into and personal property was removed therefrom and substantial evidence that defendant was guilty of this offense, and where defendant's evidence tended to show that he was not guilty of any offense.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 22 July 1976 in Superior Court, CATAWBA County. Heard in the Court of Appeals 12 April 1977.

Defendant was indicted for (1) felonious breaking and entering of the dwelling occupied by Clarence Derrick with the intent to commit the felony of larceny therein, and (2) felonious larceny after such breaking and entering. He pled not guilty.

The State's evidence showed that at some time between 22 and 25 June 1975 the Derrick residence in Newton was broken into while the family was away on vacation. A screen had been cut and a window opened on the north side of the house, a screen cut on the west side, and the basement door had been opened. Extensive damage had been done and acts of vandalism committed throughout the entire house. Obscenities had been written on walls and mirrors. Two watches, a tent, a canteen, a hunting knife, and a pocket knife were missing from the house.

An SBI handwriting expert compared samples of defendant's handwriting with photographs of the obscenities written

on the walls and mirrors, and testified that in his opinion it was highly probable that defendant wrote the obscenities. Defendant's father testified that in July 1975 defendant told him that he had broken into the house and had written obscene language on the walls and mirrors.

Defendant testified and denied he had broken into the house or that he had confessed to his father that he had done so. He offered evidence to show that his father and mother were divorced, that he lived with his mother, and that his father was extremely antagonistic to him and his mother. He also offered evidence to show that during the entire period from 22 to 25 June 1975 he was either at home, at a driver education class, or with relatives.

The jury found defendant guilty of felonious breaking and entering and not guilty of larceny. From judgment sentencing him as a committed youthful offender, defendant appealed.

Attorney General Edmisten by Associate Attorney Sandra M. King for the State.

Randy D. Duncan for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the court's consolidating for trial the charges against him with identical charges against one Kerry Gant. Joinder for trial of the charges against the two defendants was authorized by G.S. 15A-926(b)(2)a. Moreover, "[o]rdinarily, unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s)." *State v. Jones,* 280 N.C. 322, 333, 185 S.E. 2d 858, 865 (1972). Defendant contends that consolidation for trial resulted in prejudice to him in the present case because one of his witnesses was the attorney who appeared in the case representing Gant. We find no irreparable prejudice from this fact. The witness did testify for the defendant concerning the hostility which defendant's father, a witness for the State, had expressed toward defendant and his mother in a conversation prior to defendant's trial when defendant's father had tried to employ the attorney to represent him in connection with nonsupport charges then pending against him. This evidence was, of course,

material to defendant, since it tended to show the bias of one of the State's principal witnesses against him. However, defendant was in no way deprived of the benefit of this evidence by the consolidation of the cases for trial, nor do we perceive how the effect of the testimony was weakened or why the jury should have accorded it less credence because it was given by the attorney who had appeared for his co-defendant, Gant. At the time the testimony was given, the charges against Gant had already been dismissed on his motion for nonsuit made at the close of the State's evidence, and there was ample additional evidence to show the antagonism existing between defendant's father and mother. Defendant has failed to show that irreparable prejudice resulted from the consolidation of the cases for trial. In the absence of a showing that the joint trial deprived defendant of a fair trial, the exercise of the trial court's discretion in ordering the consolidation will not be disturbed upon appeal. *State v. Phifer,* 290 N.C. 203, 225 S.E. 2d 786 (1976). Defendant's first assignment of error is overruled.

[2, 3] Defendant's second assignment of error is that "[t]he court erred in allowing the State to use photographs as substantive evidence for purposes of handwriting comparison without adequate foundation assuring the accuracy of the process producing the photographs." The photographs in question, which were admitted in evidence as State's exhibits 18 and 19, clearly depict some of the obscene matter written across the surface of a mirror in one of the bedrooms in the house. Officer Gurnsey, the detective-sergeant with the Newton Police Department who investigated the break-in at the Derrick home, testified that the photographs were made under his supervision and direction and that they "fairly and accurately show the obscene writings on the wall, and the handwriting that I testified to earlier that I saw in the home of the Derricks." It has long been the rule in this State that where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of explaining or illustrating his testimony relative and material to some matter in controversy. *State v. Tew,* 234 N.C. 612, 68 S.E. 2d 291 (1951). "Accuracy is established where, as here, it is shown by extrinsic evidence that the photograph is a true representation of the scene, object or person it purports to portray." *State v. Foster,* 284 N.C. 259, 269, 200 S.E. 2d 782, 790 (1973). The photographs were admitted over defendant's general objection, and there was no request that their use be lim-

ited or restricted. When a general objection is interposed and overruled, it will not be considered reversible error if the evidence is competent for any purpose. *State v. Walker,* 6 N.C. App. 447, 170 S.E. 2d 627 (1969); 1 Stansbury's N. C. Evidence (Brandis Revision), § 27. Here, the photographs were competent under long established precedent for the purpose of illustrating the testimony of Officer Gurnsey as to what he saw in the Derrick house. Therefore, the court did not err in admitting them in evidence over defendant's general objection.

[4] In this case the photographs, State's exhibits 18 and 19, were also used in connection with the testimony of the State's witness, D. C. Matheny, an SBI agent who was qualified and held by the court to be an expert in the field of handwriting identification. Agent Matheny testified that he had received the photographs, State's exhibits 18 and 19, from Officer Gurnsey and had compared the handwriting shown therein with known samples of defendant's handwriting. After making this comparison, Agent Matheny testified that in his opinion it was "highly probable" that defendant was the author of the questioned handwriting on State's exhibits 18 and 19. In our opinion this use of the photographs by Agent Matheny is supported by the decision of our Supreme Court in *State v. Foster, supra.* In that case the Court sustained the use by a fingerprint expert of an enlarged photograph of a latent fingerprint found at the scene of a crime for comparison with a known fingerprint of the defendant, the card containing the original latent fingerprint from which the enlarged photograph was made having been lost and not being available at the trial. In the present case the only practicable way of preserving the handwriting on the walls and mirrors in the Derrick home was by means of the photographs. We hold that the use of the photographs by Agent Matheny for purposes of making the comparison was proper and that his resulting opinion testimony as an expert after making the comparison was admissible in evidence under the holding in *State v. Foster, supra.*

[5] Defendant's third assignment of error is that "[t]he court erred in allowing the handwriting expert to give his opinion without giving the facts upon which his opinion was grounded." In this connection the record shows that the State's handwriting expert was permitted to testify that, after comparing the questioned handwriting shown on State's exhibits 18 and 19 with known handwriting samples of defendant, he had formed an

opinion as to whether the writing shown on State's exhibits 18 and 19 was the handwriting of defendant. Then, over defendant's objection, the witness was permitted to testify that in his opinion it was highly probable that defendant wrote the questioned writing. In support of his third assignment of error, defendant contends it was error for the court to permit the expert to express his opinion without first testifying in greater detail as to why he arrived at it. We find no error. When the facts upon which an expert witness bases his opinion are within the expert's own knowledge, he may relate them himself and then give his opinion; or, within the discretion of the trial judge, he may give his opinion first and leave the facts to be brought out on cross-examination. *State v. Hightower,* 187 N.C. 300, 121 S.E. 616 (1924); 1 Stansbury's N. C. Evidence (Brandis Revision), § 136. The latter course was followed in this case, and defendant's third assignment of error is overruled.

[6] Defendant next assigns error to the court permitting, over objection, impeachment of the defendant on cross-examination by questions eliciting evidence of bad conduct. The defendant objected to the following:

"Q. Did you ever break into Mrs. John Cline's house?

A. We were charged with that.

Q. I am not asking you if you were charged with it. Did you break into it?

DUNCAN: OBJECTION

EXCEPTION NO. 6

Yes, I did do that. I picked up a wristwatch at the house. I didn't do any damages there."

Defendant argues the questions were improper because the conduct inquired about related to transgressions committed by him as a juvenile. We find no error. "It is permissible for the purpose of impeachment to cross-examine a defendant in a criminal case by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct, since such questions relate to matters within the knowledge of the witness." *State v. Black,* 283 N.C. 344, 350, 196 S.E. 2d 225, 229 (1973). That the questioned conduct was committed by defendant when he was a juvenile makes no difference, as defendant by taking the stand in his own behalf was subject to

cross-examination as to specific acts of misconduct. Since defendant put his credibility in issue by testifying, the inquiries about his past acts of misconduct were relevant and properly admitted by the trial court.

[7] Defendant next contends that the court erred in failing to to submit to the jury an issue as to defendant's guilt or innocence of the lesser included offense of misdemeanor breaking and entering.

> "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. . . . Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks,* 241 N.C. 156, 159-60, 84 S.E. 2d 545, 547 (1954).

Here, uncontradicted evidence presented by the State showed that the Derrick home was broken into and articles of personal property were removed therefrom. This evidence, if believed, would show a felonious breaking and entering. The State also presented substantial evidence from which the jury could find that defendant was guilty of this offense. The defendant's evidence, on the other hand, showed he was not guilty of any offense. Thus, there was no evidence from which the jury could find that the lesser included crime of misdemeanor breaking and entering was committed, unless one surmises that the jury might accept the State's evidence in part and might reject it in part. This will not suffice. *State v. Hicks, supra.* There was no error in failing to submit an issue as to defendant's guilt or innocence of misdemeanor breaking and entering.

Defendant finally assigns error to the failure of the court to set aside the verdict or to order a new trial because of duplicate indictments. We find no error. The only apparent differences between the two indictments are corrections in the later indictment of misspellings of certain words in the larceny count in the earlier indictment. That the solicitor is not restricted to the first indictment found in a criminal case, but at any time before entering upon the trial may send another bill to the grand jury and require the defendant to answer it, is the recognized practice for the convenient and necessary administration

of the criminal law. *State v. Hastings,* 86 N.C. 596 (1882). Defendant's final assignment of error is overruled.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. HUBERT MOSLEY

No. 7628SC996

(Filed 1 June 1977)

1. Criminal Law § 87.2— questions not leading

Questions propounded by the district attorney to a State's witness which directed the witness's attention to the subject matter at hand without suggesting an answer or sought to aid the witness's recollection or refresh her memory when the witness had exhausted her memory without stating the particular matters required were not leading questions and were permissible in the discretion of the court.

2. Criminal Law § 53.1— bullet entry — explanation of discrepancy between testimony and report

Where defendant offered testimony by the medical examiner and the medical examiner's written report which conflicted as to which side of the decedent's neck the fatal bullet entered, testimony elicited by the district attorney from the medical examiner that an opinion after an autopsy was more reliable than his opinion gained from a cursory examination in the emergency room was not objectionable as hearsay or conjecture and was properly admitted to explain the discrepancy between the medical examiner's direct testimony and his medical report.

3. Homicide § 21.7— second degree murder — sufficiency of evidence

The evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of second degree murder and to support a verdict of guilty of voluntary manslaughter where it tended to show that defendant and deceased lived together in defendant's residence; they argued frequently and defendant had threatened to kill deceased; the body of deceased was found lying on the bedroom floor of defendant's residence; defendant told officers that he and deceased had been struggling over a gun and it went off and shot her; defendant produced the gun and there were two spent rounds and four live rounds in the cylinder; one bullet had entered the left side of deceased's neck and exited on the right side; this gunshot wound

caused deceased's death; and both defendant and deceased were right handed.

APPEAL by defendant from *Baley, Judge.* Judgment entered 25 August 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 4 May 1977.

Defendant was charged with the murder of Jay Ola Morris on 8 April 1976. Upon defendant's plea of not guilty, he was tried by jury and found guilty of voluntary manslaughter. Judgment was entered imposing a prison sentence of not less than eight nor more than twelve years.

The State's evidence tends to show the following: On 8 April 1976, and for some time prior thereto, defendant and Jay Ola Morris lived together in defendant's home at 57 Washington Road in Asheville along with Jay Ola's daughter, Belinda, and Belinda's child. Jay Ola and defendant argued frequently, and defendant had threatened to kill Jay Ola. Shortly after 10:00 p.m., in response to a call, police officers went to defendant's residence. Jay Ola Morris' body was lying on the bedroom floor with a pool of blood under her head. Defendant told the officers that he and Jay Ola had been struggling over a gun, and it went off and shot her. Defendant produced a .38 caliber, six-shot revolver and identified it as the gun they struggled over. There were two spent rounds and four live rounds in the cylinder. An autopsy disclosed that one bullet had entered the left posterior neck, ranged slightly forward, transected the cervical spinal cord, and exited the right neck beneath the right ear. This gunshot wound caused the death of Jay Ola Morris. The autopsy further disclosed that deceased's blood alcohol content was the equivalent of .27 on the breathalyzer. Defendant was also under the influence of alcohol.

Defendant's evidence tends to show the following: Jay Ola Morris had been living with defendant for about three years, during which time defendant supported her. Jay Ola was prone to drink heavily from time to time. When defendant arrived home from work on 8 April 1976, Jay Ola was drinking. She began trying to discuss going on a trip to New York. Defendant told Jay Ola she was in no shape to discuss the trip and that they would talk about it later. Jay Ola became angry. Defendant told her he had to go to his daughter's house on business. Jay Ola told defendant he could not go, and they

argued and scuffled on the porch and in the house. Jay Ola took the .38 caliber pistol from a drawer in the bedroom, and defendant scuffled with her over the pistol. Both Jay Ola and defendant were right handed. Two shots were fired about five seconds apart. Defendant knew of only one shot. When the pistol fired, Jay Ola fell to the floor in the bedroom. The medical examiner testified that the bullet entered on the left side of the neck and came out on the right side; however, his report stated: "Gunshot wound of the right side of the neck and passing out on the left and going through the cord." The report was introduced in evidence by the defendant.

On cross-examination the medical examiner explained that the report was dictated from his cursory examination of the body in the hospital emergency room but that the later autopsy by the pathologist disclosed that the actual path of the bullet was from the left side of the neck to the right.

Attorney General Edmisten, by Associate Attorney Sandra M. King, for the State.

Penland & Barden, by Talmage Penland, for the defendant.

BROCK, Chief Judge.

[1] In his first assignment of error defendant argues that the trial court committed prejudicial error in allowing the district attorney to propound to the State's witness questions which defendant contends were leading. An examination of the questions does not convince us that they fall within the traditional abuse of suggesting the answers or seeking to secure a yes or no answer. The district attorney was either directing the witness's attention to the subject matter at hand without suggesting an answer or was seeking to aid the witness's recollection or refresh her memory when the witness had exhausted her memory without stating the particular matters required. Both are permissible in the discretion of the trial judge.

In the recent case of *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974), the Supreme Court had the following to say about leading questions:

> "It is generally recognized that an examining counsel should not ask his own witness leading questions on direct examination. A leading question has been defined as one

which suggests the answer desired and is a question which may often be answered by yes or no. (Citations omitted.) The rule prohibiting leading questions is not based on a technical distinction between direct examination or cross-examination, but on the alleged friendliness existing between counsel and his witness. It is said that this relationship would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his question. (Citations omitted.) However, it is firmly entrenched in the law of this State that it is within the sound discretion of the trial judge to determine whether counsel shall be permitted to ask leading questions, and in the absence of abuse the exercise of such discretion will not be disturbed on appeal. (Citations omitted.)

"The trial judge in ruling on leading questions is aided by certain guidelines which have evolved over the years to the effect that counsel should be allowed to lead his witness on direct examination when the witness is: (1) hostile or unwilling to testify, (2) has difficulty in understanding the question because of immaturity, age, infirmity or ignorance or where (3) the inquiry is into a subject of delicate nature such as sexual matters, (4) the witness is called to contradict the testimony of prior witnesses, (5) the examiner seeks to aid the witness' recollection or refresh his memory when the witness has exhausted his memory without stating the particular matters required, (6) the questions are asked for securing preliminary or introductory testimony, (7) the examiner directs attention to the subject matter at hand without suggesting answers and (8) the mode of questioning is best calculated to elicit the truth. (Citations omitted.)"

[2] In his second assignment of error defendant contends that the trial court committed prejudicial error in permitting certain testimony by Dr. Walker, the medical examiner. Defendant called Dr. Walker as a witness for the defense. This was obviously done for the purpose of placing before the jury the medical examiner's report which stated: "Gunshot wound of the right side of the neck and passing out on the left and going through the cord." However, Dr. Walker testified on direct examination that the "track of the bullet extended from the skin of the neck on the left side passing all the way through and coming out on the right side." This testimony was the exact opposite of the

witness's written report. Defendant did not attempt to clarify the discrepancy; he merely introduced the written report in evidence.

The State's witness, the pathologist who performed the autopsy, had testified on direct examination, as did defendant's witness, that the bullet entered on the left side of the neck and exited on the right side. The pathologist's testimony was also the exact opposite of the written report by the medical examiner. On cross-examination of defendant's witness, the medical examiner, the district attorney sought to clarify the discrepancy between his testimony on direct examination and the content of his written report. The medical examiner testified that the statement on his written report was his opinion at that time. He continued: "The pathologist had a different opinion after he was able to expose the neck." The examination of the witness continued as follows:

"Q. And after exposing the neck would he be in a position more fully to determine?

"A. I think so.

"Q. Then although you had indicated in this preliminary medical examiner's report that it was the right side of the neck and passing out the left side, that was probably an error, is that what you are telling us now?

OBJECTION BY THE DEFENSE.

OBJECTION OVERRULED.

"A. I'm afraid I'm a little confused. My statement, report statement, stated it came in the right side of the neck, but after the pathologist was able to open the neck, he could determine it came from the other way.

OBJECTION BY THE DEFENSE.

"A. There were 2 small holes. You couldn't tell one from the other.

OBJECTION OVERRULED.

"My inspection was a cursory one, just a physical examination of the body. There is no question whatsoever but that she had died from a gunshot wound. It's easier and

better to determine the cause of death after you've cut the person open and run probes through it."

Obviously the path of the bullet was an important feature in determining whether the shooting was an accident. Jay Ola was right-handed, and in struggling with defendant over the pistol, she could have been holding the gun in her right hand if the bullet entered the right side of her neck, traveled slightly to the rear, and exited at her rear left neck. On the other hand, it would be unlikely that she was holding the gun if the bullet entered her left rear neck, traveled slightly forward, and exited at her right neck. Defendant was more content with the statement in the medical examiner's written report, but that does not render incompetent the explanation by the medical examiner of the discrepancy between his testimony on direct examination and the written report. Defendant offered both the testimony and the report of the medical examiner. The State was entitled to clarify the discrepancy between the two. The testimony was not objectionable as hearsay or conjecture. The witness was merely explaining that an opinion after an autopsy was more reliable than his opinion gained from a cursory examination in the emergency room. Also, the State was entitled to cross-examine defendant's witness and to impeach the accuracy of his written report.

[3] Defendant timely made motions for nonsuit at the close of the State's evidence and again at the close of all the evidence. He assigns as error the denial of his motion made at the close of all the evidence. When a defendant offers evidence, he waives the motion for nonsuit made, either actually or by virtue of G.S. 15-173.1, at the close of the State's evidence; and only his motion lodged at the close of all the evidence will be considered. *State v. Paschall,* 14 N.C. App. 591, 188 S.E. 2d 521 (1972). "In considering the motion for nonsuit lodged at the close of all the evidence, any portion of defendant's evidence which is favorable to the State and any portion of defendant's evidence which explains or clarifies the State's evidence is to be considered." *Id.* at 593, 188 S.E. 2d at 522.

"When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of the defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy

them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland,* 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965); *State v. Nobles,* 14 N.C. App. 340, 188 S.E. 2d 600 (1972).

We have considered *State v. Jones,* 280 N.C. 60, 184 S.E. 2d 862 (1971); *State v. Allred,* 279 N.C. 398, 183 S.E. 2d 553 (1971); *State v. Griffin,* 273 N.C. 333, 159 S.E. 2d 889 (1968); and *State v. Holshouser,* 15 N.C. App. 469, 190 S.E. 2d 420 (1972), cited by the defendant in support of his argument for nonsuit. As conceded by defendant, these cases are naturally distinguishable on their facts from the present case. We think they are also sufficiently distinguishable from the present case to render them not controlling upon these facts.

The present case is more comparable and analogous to *State v. Nobles, supra,* and *State v. Christopher,* 29 N.C. App. 231, 223 S.E. 2d 835 (1976). When the evidence in the present case, actual and circumstantial, offered by the State and by the defendant, is considered in the light most favorable to the State, and when the State is given every reasonable inference arising therefrom, we think the evidence is sufficient to survive the motion for nonsuit and to require submission of the case to the jury.

Defendant argues one assignment of error to the trial judge's instructions to the jury and one assignment of error to the failure of the trial judge to instruct the jury. We see no point in a discussion of the instructions and these assignments of error. We have reviewed the jury instructions, and in our opinion, they were clear and adequate to apprise the jury of the applicable principles of law.

Defendant's final assignment of error is formal and requires no discussion.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. SHERMAN WILLIAMS

(No. 7612SC928)

(Filed 1 June 1977)

1. **Criminal Law § 91— mistrial — second trial after prescribed time limits — no dismissal of charges**

Where a criminal is tried within the period prescribed by the Interstate Agreement on Detainers and such trial results in a mistrial, he is not subsequently entitled to have the charges dismissed even though the second trial occurs after the prescribed time limits, so long as the State uses due diligence in prosecuting the case.

2. **Criminal Law § 91.7— continuance — absence of witness — denial proper**

The trial court did not err in denying defendant's motion for continuance made on the ground that one of his witnesses was unavailable to testify, since the testimony which that witness would have offered was similar to testimony of witnesses who were present at trial.

3. **Criminal Law § 66— confrontation between witness and defendant before jury — motion denied — no error**

The trial court in an armed robbery prosecution did not err in denying defendant's motion that the jury be allowed to see defendant and an eyewitness to the crime in close proximity to each other where defendant contended that the witness's description to the police was inadequate since it included nothing about defendant's unusually deformed nose, but there was no evidence that the witness had any difficulty in identifying defendant as the robber.

APPEAL by defendant from *Herring, Judge.* Judgment entered 16 June 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 April 1977.

Defendant was charged by indictment in proper form with three counts of armed robbery and entered a plea of not guilty to each count. He was convicted by a jury on all charges and sentenced to imprisonment for concurrent terms of 25 to 30 years on each count.

The State introduced evidence which tended to show as follows: On 23 May 1975, Tonya Sprague worked at Heritage Jewelers in Fayetteville with Wayne Sessoms, the manager of the store. At approximately 7:30 p.m., customers Roger Benecke and Becky Boatwright entered the store. Defendant entered the store at approximately 7:55 p.m. and asked to see some watches. As Sprague showed watches to defendant, Gerald Carter came into the store and went to where Sessoms was

assisting Benecke and Boatwright. Carter pulled out a pistol, announced that this was a robbery, and ordered everyone into the stockroom at the rear of the store.

Carter then directed Sprague, Sessoms, Benecke and Boatwright to lie down on the floor of the stockroom and held the gun on them while defendant took money from the store's cash register and loose mountings out of the diamond case. Defendant subsequently ordered Sprague to get him watches and rings from the front showcase. She did so, putting the items in a paper bag which defendant held. Meanwhile, Carter went to the rear of the store and took money from Sessom's wallet, ransacked Boatwright's purse and took Benecke's wallet. Defendant again ordered Sprague to lie on the stockroom floor. On Carter's order, Sessoms tied up Benecke and Boatwright. Carter told the victims not to call the police for five minutes, whereupon he and defendant left the store.

Defendant was brought into North Carolina from Virginia on 29 December 1975 pursuant to a detainer, and trial was set for 1 March 1976. Defendant moved for and received a continuance. The trial of this case did not commence until 13 April 1976 and resulted in a mistrial. Defendant subsequently submitted an application for a writ of habeas corpus, contending that he had not been tried within 120 days as required by the Interstate Agreement on Detainers. On 26 May, Bailey, Judge, entered an order which stated, *inter alia:*

> "1. That the above-named defendant is presently confined in the county jail of Cumberland County, State of North Carolina, upon four separate bills of indictment as above numbered charging him with four separate armed robberies;
>
> 2. That the application for a writ of habeas corpus states that the defendant is imprisoned by reason of a detainer from the Commonwealth of Virginia filed according to the terms of the Interstate Agreement on Detainers;
>
> 3. That the Interstate Agreement on Detainers, in summary, requires that when a defendant is held in this state upon a detainer from another state for the purpose of trial,

that trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state;

4. That the authorities of the Commonwealth of Virginia delivered the defendant into the custody of the authorities of the State of North Carolina on December 29, 1975;

5. That the defendant was arraigned in Cumberland County Superior Court on February 2, 1976, on the aforesaid bills of indictment and entered a plea of not guilty, at which time motions were heard and ruled upon;

6. That subsequently the case was set for trial on March 1, 1976, at which time the defendant, Sherman Williams, through his attorney, James M. Cooper, made a motion for a continuance, which continuance was granted by the Court;

7. That subsequently the defendant was tried on April 13, 1976, at which time after presentation of the evidence both by the State and the defendant and after being instructed by the Court, the jury returned into open court and stated that they were hopelessly deadlocked; at which time the Honorable Judge Presiding L. Bradford Tillery withdrew a juror and declared a mistrial;

8. That both the March 1, 1976, and the April 13, 1976, setting of this trial were within the 120 days as required by statute;

9. That James M. Cooper, Attorney for the defendant, upon the ordering of the mistrial by the aforementioned judge presiding requested from the assistant district attorney, Wade E. Byrd, that he be given at least two weeks notice prior to any further calendaring of the case so that he could determine the availability of certain out-of-state witnesses;

10. That the aforementioned attorney for the defendant further requested and received an order from the Court that he be provided with the transcript of the April 13 trial;

11. That said transcript at the present date has not yet been prepared by the court reporter;

12. That the Court finds as a fact that the mistrial ordered on April 15, 1976, by the Honorable L. Bradford Tillery,

Judge Presiding, was due to a deadlocked jury and was not in any way the fault of the State of North Carolina.

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED THAT in the interest of justice and based upon the above findings, the application for a writ of habeas corpus be dismissed and the State for good cause shown be granted 90 days from this date to try this case."

Defendant's second trial on the charge took place on 14 June 1976 and resulted in his conviction.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Tom H. Davis, Jr., for the State.

James M. Cooper for defendant appellant.

MORRIS, Judge.

In his first assignment of error, defendant contends that Judge Bailey erred in dismissing his application for a writ of habeas corpus. We disagree.

The Interstate Agreement on Detainers has been adopted by North Carolina and codified as G.S. 15A-761. Article IV(c) of the Agreement provides:

"In respect of any proceeding made possible by this Article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

[1] Defendant was first brought to trial on 13 April 1976, well within the 120-day limit of Article IV(c). Because of the mistrial, defendant had to be retried on 14 June. As defendant would have it, his trial did not commence until 14 June, after the 120-day period had expired. This contention, however, overlooks the effect of a mistrial upon defendant's statutory right to disposition of the charge. In *State v. George*, 271 N.C. 438, 156 S.E. 2d 845 (1967), our Supreme Court held where a criminal defendant is tried within the period prescribed by the Interstate Agreement on Detainers and such trial results in a mistrial, he is not subsequently entitled to have the charges

dismissed even though the second trial occurs after the prescribed time limits, so long as the State uses due diligence in prosecuting the case.

> " . . . The State, of course, cannot control the fact that a jury is unable to agree upon a verdict and is not chargeable with responsibility under these conditions. In 22A C.J.S. 60, Criminal Law § 472(3), it is said: 'If accused is tried within the statutory time . . . and such trial results in a mistrial, as when the jury failed to agree, accused cannot ignore the mistrial and claim a discharge or dismissal upon the ground that he was not tried within the time fixed by the statute providing for that relief. . . . (W)hile accused is entitled to a speedy retrial by virtue of the constitutional or statutory guaranty of a speedy trial, the statute providing for a discharge or dismissal if accused is not tried within a stated time does not govern the time within which a retrial must be had, and the time for a retrial is a matter of judicial discretion.' " 271 N.C. at 442-43, 156 S.E. 2d 848.

We have reviewed Judge Bailey's order and find no error or abuse of discretion in granting the State an additional 90 days in which to retry the case. Accordingly, this assignment is overruled.

[2] Prior to trial, defendant discovered that, due to circumstances beyond his control, one of his witnesses, Judith L. Chandler, would be unable to testify at trial. Chandler's testimony would have related to defendant's physical appearance at the time of the robbery and contradicted the testimony of the eyewitnesses. He moved for a continuance, and, by order of 14 June 1976, the trial court denied the motion. In his second assignment of error, defendant contends that the denial of his motion for continuance constitutes prejudicial error. We disagree. It is well settled that a motion for continuance is addressed to the sound discretion of the trial court and its ruling thereon is not subject to review absent an abuse of discretion. *State v. Hill,* 287 N.C. 207, 214 S.E. 2d 67 (1975) ; *State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970). Defendant claims that Chandler, who had been his parole officer in Virginia, would have been his most credible witness because his other witnesses had criminal records. However, defendant's witnesses testified as to his appearance on the date of the robbery. Under these cir-

cumstances we find no abuse of discretion in the denial of the motion. *State v. Henderson*, 216 N.C. 99, 3 S.E. 2d 357 (1939); *State v. Shirley*, 12 N.C. App. 440, 183 S.E. 2d 880, *cert. den.*, 279 N.C. 729, 184 S.E. 2d 885 (1971). This assignment is overruled.

[3] In Sprague's testimony, she stated that she observed defendant from a distance of one and one-half feet during the robbery. In her description to the police, she did not mention that defendant's nose was unusual. However, defendant introduced testimony that he had broken his nose as a child and that it had since remained deformed. Defense counsel interrupted Sprague's testimony and requested that the jury be allowed to see defendant and Sprague in close proximity to each other. The court denied the motion and defendant assigns the denial as error. He contends that the demonstration would have enabled the jurors to see better the deformity of defendant's nose and to conclude that Sprague's identification of defendant without mention of his nose was inadequate. Where there is no controlling statutory or procedural rule, the conduct of a trial rests in the sound discretion of the trial court. *Shute v. Fisher*, 270 N.C. 247, 154 S.E. 2d 75 (1967); *Frazier v. Glasgow*, 24 N.C. App. 641, 211 S.E. 2d 852, *cert. den.*, 286 N.C. 722, 213 S.E. 2d 721 (1975); 7 Strong, N.C. Index 2d, Trial, § 5, p. 261. Included in the supervisory power of the trial court is the discretion to control the method of the examination of witnesses. 1 Stansbury, N. C. Evidence, § 25, p. 59 (Brandis Rev. 1973). Here defendant does not contend that the jury did not have an otherwise adequate opportunity to view the condition of his nose. Moreover, there was no evidence tending to show that Sprague had any difficulty in identifying defendant as the robber of the store. Under these circumstances, we hold that the trial court did not abuse its discretion in denying defendant's motion.

Defendant's remaining assignments relate to the instructions to the jury. The charge of the court must be read as a whole, and a new trial will not be granted, even where there is technical error, where it clearly appears that the error is not substantial and could not have affected the result. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). Moreover, the record reveals that defendant did not bring the alleged errors to the trial court's attention prior to the time the jury began its deliberations. "As a general rule, objections to the statement of

contentions and to the review of the evidence must be made before the jury retires, or they are deemed to have been waived." *State v. Ford,* 266 N.C. 743, 746, 147 S.E. 2d 198, 201 (1966). We have examined the charge, however, and hold that it contains no error prejudicial to defendant. These assignments are overruled.

No error.

Judges HEDRICK and ARNOLD concur.

BILLY HAROLD THOMPSON, EMPLOYEE v. FRANK IX & SONS, EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 7622IC877

(Filed 1 June 1977)

1. **Master and Servant § 73— workmen's compensation — meaning of "hand"**

   As used in G.S. 97-31(12), "hand" refers to the fingers and thumb, the hand proper, and the wrist.

2. **Master and Servant § 74— workmen's compensation — permanent partial disability — award for disfigurement**

   An employee who had received compensation for the permanent partial disability of his left hand was entitled to additional compensation for serious disfigurement because of surgical scars on his left forearm above the wrist. G.S. 97-31.

   Judge HEDRICK dissenting.

APPEAL by defendants from Industrial Commission. Order filed by the full Commission 1 September 1976. Heard in the Court of Appeals 14 April 1977.

On 17 December 1974, plaintiff sustained an injury which arose out of and in the course of his employment by defendant Frank Ix & Sons. The injury resulted in the fracture of both bones in plaintiff's left forearm and required surgery to reduce the breakage. The surgery left two scars on plaintiff's arm. Dr. Gregory Holthusen, an orthopedic surgeon, reported that he rated plaintiff's disability "at the wrist at 25%." Thereafter, defendants agreed to pay plaintiff permanent partial disability based upon "25% loss of use of left hand."

Plaintiff subsequently filed a claim before the Commission for additional compensation for disfigurement resulting from the surgical scars. A hearing was held on 13 May 1976 before Deputy Commissioner Christine Denson, and the following order was filed.

"The undersigned finds as facts and concludes as matters of law the following which were entered into by the parties at the hearing as

STIPULATIONS

1. At the time of the injury by accident, the parties were subject to and bound by the provisions of the Workmen's Compensation Act.

2. The employer-employee relationship existed between plaintiff and defendant-employer at such time.

3. Liberty Mutual Insurance Company was the carrier on the risk.

4. Plaintiff's average weekly wage was $201.76.

5. On December 17, 1975, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer.

6. Plaintiff was paid temporary total disability at the rate of $80.00 per week for the period from December 18, 1974, to October 1, 1975, and temporary partial disability during various dates.

The issue is what amount plaintiff is entitled to for disfigurement, if any.

* * * *

Based upon all the competent evidence the undersigned makes the following

FINDINGS OF FACT

1. Plaintiff is a 44-year-old white male who is married and has two years of college education. His job is a 'fixer' in the textile industry. As a result of the injury in question and the injury made necessary to treat the fractures resulting from the injury, the plaintiff has sustained serious bodily disfigurement in scarring described as follows:

This is on the forearm of the left arm. Of both scars, I will describe first on the inside of the forearm. That is on the side toward the thumb. There is a long surgical scar with stitchmarks from it. That runs from a little above the wrist between 7 and 8 inches long. It is a linear scar, indented, lighter, with slightly pinkish cast than the rest of the skin. This scar, as I say, has stitch marks which are themselves about an inch long running out from either side of that scar. Then about the middle of that linear scar and at the end of the stitch marks further toward the inside of the arm is an irregularly-shaped scar which is more indented than the linear scar just described with an overall circumference of about an inch and this has some pink blotchy areas around this.

On the arm is another substantial linear scar which again starts above the wrist. At the point where it starts there is a linear scar running from the wrist toward the inside of the arm which is about an inch and a quarter longer overall, indented, and lighter than the rest of the skin. There is pink discoloration around it. The long linear scar runs from that 6 and a half inches and is slightly indented, white in coloration with pinkish discoloration around that linear scar on both sides. In the middle of that scar too is an irregularly-shaped scar which is slightly indented, whitish in coloration, and the overall width on that is about an inch and a quarter.

3. Plaintiff has been paid compensation for 25 percent loss of the use of his left hand. This was based on a rating from his treating physician, Dr. Holthusen, who, in rating plaintiff's permanent disability, said: 'In view of the scarring to his forearm and the limitation and supination I would rate the disability of the wrist at 25 percent.' Based on this rating—the Commission considering the wrist to be the hand—the plaintiff was paid permanent disability.

The disfigurement in question is to the plaintiff's arm which is a different 'member' of the body under the provisions of G.S. 97-31.

4. As a result of the injury in question, the plaintiff has suffered bodily disfigurement as hereinabove described

which is permanent and serious and is such as would tend to hamper plaintiff in his earnings and in seeking employment.

5. Proper and equitable compensation for said disfigurement is $750.00.

* * * *

The foregoing findings of fact and conclusions of law engender the following additional

CONCLUSIONS OF LAW

The bodily disfigurement sustained by the plaintiff constitutes serious disfigurement within the meaning of the Workmen's Compensation Act which has not otherwise been compensated, and for which proper and equitable compensation is $750.00.

* * * *

Based upon the foregoing findings of fact and conclusions of law the undersigned makes the following

AWARD

1. The defendants shall pay to the plaintiff the sum of $750.00 in a lump sum to cover the serious bodily disfigurement giving rise hereto.

2. Defendants shall pay the costs."

Defendants applied for a review of the award and the full Commission, by an opinion filed 1 September 1976, affirmed and adopted the opinion and award of the deputy commissioner. Defendants appeal from this award.

Morgan, Byerly, Post, Herring & Keziah, by J. V. Morgan, for plaintiff appellee.

Walser, Brinkley, Walser & McGirt, by Walter F. Brinkley, for defendant appellants.

MORRIS, Judge.

The sole issue for consideration on this appeal is whether plaintiff is entitled to be paid compensation for disfigurement after having previously received compensation for the permanent partial disability of his hand.

The rate of compensation payable to employees under the North Carolina Workmen's Compensation Act is set forth in G.S. 97-31, which provides in pertinent part:

> "In cases included by the following schedule *the compensation in each case shall be paid* for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, *and shall be in lieu of all other compensation, including disfigurement,* to wit:
>
> . . .
>
> (12) For the loss of a hand, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 200 weeks.
>
> (13) For the loss of an arm, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 240 weeks.
>
> . . .
>
> (22) *In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule* contained in this section, *the Industrial Commission may award proper and equitable compensation* not to exceed seven thousand five hundred dollars ($7,500)." (Emphasis supplied.)

Thus, G.S. 97-31(22) entitles an employee to compensation for certain disfigurements. However, the first sentence of the statute provides that when disability is paid according to the schedule, such compensation is "in lieu of all other compensation, including disfigurement."

Plaintiff received permanent partial disability based on "25% loss of use of left hand." According to the terms of G.S. 97-31, this precludes him from receiving additional compensation for disfigurement *to the hand.* The question, therefore, is whether the scars on plaintiff's forearm constitute disfigurement to the hand. Of course, in construing the statute, we are guided by the principle that words are to be given their common and ordinary meaning unless they have a technical significance or another meaning is apparent from their context. *Power*

Co. v. Clayton, 274 N.C. 505, 164 S.E. 2d 289 (1968); *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1 (1968).

[1] Some courts have defined "hand" for purposes of workmen's compensation to mean all portions of the arm below the elbow joint. *Western Construction Co. v. Early,* 81 Ind. App. 490, 142 N.E. 396 (1924); *Gondak v. Wilson Gas Coal Co.,* 148 Pa. Super. 566; 25 A. 2d 854 (1942); *National Surety Corp. v. Winder,* 333 S.W. 2d 450 (Tex. Civ. App. 1960). Other jurisdictions hold that the hand includes the phalanges, or fingers and thumb, the metacarpus, or hand proper and the carpus, or wrist. *Finoia v. Winchester Repeating Arms Co.,* 130 Conn. 381, 34 A. 2d 636 (1943); *Pittsburgh Plate Glass Co. v. Williams,* 406 P. 2d 994 (Okla. 1965). We believe that the latter definition better conforms both to the natural and ordinary meaning of the term as well as to common sense. Accordingly, we hold that "hand," as used in G.S. 97-31(12), refers to the fingers and thumb, the hand proper, and the wrist.

[2] The findings of fact describe both scars on plaintiff's left forearm as beginning "above the wrist." Likewise, defendants state in their application for review that the hearing commissioner should have found that "the scarring extends down the arm on both sides to a point *slightly above the wrist.*" (Emphasis supplied.) Thus, there is no evidence which indicates that the scars extended to plaintiff's wrist. Consequently, they cannot be considered to have been incorporated into settlement paying plaintiff 25% permanent partial disability of his hand.

It should be emphasized that we do not, by our decision, authorize double recovery for a single injury compensated pursuant to G.S. 97-31. The evidence in this case tended to indicate that plaintiff's injury resulted in disability to his hand as well as his arm. Since the settlement related only to partial loss of use of plaintiff's hand, he was properly entitled to additional compensation for the disfigurement of his arm.

The order and award of the full Commission is

Affirmed.

Judge ARNOLD concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In my opinion the forearm is part of the "hand" as the latter term is used in the North Carolina Workmen's Compensation Act and the rules promulgated by the Industrial Commission to carry out the provisions of the act. Thus the agreement entered into between the parties providing for the payment of compensation for permanent partial disability to the hand considered in light of G.S. 97-31(22) precludes an additional award for serious bodily disfigurement because of scarring to the forearm. I vote to reverse the order of the Commission.

IN THE MATTER OF: RALPH BERRY AND ABRAHAM WALLACE

No. 7627DC1046

(Filed 1 June 1977)

1. **Criminal Law § 76.5— statements to police — voir dire hearing — failure to make specific findings**

Uncontroverted *voir dire* testimony of an officer that he advised a juvenile of his rights, that the juvenile stated that he understood them, and that the juvenile and his father signed a written waiver of rights form was sufficient to support the trial judge's admission of the juvenile's statements into evidence, even though the trial court failed to make specific findings that such statements were freely, understandingly and voluntarily made.

2. **Criminal Law § 76.6— statements to police — voir dire — sufficiency of findings of fact**

Defendant's contention that the trial court erred in admitting his statements to a police officer because it failed to make specific findings after *voir dire* that his confession was understandingly and voluntarily made is without merit, since the court's finding that " . . . the juvenile . . . was apprised of his rights, and was familiar with his rights at the time of the discussion with [the officer]" was sufficient to support the order permitting defendant's statements into evidence.

3. **Infants § 10— juvenile delinquency proceeding — restitution as condition of probation — error**

In a juvenile delinquency proceeding where respondents allegedly damaged vacant houses, the trial court erred in requiring as a condition of probation that respondents pay $666.50 each to a realty company as restitution for damage, since the court made no finding of fact from which it could be determined that such a condition was

fair and reasonable, related to the needs of the children, tended to promote the best interests of the children, or was in conformity with the avowed policy of the State in its relation to juveniles.

APPEAL by respondents from *Bulwinkle, Judge* and *Harris, Judge*. Orders entered 19 August 1976 and 20 September 1976 in District Court, GASTON County. Heard in Court of Appeals 10 May 1977.

In juvenile petitions, respondents, Ralph Berry and Abraham Wallace, were alleged to be delinquent children as defined by G.S. 7A-278(2) in that they wilfully and wantonly caused damage to certain real property in Gastonia, North Carolina. At the adjudicatory hearing the State offered evidence tending to show that "extensive" damage was done to vacant new houses owned by Triangle Realty and located on New Castle Drive in Gastonia. After *voir dire* the court allowed Officer B. V. Posey to testify as follows concerning statements made to him by the respondents:

"Mr. Berry told me that he along with some other subjects were playing chase in some empty houses which were near his home on New Castle Drive and that there was some damage done to the houses while they were playing. Mr. Berry stated to me that all he did was catch one piece of sheetrock and pull it down, and the sheetrock was already hanging from the ceiling when he pulled it down. Mr. Berry told me that he also pulled a piece of tape which ran across some other sheetrock and that he pulled the tape loose all the way across to over the doorway.

* * *

"He [Wallace] stated that he went to some new houses on New Castle Drive near where he lived, with some other boys and they were playing chase in the houses and he stated that he was running through the attic and fell and hit the sheetrock and he said where he fell through was over a hallway near a light fixture and that when he fell through, one leg went on one side with a piece of lumber and the other leg went on the other side, kept him from going all the way through."

By orders dated 19 August 1976 Judge Bulwinkle found that " . . . [each respondent] is a delinquent child by reason of having committed malicious damage to real property belong-

ing to Triangle Realty located on New Castle Drive on or about the 15th or 16th of June, 1976," and by orders dated 20 September 1976 Judge Harris placed each respondent on probation for six months upon the following conditions:

> " . . . (1) That he be and remain of good behavior and violate none of the laws of this State; (2) That he report to the probation officer at such time or times as he may require to do so and answer any and all questions about his conduct and condition; (3) That he attend the public schools so long as he remains within the age group; (4) That he be at the home where he resides by nine p.m. each night; (5) That he not be in the accompaniment of anyone of questionable character or who is on probation; (6) That he pay restitution in the amount of $666.50 to be disbursed to Triangle Realty."

Respondents appealed.

Attorney General Edmisten by Special Deputy Attorney John R. B. Matthis and Associate Attorney Rebecca R. Bevacqua for the State.

Larry B. Langson, Assistant Public Defender for the 27th Judicial District, for respondent appellants.

HEDRICK, Judge.

Each respondent contends Judge Bulwinkle erred in allowing Officer Posey to testify as to statements made to him by the respondents with respect to the damage done to the property on New Castle Drive. Before the statements were allowed into evidence, the court conducted a *voir dire* to determine whether the statements were voluntarily and understandingly made. Upon *voir dire* Officer Posey testified that he explained to each respondent his rights under the *Miranda* decision and enumerated his rights from a "rights form." Each stated that he understood his rights and signed a written waiver thereof. Berry's mother and Wallace's father signed the written waivers. Wallace offered no evidence on *voir dire,* but Berry testified on *voir dire* on his own behalf. Berry acknowledged that at the time he was questioned by Officer Posey he was advised of his rights and signed a written waiver of his rights; however, while admitting that he stated to Officer Posey that he understood his rights at the time he was questioned by him, Berry equivocally testified that he in actuality did not understand all of his rights.

[1] Wallace argues that his statements were inadmissible because the court failed to make findings of fact as to whether his statements were freely, understandingly, and voluntarily made, and that the evidence on *voir dire* revealed that he did not orally waive his rights. The uncontroverted *voir dire* testimony of Officer Posey that he advised Wallace of his rights, that Wallace stated that he understood them, and that Wallace and his father signed the written waiver form is sufficient to support the trial judge's admission of Wallace's statements into evidence, *State v. Lock,* 284 N.C. 182, 200 S.E. 2d 49 (1973), even though the trial court failed to make specific findings that such statements were freely, understandingly and voluntarily made. *State v. Biggs,* 289 N.C. 522, 223 S.E. 2d 371 (1976).

[2] Berry contends the court erred in admitting his statements to Officer Posey into evidence because it failed to make specific findings after *voir dire* that his confession was understandingly and voluntarily made. He argues that he offered evidence on *voir dire* that he did not understand his rights, and, therefore, it was incumbent upon the trial judge to resolve the conflicts in the evidence by appropriate findings. Assuming *arguendo* that Berry's equivocal testimony on *voir dire* was sufficient to raise an issue of whether he understood his rights, we are of the opinion that the trial court's finding that, " . . . the juvenile Ralph Berry was apprised of his rights, and was familiar with his rights at the time of the discussion with Officer Posey," is sufficient under the circumstances of this case to support the order permitting Berry's statements into evidence.

We have carefully considered respondents' remaining assignments of error relating to the adjudicatory hearing and find them to be without merit. We hold the respondents had a fair hearing free from prejudicial error and the orders adjudicating each respondent to be a "delinquent child" will be affirmed.

G.S. 7A-286(4) sets forth the policies to be considered in designing the appropriate disposition of juveniles who have been adjudicated to be delinquent or undisciplined, and then provides,

"After considering these policy objectives, the court may:

b. Place the child on probation for whatever period of time the court may specify, and subject to such conditions of probation as the court finds are related to the

needs of the child and which the court shall specify, under the supervision of the juvenile probation officer; . . . "

G.S. 7A-285 in pertinent part provides, "In all cases the court order [adjudication or disposition order] shall be in writing and shall contain appropriate findings of fact and conclusions of law."

[3] Having adjudicated that the respondents were delinquent children, the court clearly had authority to place them on probation for six months on condition that they remain of general good behavior, report to the probation officer, attend school, adhere to a curfew, and not associate with "anyone of questionable character or who is on probation." The record in these cases demonstrates that these conditions are fair and reasonable, relate to the needs of the children, and are calculated to promote the best interest of the children in conformity with the avowed policy of the State in its relation with juveniles. Furthermore, these conditions are sufficiently specific to be enforced. However, it is our opinion that the special condition that each respondent pay $666.50 to Triangle Realty as restitution for damage is void and unenforceable. The record does not reveal, and the court made no finding of fact from which it can be determined that such a condition is fair and reasonable, relates to the needs of the children, tends to promote the best interest of the children, or is in conformity with the avowed policy of the State in its relation to juveniles. We are not unmindful of the rights of the injured parties in such cases. (See G.S. 1-538.1) but a requirement that a juvenile make restitution as a condition of probation must be supported by the record and appropriate findings of fact which demonstrate that the best interest of the juvenile will be promoted by the enforcement of the condition. In these cases the court made no finding with respect to the amount of damage to the real property. Indeed, there is no evidence in this record, other than the allegation in the petition, as to the amount of the damage. Furthermore, the court made no finding, and the evidence is vague as to precisely how much of the damage was attributable to the conduct of each respondent. While, as we stated before, the evidence and the findings made by the trial court are sufficient to support the adjudication, we are of the opinion, and so hold, that the record and the findings are not sufficient to support the condition of probation that the respondents make restitution by the payment of $666.50 each. Therefore, the disposition order is modified by

striking the sixth condition of probation in the disposition orders. Except as specifically modified, the disposition orders will be affirmed.

Modified and affirmed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM HENRY JOYNER, JR.

No. 767SC1026

(Filed 1 June 1977)

1. **Criminal Law § 18.2— misdemeanor — jurisdiction of superior court — trial in district court — showing in record**

Although a district court judgment finding defendant guilty of misdemeanor possession of marijuana after no probable cause was found as to felonious possession did not show on its face that defendant received a trial on the misdemeanor charge, the entire record shows that a trial on the misdemeanor charge was held in the district court and that the superior court thus had derivative jurisdiction of the misdemeanor where defendant was represented by counsel in the district court, no objection was made to the judgment entered in the district court but notice of appeal was given instead, and defendant did not challenge the jurisdiction of the superior court when the matter came on for a hearing *de novo*.

2. **Criminal Law § 73.1— admission of hearsay — absence of prejudice**

In a prosecution for possession of narcotics, defendant was not prejudiced by the court's failure to strike hearsay testimony by a police officer that defendant lived at the address at which narcotics and drug paraphernalia were found where the officer conceded on cross-examination that he did not have direct knowledge of where defendant lived, and defendant's own evidence showed that he lived at such address.

3. **Narcotics § 3— automobile owned by defendant — absence of prejudice**

In a prosecution for possession of narcotics, defendant was not prejudiced by the admission of an officer's testimony that defendant drove a new Lincoln Continental automobile where defendant effectively impeached this testimony during cross-examination of the officer who stated that the car was also registered to defendant's wife, and that he did not know that defendant's father had left defendant $49,000 when he died.

APPEAL by defendant from *Webb, Judge*. Judgment entered 20 July 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 5 May 1977.

Defendant was arrested on 1 March 1976 following the search of a house at 203 North Vick Street, Wilson, North Carolina. The search was conducted pursuant to a warrant. Evidence presented at trial tended to show that defendant and his wife lived in this house part of the time; that defendant kept clothes and dogs at this address, that he received mail there; and that when defendant was absent from this house he left it in the care of friends. Evidence further tended to show that on the night of the search police officers announced themselves and their authority to search pursuant to the warrant. Defendant shouted a warning to other persons in the house and delayed about thirty seconds before opening the door. The police searched the house and found marijuana and also drug paraphernalia covered with heroin residue.

On 2 March 1976, defendant was charged with felonious possession of marijuana. On 11 May 1976, the defendant went before a district court judge for a probable cause hearing. The court found there was no probable cause to support a charge of felonious possession of marijuana. However, judgment was entered against defendant for misdemeanor possession of marijuana. Defendant appealed from the district court judgment.

On 28 June 1976, between the time of the probable cause hearing and the trial *de novo* in superior court, defendant was indicted for felonious possession of heroin. This charge was consolidated for trial with the misdemeanor marijuana charge, and both cases were tried on 19 July 1976. Defendant was convicted of both offenses, and judgment was entered imposing a prison sentence. Defendant appeals.

Attorney General Edmisten, by Deputy Attorney General William W. Melvin and Assistant Attorney General William B. Ray, for the State.

Farris, Thomas & Farris, by Robert A. Farris, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the superior court lacked jurisdition to try him for misdemeanor possession of marijuana without amending the original warrant or procuring a new warrant. According to defendant, the record does not reveal that he received a trial on the misdemeanor charge in district court,

but that the district court, upon finding no probable cause for the felony charge, summarily found him guilty without affording him a trial on the lesser misdemeanor charge. Therefore, defendant asserts, the superior court had no derivative jurisdiction over him.

G.S. 7A-271(a)(5) provides:

"(a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this article, except that the superior court has jurisdiction to try a misdemeanor:

. . . .

(5) When a misdemeanor conviction is appealed to the superior court for trial de novo . . . . "

The record reflects that the following judgment was entered in district court:

"In open court, the defendant appeared in the District Court for a probable cause hearing on the charge of felonious possession of marijuana and thereupon . . . requested a probable cause hearing. Probable cause hearing held and no probable cause found as to felonious possession of marijuana and enters a verdict of guilty of the offense of simple possession of marijuana which is a violation of _____ and of the grade of misdemeanor."

On its face the district court judgment does not show that defendant received a trial on the misdemeanor charge. The question is whether the district court judgment is void. If it is, then the superior court had no jurisdiction. *State v. Fisher,* 270 N.C. 315, 154 S.E. 2d 333 (1967). We hold that the defect in the district court judgment does not void the judgment, and that the superior court had jurisdiction to hear the misdemeanor charge.

In *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738 (1953), defendant moved to arrest judgment in superior court because the prior judgment in the recorder's court did not aver that a trial had been held. Our Supreme Court concluded that a judgment need not adhere strictly to a particular form. "It is not essential to the validity of a judgment that it makes reference to the trial or the crime of which the defendant was convicted." *Id.* at 673, citing *State v. Edney,* 202 N.C. 706, 164 S.E. 23

(1932), and *State v. Taylor,* 194 N.C. 738, 140 S.E. 728 (1927). However, in this case the court took notice of the transcript of the trial which was included in the record. This Court, in *State v. Wesson,* 16 N.C. App. 683, 193 S.E. 2d 425 (1972), *cert. den.* 282 N.C. 675, 194 S.E. 2d 155 (1973), a case in which the district court judgment failed to state that defendant had been convicted and found guilty, concluded that the record as a whole revealed that a conviction and determination of guilt had been made in district court.

Jurisdiction of the superior court on appeal from a conviction in district court is derivative. A presumption of regular procedure in the district court can be inferred. *State v. Wesson, supra.* Also see *State v. McRae,* 19 N.C. App. 579, 199 S.E. 2d 505 (1973); *State v. Johnson,* 5 N.C. App. 469, 168 S.E. 2d 709 (1969); *State v. Bryant,* 5 N.C. App. 21, 167 S.E. 2d 841 (1969). Furthermore, the entire record may be considered in searching for evidence that proper procedure was followed, and in viewing the entire record before us in this case we conclude that the superior court had derivative jurisdiction.

The district court had authority to hear the misdemeanor charge immediately upon completion of the probable cause hearing. G.S. 15A-613(2). Presumably the judgment in which there is a finding of guilt and imposition of sentence would not have been entered without a trial. The record reveals that defendant was represented by counsel in district court, and that no objection was made to the judgment entered in district court. The fact that no objection was entered, but notice of appeal was given instead, suggests regularity in the district court trial. Finally, we note that defendant did not challenge the jurisdiction of the superior court when the matter came to be heard *de novo.* A motion to arrest judgment can of course be made at any time, even in the appellate courts, but again, in the present case, the failure to make objection in superior court indicates regularity in the district court proceeding.

[2] Police Officer, E. R. Bass, testified that defendant lived at 203 North Vick Street. On cross-examination Bass admitted that he did not know this of his own knowledge but " . . . was testifying only on information [he] received." We find no prejudicial error in the court's failure to strike the officer's hearsay testimony on direct examination. Bass conceded on cross-examination that he did not know where defendant lived.

In addition, defendant's own evidence, presented for the purpose of showing that he had been away from the house for two weeks prior to the search, tends to show that he regularly exercised the kind of control over the house to show that it was his principal residence. Also, defendant's own witness testified that defendant lived in the house.

[3] Error is also assigned to testimony by Officer Bass that defendant drove a new Lincoln Continental automobile. Defendant contends that the testimony was irrelevant and prejudicial because it implied that he purchased an expensive car with money obtained by selling narcotics. Again we can find no prejudice to defendant, and we do not consider whether the testimony was relevant. Counsel for defendant effectively impeached this testimony during cross-examination of Officer Bass who stated that the car was also registered to defendant's wife, and that he did not know that defendant's father left him $49,000.00 when he died.

We have also examined defendant's remaining assignments of error to evidentiary rulings, to the denial of his motion for judgment as of nonsuit, and, finally, to the court's instructions to the jury. We find no merit in these contentions and conclude that defendant received a fair trial, free of prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

HOUSE OF STYLE FURNITURE CORPORATION, PLAINTIFF v. BOBBY SCRONCE, RICHARD WIKE, T. C. ROGERS, LLOYD GEORGES AND BETTY GEORGES, INDIVIDUALLY AND IN THEIR CAPACITY AS OFFICERS AND DIRECTORS AND EMPLOYEES OF CAPRICE FURNITURE COMPANY, INC., AND CAPRICE FURNITURE COMPANY, INC., DEFENDANTS AND THIRD PARTY PLAINTIFFS v. SOLOMON BERKOWITZ, INDIVIDUALLY, THIRD PARTY DEFENDANT

No. 7622SC901

(Filed 1 June 1977)

Judgments § 2— order entered outside county where action pending — no authority of judge

The trial judge was without authority to enter an order of dismissal and entry of default where the action at all times was pending

in Alexander County; the judge heard the motion for and entered the order of dismissal and entry of default in Iredell County; the parties did not consent for the motion to be heard in Iredell County; and there was no statute authorizing the judge's action in that county.

APPEAL by plaintiff and third-party defendant from order of *Collier, Judge,* entered 29 March 1976, judgment of *Barbee, Judge,* entered 13 April 1976, and order of *Collier, Judge,* entered 30 June 1976, in Superior Court, ALEXANDER County. Heard in the Court of Appeals 11 May 1977.

Plaintiff instituted this action on 24 September 1975 in Alexander County. In its complaint, plaintiff alleged claims for relief on numerous grounds including breach of contract, improper cancellation of corporate stocks, and misuse of corporate property. Among other things, it asked for injunctive relief and monetary damages.

In their answer, as amended, defendants denied that they were liable to plaintiff in any manner. Defendant Caprice counterclaimed for breach of contract; and in a third-party complaint defendants alleged a claim against Solomon Berkowitz (an alleged official of plaintiff) on the grounds of libel and indirect defamation.

On 9 January 1976 counsel for defendants served notice on counsel for plaintiff and third-party defendant that they would take the oral depositions of Lieb Berkowitz, an officer of plaintiff corporation, and Solomon Berkowitz, individually and as an officer of plaintiff corporation, on 20 February 1976. On 12 February 1976 counsel for defendant served notice that the taking of depositions had been rescheduled for 27 February 1976.

On 21 and 23 February 1976 orders were signed allowing the attorneys of record for plaintiff and third-party defendant to withdraw from the case.

On 11 March 1976 defendants moved pursuant to G.S. 1A-1, Rules 41(b) and 37(d), for dismissal of plaintiff's claims and entry of and judgment by default against plaintiff and the third-party defendant on the ground that plaintiff and third-party defendant had failed to comply with the North Carolina Rules of Civil Procedure in that they failed to appear for the taking of depositions following proper notice.

In an order entitled "ORDER OF DISMISSAL AND ENTRY OF DEFAULT" dated 24 March 1976 and filed 29 March 1976, Judge Collier, Resident Judge of the Twenty-Second Judicial District, which includes Iredell and Alexander Counties, recited that on 23 March 1976, in the Iredell County Hall of Justice in Statesville, N. C., he heard and considered the motion of defendants and third-party plaintiffs for a dismissal of plaintiff's claims and for judgment by default against plaintiff and the third-party defendant; and that plaintiff and third-party defendant were not present or represented at said hearing although they had been given proper notice. Judge Collier found certain facts, including findings that plaintiff's officials and the third-party defendant had failed to appear for purpose of having their depositions taken although they had been given proper notice. He concluded that defendants were entitled to the relief asked for in their motion and ordered: (1) that plaintiff's claims be dismissed; (2) that default be entered in favor of defendants on their counterclaim against plaintiff; and (3) that default be entered in favor of defendants in their action against the third-party defendant. He further ordered that the cause be heard at the next session of superior court held in Alexander County to determine the amount of damages defendants were entitled to recover.

The cause came on for hearing before Judge Barbee in Alexander Superior Court on 12 April 1976 at which time plaintiff and third-party defendant did not appear in person or by counsel. After hearing testimony Judge Barbee entered a judgment finding facts, making conclusions of law and providing, among other things, that defendant Caprice recover $12,463.02 from plaintiff and that defendants recover $10,000 from the third-party defendant.

On 13 April 1976 plaintiff and third-party defendant, through their present counsel, moved for relief from the order entered by Judge Collier and the judgment entered by Judge Barbee. Following a hearing on the motion, in an order entered 30 June 1976, Judge Collier denied the motion.

Plaintiff and third-party defendant appealed. (On 15 November 1976 this court entered an order allowing counsel for defendants and third-party plaintiff to withdraw from the case.)

Pope, McMillan & Bender, by W. H. McMillan, for plaintiff and third-party defendant appellants.

No counsel for appellees.

BRITT, Judge.

In their first assignment of error, appellants contend that Judge Collier lacked authority to enter his order of dismissal and entry of default. This contention has merit.

This action was instituted, and at all times thereafter has been pending, in Alexander County. The record discloses that Judge Collier heard the motion for and entered the order of dismissal and entry of default in Iredell County. Although Iredell and Alexander Counties are both in the Twenty-Second Judicial District, and Judge Collier is the resident judge of that district, we think his action in this case was unauthorized.

In 1 McIntosh, North Carolina Practice and Procedure (2d ed. 1956) § 126, pp. 72-73, we find:

> Hearings before a judge outside the courthouse or out of the regular session of the Court are said to be at chambers, and such matters are called "in chambers business." Such hearings may be had in some cases by express statutory provisions and in others by consent of the parties, and may include all questions in a pending action, except the trial of issues of fact by a jury. The place of conducting "in chambers" business is ordinarily not material so long as it is conducted within the county in which the action is pending. But where "in chambers" business is conducted outside the county of pending action, it must be specifically authorized by statute or the parties must have consented. And where consent is given, it is held that such consent must appear on the face of the record.

In *Patterson v. Patterson,* 230 N.C. 481, 484, 53 S.E. 2d 658, 661 (1949), the Supreme Court stated that " . . . in this State a judge of the Superior Court has no authority to hear a cause or to make an order substantially affecting the rights of the parties outside of the county in which the action is pending unless authorized so to do by statute, or by consent of the parties."

In *Shepard v. Leonard,* 223 N.C. 110, 114, 25 S.E. 2d 445, 448 (1943), we find:

> Even as to regular judges "it is the uniform holding in this jurisdiction that, except by consent, or unless authorized by statute, a judge of the Superior Court, even in his own district, has no authority to hear a cause or to make an order substantially affecting the rights of the parties, outside the county in which the action is pending." *Bisanar v. Suttlemyre,* 193 N.C., 711, 138 S.E., 1; *S. v. Humphrey,* 186 N.C., 533, 120 S.E., 85; *Scott Drug Co. v. Patterson,* 198 N.C., 548, 152 S.E., 632; *Bank v. Hagaman,* 208 N.C., 191, 179 S.E., 759; *S. v. Whitley,* 208 N.C., 661, 182 S.E., 338.

We also note *Chappell v. Stallings,* 237 N.C. 213, 74 S.E. 2d 624 (1953), where an action to foreclose a tax lien on property was brought in Perquimans County and judgment by default was entered. Before the foreclosure sale was held, a temporary restraining order was issued enjoining the sale of the land until further notice of the court. A show cause hearing was held in Elizabeth City where Judge Williams determined that the commissioner was authorized and permitted to proceed with the sale of the land. In a dictum statement the Supreme Court stated:

> "We know judicially that Elizabeth City is the county seat of Pasquotank County. Judge Williams was precluded from passing on the merits of the motion in the cause at Elizabeth City under the procedural rule that except by consent or in those cases specially permitted by statute, the judge can make no orders in a cause outside of the county in which the action is pending."

This case is governed by the quoted rule. Certainly the order of dismissal and entry of default affected substantial rights of appellants. They did not consent for the motion to be heard in Iredell County and our research fails to disclose any statute authorizing Judge Collier's action in that county. We hold that the order of dismissal and entry of default was invalid.

Appellants assign as error entry of the judgment by Judge Barbee. Since this judgment was predicated on the entry of

default ordered by Judge Collier, we hold that it cannot stand and it too will be vacated.

Appellants assign as error the order of Judge Collier entered 13 April 1976 denying their motion for relief from his previous order and the judgment of Judge Barbee. We hold that this order also should be vacated and it is so ordered.

The orders and judgment appealed from are vacated and this cause is remanded to the Superior Court of Alexander County for further proceedings.

Remanded.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM ARCHIE LLOYD

No. 7618SC946

(Filed 1 June 1977)

1. **Automobiles § 126; Criminal Law § 34.4— drunken driving — reason for stopping defendant — other violations**

In this prosecution for driving under the influence of intoxicants, a highway patrolman's testimony that defendant drove at a high rate of speed across the center line in the face of oncoming traffic was competent to show the patrolman's justification for pursuing and stopping defendant, although such testimony tended to show other violations for which defendant was not charged.

2. **Automobiles § 126.1— drunken driving — opinion testimony as to intoxication**

In a prosecution for driving under the influence of intoxicants, testimony by the arresting officer and the breathalyzer operator that in their opinion defendant was under the influence of intoxicants did not invade the province of the jury and was properly admitted.

3. **Automobiles § 126.3— breathalyzer test — when delay required**

Police officers are not required by G.S. 20-16.2(a) to delay administering a breathalyzer test for a period of up to 30 minutes after the person to be tested has been advised of his rights unless such person exercises his right to call a lawyer or to have a witness present at the testing.

State v. Lloyd

APPEAL by defendant from *Seay, Judge.* Judgment entered 9 June 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 3 May 1977.

Defendant was found guilty in district court of driving under the influence of intoxicants. He appealed to superior court where he was tried *de novo.*

The State presented in evidence the testimony of the arresting officer, North Carolina State Highway Patrolman W. R. Atkins. Atkins' testimony tended to show that at approximately 11:10 p.m. on 30 March 1975, he was driving north on Penny Road in High Point. The posted speed was 35 miles per hour. The defendant's auto was approaching his in the southbound lane at a high rate of speed. Defendant's vehicle crossed the center line in the road forcing the patrolman off the paved part of the road and onto the shoulder. The patrolman immediately began turning his vehicle to give pursuit, at which time he observed defendant's vehicle again cross the center line.

Atkins subsequently caught up with the defendant, signalling him to pull off the road and stop. When Atkins approached the defendant, he detected a strong odor of alcohol. He subjected the defendant to two balance tests and observed that defendant was hesitant in his motions and unsteady on his feet. At this point Atkins placed defendant under arrest for driving under the influence of intoxicants, read him his rights, and took him to the police station for a breathalyzer test.

They arrived at the police station between 11:30 p.m. and 11:35 p.m. Atkins again reminded defendant of his rights, requested that he submit to the breathalyzer test, and proceeded to obtain information from him for the alcohol information form.

The breathalyzer operator informed the defendant of his rights with respect to the breathalyzer, tested the machine, and administered the test at 11:55 p.m. The results showed an alcohol level in the blood of eleven-hundredths of one per cent.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Thomas F. Kastner, Assistant Public Defender, for the defendant.

BROCK, Chief Judge.

[1] In defendant's first assignment of error he objects to the patrolman's testimony in which the patrolman explained the purpose for the center line on the highway. Defendant argues that the testimony amounts to a conclusion of law by a non-expert as to the effect and reason for the center line. It is argued the error is prejudicial in that it places before the jury evidence of guilt of an offense for which defendant had not been charged. We disagree.

At the point in the patrolman's testimony where this evidence occurred, he was testifying as to why he, as a trained law enforcement officer, decided to stop defendant. The first reason given was that the defendant was driving at a rate of speed considerably in excess of the posted speed limit. The patrolman's testimony as to defendant's speed is competent and not challenged by the defendant on appeal. The second reason was that while travelling at a high rate of speed, defendant drove across the center line in the face of oncoming traffic, forcing the oncoming vehicle out of its lane and off the road. Defendant's action indicates the operation of a motor vehicle in such a manner as to have actually placed another member of the motoring public in peril. This evidence was competent to show that the patrolman, trained in the enforcement of the traffic laws of this State, had reason to stop the defendant.

The fact that such evidence is also evidence of violations for which defendant was charged is of no moment. Evidence which tends to prove other offenses is competent where such evidence exhibits a chain of circumstances with respect to the offense in issue, and is so connected with the offense charged as to throw light upon one or more of the questions in issue. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). The patrolman's testimony concerning defendant's speeding and crossing the center line was competent to show the patrolman's justification in pursuing and stopping the defendant.

[2] In his second assignment of error brought forward for argument, defendant contends that the trial court erred in allowing the patrolman and breathalyzer operator to testify as to their opinion concerning defendant's state of intoxication. The prosecution asked each officer if he had an opinion satisfactory to himself as to whether the defendant was under the influence of intoxicating beverages. Each answered that in

his opinion the defendant had consumed sufficient intoxicants so as to appreciably impair his mental and physical abilities. After giving the opinion, each officer stated the observations upon which the opinion was based, including the manner of vehicle operation, odor of alcohol, unsteadiness, and slurred speech.

Defendant argues that the officers, in stating their opinions, invaded the province of the jury by prejudicially offering conclusions on the very issue to be decided by the jury. He further contends that the jury was capable of drawing its own conclusion from the evidence to be gleaned from the officers' observations and relation of facts. This argument is without merit. It is now "a familiar rule of evidence in this jurisdiction that a lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants." *State v. Lindley,* 286 N.C. 255, 258, 210 S.E. 2d 207, 209 (1974); *see, e.g., State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Flinchem,* 247 N.C. 118, 100 S.E. 2d 206 (1957); *State v. Warren,* 236 N.C. 358, 72 S.E. 2d 763 (1952); *State v. Harris,* 213 N.C. 648, 197 S.E. 142 (1938); *State v. Buchanan,* 22 N.C. App. 167, 205 S.E. 2d 782 (1974); and *State v. Dark,* 22 N.C. App. 566, 207 S.E. 2d 290 (1974).

[3] In his final assignment of error brought forward for argument, defendant contends the breathalyzer test results should have been suppressed. He cites *State v. Shadding,* 17 N.C. App. 279, 194 S.E. 2d 55 (1973), for the proposition that where a person is advised of his rights under G.S. 20-16.2(a) and does not waive them, the results of the breathalyzer tests are admissible only if the testing was delayed (not to exceed thirty minutes) to give the defendant an opportunity to exercise such rights.

The trial judge conducted a *voir dire* to determine the admissibility of the breathalyzer test results. In declaring the results admissible, he made findings of fact that the defendant was brought to the police station and advised of his rights under G.S. 20-16.2(a) at 11:30 p.m.; that he understood his rights and had no questions; and that the test was administered at 11:55 p.m. Defendant contends that under the holding in *Shadding, supra,* since no waiver was made by defendant, the police had to wait thirty minutes before administering the

test. Because they waited only twenty-five minutes, the police violated the prescribed procedure. We disagree.

General Statute 20-16.2(a) states and *Shadding* so holds that the breathalyzer test will be delayed a maximum of thirty minutes from the time defendant is notified of his rights. The statute gives the defendant the right to have a lawyer, doctor, nurse, or witness present at the testing. The purpose of the delay is to allow the defendant, who exercises his rights, a reasonable but limited amount of time to procure their presence. The effect of the statute then is to require a defendant to exercise his rights in a timely manner. Even if he does exercise his rights within thirty minutes of notification, the test can and will be administered after the lapse of thirty minutes regardless of whether the requested persons have arrived.

Beyond the delay described above, there is no statutorily prescribed delay. In the present case there was a period of twenty-five minutes after notification during which defendant made no effort to exercise his rights. At the time the test was administered, defendant made no effort to exercise his rights. The police are not required to delay testing unless the defendant exercises his rights. Thus there was no error in the testing procedures nor in the admission of the test results.

Affirmed.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. CALLIE SORRELLS, JR.

No. 7612SC1039

(Filed 1 June 1977)

Criminal Law § 98.1— rape prosecution — misconduct of prosecuting witness — no prejudice to defendant

Defendant in a prosecution for rape was not prejudiced when the prosecuting witness, during defendant's testimony, jumped up from her chair behind the district attorney's table and ran toward defendant shouting, "You no good black so and so, you did do it, you know you did," since the court excused the jury and admonished the prosecuting witness concerning her conduct in the courtroom, and the court then recalled the jury and instructed them to put the incident out of their minds and not to consider it under any circumstances.

State v. Sorrells

APPEAL by defendant from *Gavin, Judge.* Judgment entered 22 July 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 May 1977.

Defendant was indicted for second degree rape and for crime against nature. He pled not guilty.

The State presented the victim, a sixteen year old school girl when the offenses were committed. She testified that as she was walking home from school shortly after 11:00 a.m. on 3 June 1975, a car driven by defendant and carrying one male passenger stopped. Defendant offered to take her home, and she got into the car. Defendant drove instead to a wooded area, where he ordered her to get out. When she ran, he knocked her down and kicked her. After threatening to kill her, defendant and the other man each had intercourse with her. Each then forced her to take his penis into her mouth. After this was done, defendant drove her near to her house. When she got out of the car, she wrote down the license number, HTA 757. On reaching her home, she told her mother what had happened, and her mother took her to the hospital. The following week she picked out defendant's picture from seven photographs shown her by an officer.

The State also presented evidence to show that North Carolina license number HTA 757 was the license number of defendant's car.

Defendant testified that during the entire morning of 3 June 1975 he was engaged in training duties at Fort Bragg. Several witnesses corroborated his alibi.

The jury found defendant guilty of both charges. From judgment imposing prison sentences, defendant appeals.

Attorney General Edmisten by Assistant Attorney General Davis S. Crump and Associate Attorney Patricia B. Hodulik.

Nance, Collier, Singleton, Kirkman, and Herndon, by James D. Little for defendant appellant.

PARKER, Judge.

All questions presented on this appeal arose out of the following episode which occurred during the course of the trial. After the State presented its evidence and rested, defendant took the stand and testified concerning his activities at Fort

Bragg during the morning of 3 June 1975. He then testified that the first time he ever saw the prosecuting witness was in court, and he denied he had raped her. At that point the prosecuting witness jumped up from her chair behind the District Attorney's table and ran toward the defendant shouting, "You no good black so and so, you did do it, you know you did." Courtroom officers intervened and forced the prosecting witness to be seated, and the judge sent the jury to their room. In the absence of the jury, the judge admonished the prosecuting witness concerning her conduct in the courtroom. After a brief recess, the prosecuting witness apologized to the court and stated that she could control herself, and the judge permitted her to remain in the courtroom. The judge then called the jury back and instructed them as follows:

> "Members of the jury, I want to instruct you that you will not consider any statement made by the prosecuting witness which was made just a moment or two before I sent you out when she got up out of the chair and approached this witness. That is not evidence and you should put that out of your minds and not consider it under any circumstances."

The trial then proceeded to its conclusion without further untoward incident. Based on the foregoing episode, defendant in apt time moved for a mistrial. He now assigns error to the denial of that motion. We find no error.

Certainly every criminal trial should be conducted in an atmosphere of judicial calm, free from the bias which emotional outbursts may arouse. It must be recognized, however, that a criminal trial by its very nature may be subject to dramatic incidents which the trial judge cannot be expected to foresee in time to prevent. When such an incident involving an unexpected emotional outburst occurs, the judge must act promptly and decisively to restore order and to erase any bias or prejudice which may have been aroused. Whether it is possible to accomplish this in a particular case is a question necessarily first addressed to the sound discretion of the trial judge. "Not every disruptive event occurring during the course of the trial requires the court automatically to declare a mistrial," *State v. Dais,* 22 N.C. App. 379, 384, 206 S.E. 2d 759, 762 (1974); *see* Annot., 46 A.L.R. 2d 949 (1956), and if in the sound discretion of the trial judge it is possible, despite the untoward event, to preserve defendant's basic right to receive a fair trial before

an unbiased jury, then the motion for mistrial should be denied. On appeal, the decision of the trial judge in this regard is entitled to the greatest respect. He is present while the events unfold and is in a position to know far better than the printed record can ever reflect just how far the jury may have been influenced by the events occurring during the trial and whether it has been possible to erase the prejudicial effect of some emotional outburst. Therefore, unless his ruling is clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal.

In the present case the judge did act promptly and decisively. Immediately after the outburst occurred, the jury was sent from the courtroom. The trial was not resumed until the judge was assured that the prosecutrix could control herself. When the jury returned, the judge instructed it to put the incident out of their minds and "not consider it under any circumstances." The remainder of the trial proceeded in a calm and orderly manner. We find no manifest abuse of discretion in denial of the motion for mistrial.

While each case must, of course, be decided on its own facts, other courts in cases which involved factual situations somewhat similar to the situation presented in the present case have sustained the trial court's decision denying a motion for mistrial. *State v. Savage*, 161 Conn. 445, 290 A. 2d 221 (1971); *Morris v. Commonwealth*, 459 S.W. 2d 589 (Ky. 1970); *State v. Gill*, 243 Or. 621, 415 P. 2d 166 (1966).

We also find no error in the court's denial of defendant's motion, made after denial of the motion for mistrial, that the court make inquiry of the jury prior to proceeding with the case to determine whether there had been prejudice to defendant as a result of the outburst of the prosecuting witness. This motion was also addressed to the sound discretion of the trial judge. The judge apparently decided that his clear and prompt instruction to the jury not to consider the emotional outburst of the prosecuting witness would be sufficient to remove whatever prejudice which the incident had created and to assure defendant a fair trial. In so deciding, we find no abuse of discretion.

What we have said disposes of defendant's remaining assignments of error, all of which are overruled. In defendant's trial and in the judgment appealed from, we find

No error.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. VERNON BOONE

No. 7618SC1042

(Filed 1 June 1977)

1. **Searches and Seizures § 1— seizure of tractor in plain view**

A search warrant was not required for the seizure of a tractor which was parked under an open shed on defendant's farm and which was in plain view and visible to the naked eye of officers who were on adjacent public land.

2. **Criminal Law § 116.1— failure of defendant to testify — instruction**

Defendant was not prejudiced by the court's instruction that the jury "should not," rather than "shall not," consider defendant's failure to testify as evidence against him.

3. **Criminal Law § 24— refusal to accept plea bargain — imposition of greater sentence**

Defendant's sentence is set aside and the case is remanded for the imposition of a proper sentence where the record indicates that the trial court imposed a greater sentence because defendant exercised his right to plead not guilty and refused to accept a lesser plea proffered by the State.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 23 July 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 May 1977.

Defendant was convicted of receiving stolen property, a Ford tractor, valued at more than $200.00. The tractor allegedly was stolen on the weekend of 28-29 June 1975 from the Neuse Tractor Company.

Prior to trial defendant moved to suppress evidence obtained by police during a 22 October 1975 warrantless search. The motion was denied. At the hearing on defendant's motion, testimony presented tended to show that the police officers received an anonymous "tip" that defendant had a stolen blue Ford tractor in a shed located on defendant's farm approximately a mile from defendant's residence. Title to the farm was in defendant's wife. From adjacent public land the officers were

able to see a blue Ford tractor in defendant's shed, or lean-to, about one hundred feet away. After viewing the tractor the officers, without a search warrant, entered upon defendant's land, which was enclosed by a barbed wire fence. Upon examination of the tractor the officers recorded the serial and model numbers and determined that the tractor had been reported stolen from the Neuse Tractor Company.

Additional evidence presented by the State at trial tended to show: After being advised of his constitutional rights defendant talked with the officers and told them that the tractor had been at his farm for about two months, and that a man called "Judge" had left it there for defendant to use, and that he did not pay for the tractor, and that if it were stolen he did not want it on his property. The State also presented evidence that on 30 June 1975 defendant pledged the tractor as security for a loan. Defendant acknowledged that he had a bill of sale prepared in order to use the tractor as security to get money.

From judgment imposing a prison sentence defendant appeals.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Boyan and Slate, by Clarence C. Boyan, for defendant appellant.

ARNOLD, Judge.

Defendant argues that the court erred in denying his motion to suppress the evidence obtained during the warrantless search of his property. Relying on *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), defendant contends that the search was unconstitutional and that the court applied the wrong rule of law in reaching its decision. He asserts that the rule which permitted police officers to search without a warrant any land which was not within the curtilage of the suspect's dwelling can no longer be applied. *See, e.g., State v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481 (1954). Defendant argues that under recent decisions, "what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. United States, supra,* at 351, *see also, Mancusi v. DeForte,* 392 U.S. 364, 368, 88 S.Ct. 2120, 20 L.Ed. 2d 1154 (1968). Defendant's argument, when applied to the case at bar, is unpersuasive.

[1] The judge's finding that the tractor was in plain view is supported by evidence and thus binding on appeal. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972). We find no error in the court's conclusion that a search warrant was not required. The tractor, parked under an open shed, was in plain view and visible to the naked eye of the officers who were in a place where they had a right to be. The Fourth Amendment protects people, not places, and what is knowingly exposed to the public is not subject to Fourth Amendment protection. *Katz v. United States, supra; Lewis v. United States,* 385 U.S. 206, 210, 87 S.Ct. 424, 17 L.Ed. 2d 312 (1966). *See also, State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968). Only such searches and seizures which are unreasonable are prohibited by the Constitution, *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 (1960), and whether a search or seizure is reasonable must be determined on the facts of each individual case. *Cooper v. California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 (1967). In the instant case the search was within the limits of reasonableness.

[2] There was no prejudicial error in the denial of defendant's request for instructions to the jury concerning his failure to testify. The court charged the jury that it "should not" consider defendant's failure to testify as evidence against him. Defendant says that the court was in error because it failed to charge the jury that it "shall not" consider defendant's silence against him. Use of the phrase "should not," though not expressly approved, is not error prejudicial to defendant. The jury unmistakenly was admonished not to consider defendant's failure to testify as evidence against him.

We find no merit in defendant's contention that the court erred in denying his motion for judgment as of nonsuit or that the court expressed an opinion concerning evidence which was presented. We have also carefully considered the judge's charge and find it to be free of prejudicial error.

[3] The record before us contains the following:

> "The Court by statement in open court to counsel for the defendant, with the defendant present, indicated that he would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not

guilty and the jury had returned a verdict of guilty as charged of a violation of G.S. 14-70. In soliloquy between counsel for the defendant and the Court it was indicated by the presiding judge that the prison sentence would be necessary although the Court was not familiar with the past record or character of the defendant. It was further placed in the record that during the trial of this cause the presiding judge had indicated in chambers to the defendant's counsel his intentions to give to the defendant an active prison sentence if he persisted in his plea of not guilty and did not accept a lesser plea proffered by the Assistant District Attorney."

Defendant has the constitutional right to plead not guilty, to confront his accusers and witnesses, and to have a trial by jury. These rights are not to be impeded. The trial judge may have sentenced defendant quite fairly in the case at bar, but there is a clear inference that a greater sentence was imposed because defendant did not accept a lesser plea proffered by the State. This Court has indicated that it would not tolerate an inference that a greater sentence was imposed because a defendant exercised his right to appeal. *State v. Lowry*, 10 N.C. App. 717, 179 S.E. 2d 888 (1971). We also cannot tolerate the inference that a greater sentence was imposed because defendant exercised his right to plead not guilty.

In defendant's trial we find no error sufficient to warrant a new trial. However, judgment is vacated and the case is remanded to the Superior Court of Guilford County for proper sentencing and judgment.

Vacated and remanded.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES HERRING

No. 764SC951

(Filed 1 June 1977)

1. **Constitutional Law § 51— six months between offense and arrest — no denial of speedy trial**

In a prosecution of defendant for sale and delivery of controlled substances where the alleged offense occurred on 23 September 1975 but defendant was not arrested until 17 March 1976, the trial court did not err in denying defendant's motion to dismiss, which was grounded on prejudice suffered by him due to pre-indictment delay, without holding an evidentiary hearing on that motion, since defendant did not demonstrate either intentional delay on the part of the State in order to impair defendant's ability to defend himself or actual and substantial prejudice from the pre-indictment delay.

2. **Criminal Law §§ 91.4, 91.8— continuance to confer with counsel — no supporting affidavit — motion denied — no error**

Defendant's motion for a continuance made on the ground that he needed more time to confer with counsel was properly denied by the trial court where there was no affidavit submitted in support of defendant's motion, and defendant did not attempt to offer any evidence as to how he might be prejudiced by the denial of a motion to continue.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 15 June 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 3 May 1977.

Defendant was tried for and convicted of the sale and delivery of the controlled substance, Phencyclidine and marijuana, and for possession of each of these substances with the intent to sell.

From judgments imposing consecutive prison terms, defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Gaylor, Edwards and Miller, by Jimmy F. Gaylor, for defendant appellant.

VAUGHN, Judge.

[1] Defendant brings forward four assignments of error. Our consideration of the first two will be made jointly. De-

fendant contends that the trial court erred when it denied defendant's motion to dismiss, which was grounded on prejudice suffered by him due to pre-indictment delay, without holding an evidentiary hearing on that motion. Additionally, he assigns as error the court's denial of this same motion to dismiss because his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated by this pre-indictment delay. The record reveals that on the evening of 23 September 1975, two undercover SBI agents bought the controlled substances, marijuana and Phencyclidine from the defendant in the parking lot of a housing development. Both agents testified that a third party, then known to the agents as "John," brought the defendant over to the agents' car after they had made it known to John that they were interested in purchasing narcotics. This "John" was actually Jerry Darden, alias Tony Dorton, who was a friend of the defendant and testified on his behalf.

Defendant was not arrested for this transaction until 17 March 1976. The agents explained that the delay between the offense and the arrest was because they were conducting an undercover narcotic campaign during that time. If they had arrested defendant, the arrest would have exposed their identity as undercover agents.

Defendant, in his motion for dismissal states:

"3. The State, without a valid reason, has failed and refused to accord the defendant a prompt trial.

* * *

(b) . . . [t]he defendant cannot with any reasonable certainty recall any events occurring on the date the alleged crime occurred and is therefore unable to assist counsel in the preparation of his defense."

The decision of the North Carolina Supreme Court in *State v. Dietz,* 289 N.C. 488, 223 S.E. 2d 357, controls the result we must reach in the case on defendant's argument that (1) he should have been given a hearing on his motion, and (2) that the motion should have been allowed. In that case, as here, there had been no hearing on the motion. The Court said:

" . . . We disagree with the Court of Appeals and hold that the trial court did not abuse its discretion in failing to hold such hearing. First, it does not appear in the record that

defendant ever requested a hearing either before or after his motion to dismiss had been denied. Second, we agree with the reasoning of the Court in *United States v. Pritchard,* 458 F. 2d 1036 (7th Cir. 1972), cert. den., 407 U.S. 911, S.Ct. 2434, 32 L.Ed. 2d 685 (1972):

> ' . . . In the instant case the defendant's assertion of prejudice is a wholly conclusory allegation. No specific actual prejudice is factually alleged. The rationale of *Marion* is equally applicable here. Mere "delay" does not equate with "actual prejudice." And, defendant alleged nothing in his motion which entitled him to an evidentiary hearing on an issue of actual prejudice alleged to have resulted from the delay. His motion speaks only of a potential prejudice predicated on the pre-indictment delay itself. Moreover, no actual prejudice was shown at the ensuing trial. [Citation omitted.]' Accord, *United States v. White, supra.*" *State v. Dietz, supra,* at p. 494.

The Court held that because of the failure of defendant to request a hearing and the conclusory nature of the allegations, the trial court was not required to hold a hearing.

In this case, as in *Dietz,* defendant asserted that he could not remember events occurring on the date the alleged crime occurred. The Court said:

> "Again, defendant produced no evidence to support these allegations. Mere claims of 'faded memory' have often been held not to constitute 'actual and substantial' prejudice required by *Marion. United States v. McGough,* 510 F. 2d 598 (5th Cir. 1975); *United States v. Giacalone, supra; United States v. Atkins,* 487 F. 2d 257 (8th Cir. 1973). Rather, the courts hold that defendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as the result of the pre-indictment delay. *United States v. Parish,* 468 F. 2d 1129 (D.C. Cir. 1972), cert. den., 410 U.S. 957, 35 L.Ed. 2d 690, 93 S.Ct. 1430 (1973). Hardly a criminal case exists where the defendant could not make these general averments of impaired memory and lost witnesses." *State v. Dietz, supra,* at p. 493.

Here, defendant has not demonstrated "*either* intentional delay on the part of the State in order to impair defendant's ability to defend himself *or* 'actual and substantial' prejudice from the pre-indictment delay." *State v. Dietz, supra,* at p. 495.

Defendant's first two assignments of error are overruled.

Defendant's next two assignments of error simply stated are that the trial court erred in denying his motion for a continuance without holding an evidentiary hearing because that ruling deprived defendant of effective assistance of counsel.

[2] Counsel for the defendant was appointed on 3 June 1976. Defendant, for unstated reasons, did not confer with his appointed counsel until 9 June 1976. Defendant was tried, as scheduled, on 15 June 1976 after his motion for a continuance had been denied. The crime for which defendant was being tried occurred on 23 September 1975. It is defendant's contention that he was denied his constitutional right to effective assistance of counsel by the trial court's failure to grant his motion for continuance. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811. Defendant will not be awarded a new trial because of the denial of a motion for continuance unless he is able to show that there was error in the denial and that the defendant was prejudiced thereby. Unless the reasons for a continuance are specifically stated and supported by an affidavit, one should not be granted. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844.

Defendant's counsel stated that the grounds for the motion for continuance were:

> "1. Counsel for the Defendant was appointed on Thursday, June 3, 1976, and did not confer with the Defendant about the case until Wednesday, June 9, 1976, allowing insufficient time for the preparation of the case.
>
> 2. The only witness that Defendant has that could offer evidence in his behalf and possibly testimony bearing upon Defendant's guilt or innocence is presently incarcerated in the Harnett County Youth Center and Counsel for the Defendant has not had time to make arrangements to interview that witness, Tony Dorton."

There was no affidavit submitted in support of defendant's motion. The record also fails to show that defendant attempted to offer any evidence as to how he might be prejudiced by the denial of a motion to continue.

Counsel does not explain why he did not confer with defendant before 9 June 1976. Even so, defendant and his counsel then had ample time to prepare this case for trial. The record reveals that Jerry Darden, alias Tony Dorton, did testify on defendant's behalf. No reason is given as to why counsel could not confer with that witness prior to trial.

Defendant in this case has failed to show that the denial of his motion for a continuance was erroneous or that he was prejudiced by the denial. The assignments of error are overruled.

We have considered the assignments of error on their merits. We note, nevertheless, that the record discloses that defendant was arraigned on 17 May 1976, and entered a plea of not guilty. The record further discloses that "[t]he attorney for the defendant announced that there are no pretrial motions."

We find no prejudicial error in defendant's trial.

No error.

Chief Judge BROCK and Judge CLARK concur.

INDIAN TRACE CO., A JOINT VENTURE COMPOSED OF BEASLEY-KELSO ASSOCIATES, INC. AND GARVIN B. HARDISON v. WILLIAM J. SANDERS, ET AL

No. 763SC885

(Filed 1 June 1977)

Appeal and Error § 39.1— record on appeal — certification by clerk — time for filing

Appeal is dismissed for failure of appellant to comply with the requirement of App. R. 11(e) that the record on appeal be presented to the clerk of superior court for certification within 10 days after it is settled and with the requirement of App. R. 12(a) that the record on appeal be filed in the Court of Appeals within 150 days after notice of appeal is given.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 22 May 1976 in Superior Court, PAMLICO County. Heard in the Court of Appeals 10 May 1977.

This is a special proceeding wherein the plaintiff, Indian Trace Co., seeks to have the court partition a tract of land

located in Pamlico County. Plaintiff alleged in its complaint that it owns a seven-eleventh undivided interest in the property and defendants, William J. Sanders *et al,* own a four-elevenths interest in the property. Defendants answered alleging that they were the sole owners of the property, having obtained title by adverse possession. After trial the court granted plaintiff's motion for a directed verdict. From a judgment decreeing that plaintiff and defendants are the owners of the property as tenants in common as alleged in plaintiff's complaint and decreeing that the property be partitioned, defendants appealed.

Lee, Hancock and Lasitter by C. E. Hancock, Jr., for plaintiff appellee.

Frazier and Moore by Reginald L. Frazier for defendant appellants.

HEDRICK, Judge.

The record before us discloses the following chronology of events:

Judgment in this case was entered on 22 May 1976 and *notice of appeal* was given in open court at that time. Defendants were allowed 50 days within which to "serve case on appeal." On 22 July 1976 defendants obtained an order extending the time to serve the record on appeal to 1 September 1976. On 20 August 1976 defendants obtained a further extension of 20 days within which to serve the record on appeal. Under the date of 24 August 1976 the following appears in the record:

> "I, Sadie W. Edwards, Clerk of the Superior Court of Pamlico County, State of North Carolina, said Court being a Court of Record, having an official seal, which is hereto affixed, do hereby certify the foregoing and attached (sixty-eight sheets) to be a true copy of the file entitled:
>
> Indian Trace Co., A Joint Venture
> Composed of Beasley-Kelso Associates,
> Inc. and Garvin B. Hardison
>
> VS
>
> William J. Sanders and others
>
> as the same is taken from and compared with the original now on file in this office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the Superior Court of Pamlico County, at my office in Bayboro, North Carolina, this 24th day of August, 1976.

s/ SADIE W. EDWARDS
Clerk Superior Court
Ex Officio Judge of Probate"

On 15 October 1976 the parties by stipulation settled the record on appeal. On 25 October 1976 the record on appeal was filed in this Court. On 28 October 1976 defendants made a motion seeking permission to file the "Clerk's Certification" as an addendum to the record. That motion was denied without prejudice on 9 November 1976 for the reason that the "certification sought to be added to the record on appeal has not been presented to this Court." On 15 November 1976 defendants' counsel, Frazier & Moore, filed a motion in this Court to be allowed to withdraw as counsel. In their motion counsel stated that they desired to withdraw " . . . because of the inability of the appellants to advance the total cost of the appeal and their desire to change attorneys. . . . " Frazier & Moore stated in the motion that " . . . appellants have paid one-half (1/2) of the attorneys fee of Five Thousand Dollars ($5,000.00), which we have had to recycle into the cost of the transcript, court records, docketing cost and cost of bonds." This court allowed Frazier & Moore's motion to withdraw by order dated 19 November 1976. On 18 March 1977 defendants, through their attorneys Frazier & Moore, filed a motion to add to the record on appeal the clerk's certification of the settled record on appeal dated 15 March 1977. Ruling on the motion was postponed by this Court pending expiration of time for oral argument. The motion was denied by this Court in conference on 10 May 1977. On 25 March 1977 plaintiff moved pursuant to Appellate Rule 25 that the appeal be dismissed for defendants' failure to comply with Appellate Rule 12(a). Ruling on this motion was postponed pending expiration of time for oral argument.

Appellate Rule 25 in pertinent part provides:

"If after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision, the appeal may on motion of any other party be dismissed."

Appellate Rule 11(e) provides:

"Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11, the appellant shall present the items constituting the record on appeal to the clerk of superior court for certification. The clerk of superior court shall forthwith inspect the items presented and, if they be found true copies and transcriptions, certify them, noting the date of certification on the appropriate docket."

Appellate Rule 12(a) provides:

"Within 10 days after certification of the record on appeal by the clerk of superior court, but no later than 150 days after giving notice of appeal, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken."

Chief Judge Brock stated in *Ledwell v. County of Randolph*, 31 N.C. App. 522, 523, 229 S.E. 2d 836, 837 (1976),

"The North Carolina Rules of Appellate Procedure are mandatory. 'These rules govern procedure in all appeals from the courts of the trial divisions to the courts of the appellate division; . . . ' App. R. 1(a)."

In response to plaintiff's motion to dismiss for defendants' failure to comply with Appellate Rule 12(a), defendants' counsel stated,

"[A]fter having carefully perused the latest Motion of the plaintiff as well as the record proper, we totally fail to comprehend the thrust of the plaintiff's motion to dismiss and say to this court, that, the statement of the case was timely served on the attorneys for the plaintiff, who, accepted the same as was certified to this Court. That the matter was properly and timely docketed in the North Carolina Court of Appeals as by rules provided; that within the time provided by rules the brief was filed; However, it was brought to the attention of the undersigned that the Clerk's Certificate of the record proper was dated August 28, 1976. We moved at the time to file with this court a modified certificate of the Clerk of the Superior Court of Pamlico County. The attorneys for the plaintiff now allude to the One Hundred Fifty (150) day rule, which we say, we

were well within said time unless the plaintiff is contending that the case was not timely docketed. . . . "

Manifestly defendants have failed to comply with Appellate Rules 12(a) and 11(e). Indeed, the appeal was subject to dismissal for counsel's failure to comply with the rules when counsel filed their motion to be allowed to withdraw even though they had already been paid $2,500 in attorneys' fees. Although the record demonstrates that counsel was well aware of the "150 day rule," and the record on appeal was settled in ample time for defendants' counsel to have complied with the rule, counsel has offered no explanation for their failure to do so.

Appeal dismissed.

Judges MORRIS and ARNOLD concur.

STATE OF NORTH CAROLINA v. ALVIN DUANE SINGLETON

No. 762SC945

(Filed 1 June 1977)

1. **Searches and Seizures § 3— validity of search warrant — voir dire — when informant saw drugs — contents of warrant**

In a *voir dire* hearing to determine the admissibility of marijuana seized pursuant to a search warrant, the trial court did not err in refusing to permit defendant to elicit information as to precisely when an informant saw defendant with the drugs where the affidavit stated that the informant had seen drugs in the possession of defendant at his residence "within the last 48 hours," since the magistrate could have reasonably concluded from this information that the drugs were still in defendant's possession, and defendant was not entitled to know the precise moment they were seen; nor did the court err in refusing to permit defendant to ask an officer what the warrant authorized officers to search, since the warrant was the best evidence of its contents.

2. **Searches and Seizures § 3— search warrant — sufficiency of affidavit**

An officer's affidavit stating that an informant had seen drugs in defendant's possession at his residence within the past 48 hours and that he had provided reliable information in the past was sufficient to establish probable cause for the issuance of a warrant to search defendant's residence.

3. Narcotics § 3— expert on controlled substances — apparatus used in smoking marijuana

Where the trial court found that an SBI agent was an expert in the field of controlled substances, the court did not err in permitting the agent to testify that officers seized "several types of smoking apparatus usually used in the smoking of marijuana."

4. Narcotics § 3— weight of marijuana — testimony not hearsay

An officer's testimony that the total weight of seized marijuana was 265.5 grams was not inadmissible as hearsay, although he testified that he did not weigh the drug, where the officer stated that he was present when the weight was taken and saw the weights on the scales, and it is therefore apparent that he was testifying from firsthand knowledge.

APPEAL by defendant from *Webb, Judge.* Judgment entered 29 June 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 14 April 1977.

Defendant was indicted for felonious possession of a controlled substance, to wit: more than one ounce of marijuana. He entered a plea of not guilty and was convicted by a jury on the charge. Judgment was entered sentencing defendant to imprisonment for a term of 2 years.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Moore and Moore, by Regina A. Moore, for defendant appellant.

MORRIS, Judge.

At trial, a voir dire was conducted to determine the admissibility of the marijuana seized pursuant to a warrant to search the premises. The affidavit accompanying the warrant stated, *inter alia,* that Deputy Sheriff Jerry V. Beach received information from a 'reliable informant' on 11 May 1976 that defendant had in his home various drugs, including marijuana and LSD; that the informant "has seen drugs" in defendant's possession at his residence "within the last 48 hrs."; and that Beach had "known my informa. . . for about 10 yrs. He is reliable and has given me reliable info. in the past and has never told me a lie about anything to my knowledge."

Beach testified that the warrant was read to defendant when the officers arrived at defendant's home. Beach asked defendant to come with him to another room, whereupon defendant stated that he would fully cooperate with the officers. Beach advised defendant of his rights and asked him to turn over any illegal drugs in his possession. Defendant then stated that some drugs had come through the mail for another person which he opened by mistake. Upon request, defendant took the officers to his room and handed them a box containing the marijuana.

[1] Defendant's counsel attempted to elicit testimony from Beach concerning precisely when the informant had seen defendant with the drugs and what the warrant authorized the officers to search. The district attorney objected to both questions, and the objections were sustained. By his first and second assignments of error, defendant contends that the trial judge committed prejudicial error in refusing to permit these questions. We disagree.

Although the time the informant saw the drugs at defendant's residence is one component in the concept of probable cause, defendant is not entitled to know the precise moment they were seen, so long as the affidavit otherwise shows facts from which a magistrate could reasonably determine that probable cause to search exists. *State v. Cobb*, 21 N.C. App. 66, 202 S.E. 2d 801, *cert. den.*, 285 N.C. 374, 205 S.E. 2d 99 (1974). The affidavit in the present case, unlike that in *Cobb*, narrowed down the informant's observation to within 48 hours of the time the warrant was obtained. We believe that the magistrate, acting upon this information, could reasonably conclude that there was probable cause to believe that the drugs were still in defendant's possession. As for defendant's question relating to the scope of the warrant's authorization, the warrant itself was the best evidence of its contents. Accordingly, it was not prejudicial error to overrule this question. Examination of the record reveals that defendant had a full and fair opportunity to adequately question Deputy Beach concerning possible defects in the warrant and affidavit. These assignments are overruled.

[2] By his third assignment of error, defendant contends that the trial judge erred in finding that the warrant was valid and in overruling the motion to suppress. In order to establish probable cause to search based on an informant's tip, an affidavit

must contain facts showing that there is illegal activity or contraband in the place to be searched and underlying facts which indicate that the informant is credible or that the information is reliable. *Spinelli v. U. S.*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); *State v. Campbell*, 282 N.C. 125, 191 S.E. 2d 752 (1972). The affidavit in the present case alleged that the informant had seen the drugs within the preceding 48 hours and that he had provided reliable information in the past. These facts, though brief, are sufficient to establish probable cause for the issuance of a warrant. *See State v. Cumber*, 32 N.C. App. 329, 232 S.E. 2d 291 (1977); *State v. Altman*, 15 N.C. App. 257, 189 S.E. 2d 793, *cert. den.*, 281 N.C. 759, 191 S.E. 2d 362 (1972). This assignment is overruled.

[3] The State called as a witness Fred Cohoon, a special agent with the State Bureau of Investigation. During the course of Cohoon's direct examination, the trial court found as a fact that Cohoon " . . . is an expert in the field of controlled substances." Thereafter, Cohoon testified, over objection, that officers seized " . . . several types of smoking apparatus usually used in the smoking of marijuana." Defendant moved to strike the answer, and the motion was denied. By his fourth assignment of error, defendant maintains that the evidence was improperly admitted. We disagree. Cohoon was found by the trial court to be an expert witness in the area of controlled substances. Such a finding is within the discretion of the trial court, whose ruling is conclusive unless there is no evidence to support the ruling or unless there is an abuse of discretion. *State v. Moore*, 245 N.C. 158, 95 S.E. 2d 548 (1956); 1 Stansbury, N. C. Evidence, § 133, p. 430 (Brandis Rev. 1973). Having determined that Cohoon was an expert as to controlled substances, the trial court could then properly permit him to relate what he saw and render his opinion with respect thereto. *See State v. Stewart*, 156 N.C. 636, 72 S.E. 193 (1911). This assignment is overruled.

[4] Cohoon also testified, over objection, that although he did not weigh the marijuana, its total weight was 265.5 grams. Defendant assigns as error the admission of this testimony on the grounds that Cohoon's testimony as to the total weight of the marijuana was inadmissible hearsay. We cannot agree. Cohoon did not weigh the drug, but he stated that he was present when its weight was taken and "saw the weights . . . on the pharmacy scales." Thus it is apparent that Cohoon was testifying from

firsthand knowledge, and his testimony as to weight was competent. This assignment is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. AARON MAYO ROBINSON

No. 762SC1030

(Filed 1 June 1977)

Homicide § 21.1— sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a murder prosecution where it tended to show that defendant had previously beaten and threatened to kill decedent; decedent had taken out a warrant against defendant and had been subpoenaed to testify against him; defendant was aware that decedent was scheduled to testify against him; defendant was seen at decedent's house in an intoxicated condition at the approximate time of the murder; a broken bottle which could have caused decedent's death bore defendant's fingerprints and was found near decedent's blood; and defendant changed shirts between the time he was seen prior to the murder and when he was interviewed shortly thereafter.

APPEAL by defendant from *Peel, Judge.* Judgment entered 30 September 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 5 May 1977.

Defendant was charged by indictment in proper form with murder. He entered a plea of not guilty to the charge and was convicted by a jury of second-degree murder. Judgment was entered sentencing defendant to imprisonment for a term of 65 to 70 years.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Assistant Attorney General H. A. Cole, Jr., for the State.

Clarence W. Griffin for defendant appellant.

MORRIS, Judge.

By his only assignments of error brought forward on appeal, defendant contends that the trial court erred in denying his motions for a "directed verdict of not guilty" at the close of the State's evidence and again at the close of all the evidence. Defendant's motion should properly have been for judgment as in the case of nonsuit, and we shall treat it as such. *State v. Holton,* 284 N.C. 391, 200 S.E. 2d 612 (1973). On a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment to be drawn therefrom. *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973). Where the evidence is direct, circumstantial or both, if there is evidence from which the jury may find that the offense charged has been committed and that defendant committed it, the motion should be overruled. *State v. Lindley,* 286 N.C. 255, 210 S.E. 2d 207 (1974). Defendant's evidence relating to matters of defense will not be considered in ruling on motion to nonsuit. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975).

The State's evidence tended to show as follows: Until the time of her death, the decedent, Elizabeth Hill, lived in a small house approximately five miles north of Williamston. She had previously resided with defendant in the Williamston Housing Project. On various occasions, neighbors had observed defendant beat and threaten to kill decedent. On one occasion, she took out a warrant charging defendant with assault after he allegely cut her with a razor blade. At approximately 9:00 p.m. on 15 July 1976, Martin County Deputy Sheriff Plum Rogers went to decedent's residence and delivered a subpoena directing her to be in court the following week in connection with the assault charge against defendant. As Rogers drove away from the Hill house, he noticed defendant walking towards it. Defendant was, in Rogers' opinion, under the influence of intoxicating beverages at the time and was wearing a white short-sleeved shirt. Rogers observed defendant until he saw defendant enter decedent's yard at approximately 9:35 p.m.

At 2:00 a.m. on 16 July, the Williamston Rescue Squad received a call from defendant requesting that they go to the Hill residence. Upon their arrival, the rescue team discovered decedent's body lying in her bedroom. She had sustained a deep gash across the length of her forehead as well as cuts on her

ear and arm. Investigating officers discovered blood at various points on the floor inside the house and on the front porch. Also found on the porch near the bloodstains was a broken wine bottle bearing defendant's fingerprints. An autopsy disclosed that the wound on decedent's head was caused by a blunt object. The cuts on the ear and arm were the result of a sharp pointed object, and could have been caused by a broken bottle.

The police investigators spoke with defendant at approximately 2:30 that same morning, at which time he was wearing a clean long-sleeved shirt. Defendant informed the officers that he had gone to decedent's house at 12:30 a.m. and discovered her dead upon his arrival. Defendant subsequently told the police that he had spent most of the evening of 15 July at the house of Teeny Bell, a friend. He further stated that he had taken a sandwich to decedent at about 6:00 and returned shortly thereafter and remained at Bell's house until 12:30 a.m. Defendant also mentioned that decedent had been served with papers requiring her to go to court the following week. Bell told officers that defendant came to her house at 8:00 p.m. on 15 July but thereafter went to decedent's house and returned at 10:45 p.m. Defendant then remained with her until he left at 12:30 a.m., when he again went to decedent's house. She further stated to the police that defendant, who was wearing a white short-sleeved shirt, came back to her house a few minutes later and announced that decedent was dead.

Thus, in the present case, the State presented evidence which tended to show that defendant had previously beaten and threatened to kill decedent; that decedent had taken out a warrant against defendant and had been subpoenaed to testify against him; that defendant was aware that decedent was scheduled to testify against him; that defendant was seen at decedent's house in an intoxicated condition at the approximate time of the murder; that a broken bottle which could have caused decedent's death contained defendant's fingerprints, and was found near decedent's blood; and that defendant had changed shirts between the time he was seen prior to the murder and when he was interviewed shortly thereafter. We believe, and so hold, that when this evidence is viewed in the light most favorable to the State, *State v. Everette, supra*, it is sufficient to withstand defendant's motions and take the case to the jury. Accordingly, we find

No error.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. WAYNE PRESTON WILLIAMS

No. 7626SC949

(Filed 1 June 1977)

1. **Criminal Law § 101; Constitutional Law § 56— juror asleep — failure to declare mistrial**

The trial court in an armed robbery case did not err in failing to declare a mistrial on its own motion when the court observed that one of the jurors had fallen asleep, and defendant's conviction did not constitute a conviction by eleven jurors instead of the required twelve.

2. **Criminal Law §§ 66.18, 178— in-court identification — admissibility determined at prior trial — law of the case**

In this second trial of defendant after his first trial ended in a mistrial, the trial court did not err in accepting the determination of the admissibility of in-court identification testimony made at the first trial and refusing to hold another *voir dire* hearing where defendant was unable to advise the court that he could offer evidence that would be any different from that given at the first hearing.

3. **Criminal Law §§ 66.9, 66.16— photographic identification not impermissibly suggestive — independent origin of in-court identification**

A photographic identification procedure was not impermissibly suggestive where a robbery victim was shown five photographs of young white persons with long hair on the day after the robbery, no suggestion was made that a suspect was included in the group, all five persons in the photographs looked reasonably similar, and the victim immediately selected a photograph of defendant as the robber; furthermore, the victim's in-court identification of defendant was of independent origin and not tainted by the photographic identification where the record shows that the victim had a good opportunity to observe defendant during the commission of the crime at a night deposit box, the victim's description of the robber fit that of defendant, and the victim recognized defendant as a person who had previously cashed checks at the service station where the victim worked.

APPEAL by defendant from *Barbee, Judge.* Judgment entered 16 June 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 May 1977.

Defendant was charged with and convicted of armed robbery. From judgment imposing a twenty-year prison term, defendant appealed.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Public Defender Michael S. Scofield, by Assistant Public Defenders Mark A. Michael and Ann Villier, for defendant appellant.

VAUGHN, Judge.

[1] Defendant brings forward four assignments of error presented in three arguments. First, defendant contends that the court erred by not declaring a mistrial on its own motion when the court observed that one of the jurors had fallen asleep. The record shows that, during the cross-examination of one of the State's witnesses, the following transpired:

> "THE COURT: Will all the Jurors just stand up a minute, please? You can't go to sleep. (One juror had fallen asleep on the back row of the Jury Box.)"

Defendant's counsel then proceeded with cross-examination without so much as suggesting to the court that there was a possibility of prejudice to the defendant.

Defendant now argues that the court, on its own motion, should have declared a mistrial. He argues that the result is that his conviction is a nullity because it amounts to a conviction by eleven jurors instead of the required twelve. *State v. Hudson,* 280 N.C. 74, 185 S.E. 2d 189. The "sleeping juror" had been duly impaneled along with the other eleven and the twelve duly returned a verdict of guilty in open court. Defendant, therefore, was convicted by a jury of twelve as required by law. At trial, defendant did not contend that he was prejudiced and there is nothing in the record to indicate that he was. The judge did not err, therefore, in failing to order a mistrial without the request or consent of defendant.

[2] Defendant's first trial on this charge of armed robbery ended in a mistrial. His second assignment of error is that the trial court erred by denying his motion for a second voir dire hearing on the admissibility of the State's witnesses' in-court identification of defendant. It is his contention that the adop-

tion of the determination of admissibility on this issue, which had been made by another judge after a voir dire hearing had been conducted during the first trial of defendant, was prejudicial to him.

Defendant was unable to advise the court that he could offer evidence that would be any different from that given at the first hearing. It was not necessary, therefore, for the judge to conduct another hearing on the admissibility of the eyewitness testimony of the victim.

[3] Defendant finally assigns as error that the judge failed to find the photographic lineup used by the police in their investigation of this case so unnecessarily suggestive that evidence of the lineup and the subsequent in-court identification of defendant should have been suppressed. Defendant argues that the photographs shown to the witness were so dissimilar as to be unnecessarily suggestive, and under the rule of *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed. 2d 1247, it was error for the trial judge to allow in-court identification of defendant by this witness. According to the doctrine espoused in *Simmons*, when conviction is based upon an eyewitness identification at trial which was preceded by a pretrial photographic identification procedure, the conviction will only be set aside if it is determined that the pretrial identification by photograph was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

The Supreme Court of North Carolina has set forth the following factors which should be considered in applying the *Simmons* test:

> " '(1) The manner in which the pretrial identification was conducted; (2) the witness's prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any description given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification.' " *State v. Knight*, 282 N.C. 220, 225, 192 S.E. 2d 283.

The eyewitness in the case before us testified that he got out of his car on the night of the robbery near the night deposit

box and that he first saw defendant standing in front of his car, about seven or eight feet away. He stated that " . . . the lighting was fairly decent. It is not good lighting, but you can see." The witness's car lights were on as were other lights in the bank parking lot and in an adjacent parking lot. There was also a small light above the bank depository.

The witness testified further that he described the robber to the police as having long blonde hair, wire-rimmed glasses and a blonde or light brown mustache. He recalled telling the owner of the gas station on the night of the robbery after the police had completed their investigation at the station, that he had recognized the robber as a person who had been in the station before and for whom he had cashed checks which had been returned by the bank because of insufficient funds.

The day after the robbery, the police showed the eyewitness five photographs. No suggestion was made that a police suspect was included in the group. All of the photographs were of young, white persons with long hair. All five individuals in the photographs looked reasonably similar. The witness immediately and without hesitation selected the third photograph he viewed as being that of the person who robbed him and that photograph was that of defendant.

The record thus reveals that this eyewitness had a good opportunity to observe defendant during the commission of the crime and recognized defendant as a person who he had seen at the station before. His photographic identification of defendant was immediate, spontaneous and unwaivering. He never made previous or subsequent identifications of any other persons as being the robber that he had observed during the commission of the robbery. The judge properly concluded, therefore, that the pretrial photographic identification procedure was properly conducted, was not impermissibly suggestive and that the in-court identification of defendant was based on the witness's observation of defendant at the scene of the crime. Defendant's assignment of error is overruled.

No error.

Chief Judge BROCK and Judge CLARK concur.

State v. Lockett

STATE OF NORTH CAROLINA v. JOSEPH W. LOCKETT

No. 7612SC1047

(Filed 1 June 1977)

Homicide § 21.1— murder of defendant's wife — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a murder prosecution where it tended to show that defendant's wife was killed; a butcher knife which was missing from her cutlery set and which was found fifty feet from her apartment was the murder weapon; the knife contained bloodstains matching the blood of decedent; defendant's fingerprints were imprinted in the bloodstains on the knife; and those prints were impressed after the murder took place.

APPEAL by defendant from *Preston, Judge.* Judgment entered 30 July 1976 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 10 May 1977.

Defendant was charged by indictment in proper form with second-degree murder. He entered a plea of not guilty and was convicted by a jury of voluntary manslaughter. Judgment was entered sentencing defendant to imprisonment for a term of 16 to 20 years.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Public Defender Mary Ann Tally for defendant appellant.

MORRIS, Judge.

Defendant presents two assignments of error for review. However, as to defendant's first assignment, he concedes that there was "no error of consequence" and fails to support it in his brief with reason or authority. This assignment is therefore deemed abandoned. Rule 28(b)(3), North Carolina Rules of Appellate Procedure.

By his second assignment of error, defendant contends that the trial court erred in denying his motions for judgment as of nonsuit made after the State rested and after the close of all the evidence. In reviewing a motion for judgment as of nonsuit, the trial court is required to consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference and intendment to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

If there is evidence, direct, circumstantial, or both, from which the jury can find that the offense charged was committed by defendant, the motion must be overruled. *State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24 (1975).

The State introduced evidence that tended to show as follows: At 2:32 a.m. on 15 February 1976, the Fayetteville Law Enforcement Center received a call from a person identifying himself as defendant asking that an ambulance be sent to his apartment. At approximately 2:55 a.m., defendant awakened Calvin Horton, a neighbor, and told him and his wife that "somebody killed my old lady." Horton accompanied defendant to his apartment and discovered defendant's wife on the floor. She was lying on her back and wore a gown covered with blood.

Investigating officers discovered that the door to defendant's apartment had been shattered, and there was a faint impression of a shoe print on the center portion of the door. In the middle of the floor was a lock which had apparently been knocked from the door. Defendant's wife had a puncture wound in her left side under her armpit and a cut under her right eye. An autopsy revealed that the puncture penetrated the left lung and thoracic aorta and was the cause of death. She also sustained bruises in the scalpal area caused by a blunt instrument. The officers also discovered that a butcher knife was missing from a cutlery set in the apartment. They located the knife in bushes approximately 50 feet from the apartment and found a reddish stain on its blade.

Defendant's right leg was in a cast which extended from 3 or 4 inches below the groin to below the knee. He had freshly skinned knuckles, a swollen right foot, scratches on his forehead and chest, and a long red welt on his left arm. The officers found bloodstains on his pants, shirt and slippers and on a crumpled paper towel in the trash can. Analysis of these stains revealed them to be type A blood, the defendant's blood type. The stain on the knife was analyzed as type O blood, that of defendant's wife. Latent fingerprints found on the cutlery set and impressed in the bloodstain on the butcher knife were identified as defendant's.

On the evening prior to the murder, defendant played cards at a lounge in Fayetteville from 5:00 p.m. to 1:00 a.m. Defendant was in need of money to continue in the game and told a friend that he could go home to get it. At approximately 8:30, defendant used the telephone, left the lounge and stayed

gone for 1½ to 2 hours. He then returned and continued to play cards until 1:00 a.m.

Defendant introduced evidence in his behalf. Any evidence, however, which conflicts with that of the State is not to be considered on a motion for judgment as of nonsuit. *State v. Carthens,* 284 N.C. 111, 199 S.E. 2d 456 (1973), *cert. den.,* 415 U.S. 979, 39 L.Ed. 2d 875, 94 S.Ct. 1567 (1974).

Thus, the State introduced evidence from which the jury could reasonably infer that the butcher knife was the murder weapon; that the knife contained bloodstains matching the blood of decedent; that defendant's fingerprints were imprinted in the bloodstain on the knife; and that these prints were impressed after the murder took place. We believe that this evidence, when viewed in the light most favorable to the State, was sufficient to withstand defendant's motions and take the case to the jury.

No error.

Judges HEDRICK and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 MAY 1977

CLARK v. CLARK No. 7624DC872	Madison (72CVD25A)	Vacated and Remanded
STATE v. ARMSTRONG No. 764SC1023	Onslow (76CR2568)	No Error
STATE v. ATKINSON No. 768SC883	Wayne (75CR12474) (75CR12190)	No Error
STATE v. BELLAMY No. 7613SC1020	Columbus (75CR1920)	Appeal Dismissed
STATE v. CAMP No. 7627SC1056	Gaston (76CR11327)	No Error
STATE v. HOOD No. 7626SC970	Mecklenburg (75CR53111)	No Error
STATE v. IKARD No. 7622SC963	Iredell (75CR3700)	Affirmed
STATE v. JACKSON No. 7629SC964	Rutherford (75CR7755)	No Error
STATE v. LEWIS No. 763SC1032	Carteret (76CR6567)	Affirmed
STATE v. OWENS No. 7627SC981	Cleveland (75CR13211)	No Error
STATE v. SEAY No. 7612SC1013	Cumberland (75CR1603)	No Error
STATE v. SLOAN No. 7720SC9	Moore (76CR3163)	No Error
STATE v. SUTTON No. 7615SC971	Alamance (76CRS3276)	No Error
STATE v. WARREN No. 7615SC960	Alamance (75CR8214)	No Error

FILED 1 JUNE 1977

IN RE KNAPP No. 761SC957	Camden (76CVS12)	Affirmed
MEYER v. LIBBY'S VILLAGE SHOP No. 7626SC910	Mecklenburg (73CVS4514)	New Trial
STATE v. BALDWIN No. 7615SC987	Orange (76CR5303)	No Error

STATE v. BURGESS No. 7619SC1025	Cabarrus (76CR3545) (76CR3546) (76CR3547)	No Error
STATE v. COPER No. 762SC988	Beaufort (76CR2053)	No Error
STATE v. CRISCO No. 7619SC973	Rowan (76CR5281)	No Error
STATE v. FOSTER No. 7618SC947	Guilford (76CR23450)	No Error
STATE v. GREEN No. 7630SC1055	Jackson (76CR830) (76CR831) (76CR832)	No Error
STATE v. LASSITER No. 7614SC1054	Durham (76CR3102)	No Error
STATE v. PENDRY No. 7621SC1051	Forsyth (76CR35899) (76CR35900)	Dismissed
STATE v. WHITAKER No. 771SC6	Currituck (75CR558) (75CR559)	No Error
STATE v. WILLIAMS No. 7611SC986	Lee (76CR1124) (76CR1125)	No Error
STATE v. WILLIAMS No. 7721SC10	Forsyth (75CR44550)	No Error

HIGH POINT BANK AND TRUST COMPANY, PLAINTIFF v. MORGAN-SCHULTHEISS, INC., A CORPORATION; CLARENCE V. MATTOCKS, SUBSTITUTED TRUSTEE; EVELYN H. POSTON AND JANICE E. POSTON, DEFENDANTS AND EVELYN H. POSTON, PLAINTIFF v. MORGAN-SCHULTHEISS, INC., A NORTH CAROLINA CORPORATION, DEFENDANT

No. 7618SC857

(Filed 15 June 1977)

1. **Attorneys at Law § 6— withdrawal of attorney**

The attorney-client relationship may, in good faith, be dissolved at any time as between the attorney and his client, but the attorney may not be released from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation.

2. **Attorneys at Law § 6; Rules of Civil Procedure § 56— summary judgment hearing — absence of appellants' counsel — no "counsel of record"**

The court did not err in conducting a summary judgment hearing without the presence of appellants' counsel and without the withdrawal of appellants' counsel pursuant to Rule 16 of the Superior and District Court Rules where the only document indicating that appellants were represented by counsel was a stipulation extending the time to plead, the motion for summary judgment was personally served upon the appellants, appellants' answer was signed and filed by appellants *in propria persona,* appellants stated at the hearing that they were appearing without an attorney, and the statement by one appellant that she had talked with an attorney by telephone the day before did not reveal an attorney-client relationship, since there was no "counsel of record" within the contemplation of Rule 16.

3. **Mortgages and Deeds of Trust § 1— warranty deed and option to repurchase — sale or mortgage**

There was a genuine issue of material fact as to whether a warranty deed and a separate agreement giving the grantor the option to repurchase within a specified time constituted a sale with an option to repurchase or a mortgage where there was evidence presented on the motion for summary judgment tending to show that the grantor was in financial distress and was desperately attempting to secure a loan; the grantee agreed that it would borrow $60,000 from a bank to pay the grantor for the property and would secure the note with a deed of trust on the property; the grantor was given an option to repurchase for $65,000 plus interest and charges paid by the grantee on the $60,000 bank loan; the grantor was given the right to possession of the property during the option period; the grantor was given the right to try to sell the property, and the grantee was given the right of first refusal to buy at the price offered by a prospective purchaser in the event the grantor secured a purchaser for an amount sufficient to exercise the option to repurchase; an attorney's fee paid

by the grantor included the fee for title search and certification of title to the bank furnishing the $60,000 to the grantee; the value of the property conveyed was between $77,400 and $150,000; and the grantor thought a loan was being arranged and never agreed to sell all of her property.

4. Appeal and Error § 16— appeal from summary judgment — default judgments on counterclaims — jurisdiction

Where it is clear that defendant's motion for summary judgment, filed the same day as an answer setting up counterclaims, was directed only to plaintiff's principal action, an appeal from an order allowing defendant's motion for summary judgment did not deprive the court of jurisdiction to enter default judgments on the counterclaims.

5. Judgments § 14— default judgment — claim not actually counterclaim

The court erred in entry of default judgment on a purported counterclaim for failure to answer where the purported counterclaim amounted to no more than a denial of the allegations in plaintiff's complaint, was not in effect a counterclaim, and thus required no answer by plaintiff.

No. 76CVS1402

BEFORE *Wood, J.* Summary judgment entered 8 April 1976 in Superior Court, GUILFORD County. Appeal by Evelyn H. Poston and Janice E. Poston.

No. 76CVS2096

Before *Wood, J.* Summary judgment entered 8 April 1976 in Superior Court, GUILFORD County. Appeal by Evelyn H. Poston.

Before *Long, J.* Default judgment entered 24 May 1976 in Superior Court, GUILFORD County. Appeal by Evelyn H. Poston.

Before *Rousseau, J.* Order dimissing appeal entered 30 August 1976 in Superior Court, GUILFORD County. Appeal by Evelyn H. Poston.

Heard in the Court of Appeals 13 April 1977.

These two actions have been consolidated for purpose of appeal. The first action (#76CVS1402), brought by High Point Bank and Trust Company on 15 January 1976, is to obtain judgment for the principal and interest due on a $60,000 note and costs, together with judicial foreclosure of the deed of trust by which the note was secured. Morgan-Schultheiss is the maker of the note and executed the deed of trust. Clarence V. Mat-

tocks is the substitute trustee under the deed of trust. Evelyn H. Poston and Janice E. Poston are residing on the property described in the deed of trust. They were made parties as having an interest in the subject matter based on their continued occupancy of the property and their claim of ownership. The complaint asked, *inter alia,* that ". . . EVELYN H. POSTON and JANICE E. POSTON be ordered and directed to vacate said real property and to surrender possession of said real property to the Plaintiff; that it be adjudicated that EVELYN H. POSTON and JANICE E. POSTON have no right, title or interest in and to said real property and that sale of said property by the Substituted Trustee will pass title to said real property free and clear of any and all claims on the part of EVELYN H. POSTON and JANICE E. POSTON. . . ."

All defendants answered. Morgan-Schultheiss, Inc., admitted the execution of the note and deed of trust and that the note was in default. As its first defense, it alleged that there was then pending an action entitled "Evelyn H. Poston vs. Morgan-Schultheiss, Inc." (Filed No. 76CVS2096) which related to Evelyn H. Poston's claim to the equity of redemption in the property. In that action Morgan-Schultheiss had set up four counterclaims which were actions to quiet title, for rents, in ejectment, and for abuse of process. It asked that the bank's action not be heard or determined until the matters contained in the Poston action had been adjudicated or in the alternative, that the two actions be consolidated for trial. As a further answer and defense and counterclaim, and as a cross-claim against the defendants, it asked that, should the indebtedness be paid, the court order that Morgan-Schultheiss be entitled to possession of the real property and that the Postons be ordered to vacate the property and surrender possession to Morgan-Schultheiss.

Defendants Poston answered admitting the note and deed of trust and admitting that they are in possession and that they claim an equity of redemption in the property.

Plaintiff moved for summary judgment in #76CVS1402. In support of the motion, plaintiff filed a copy of agreement between Evelyn H. Poston and Morgan-Schultheiss, under which it was agreed that Morgan-Schultheiss would buy the property in question from Evelyn Poston; that it would borrow the $60,000 purchase price and secure the note with a deed of trust

conveying the property; that all liens and encumbrances against the property, except a deed of trust to Perpetual Savings and Loan Association, would be paid and satisfied by record at the time of closing; that J. V. Morgan, Attorney, would hold as trustee a sufficient amount of the purchase price to satisfy that indebtedness in the event that seller's husband did not comply with a court order to make those payments; that seller was given an option to repurchase the property on or before 1 February 1975 upon the payment to buyer of $65,000 plus all interest and charges paid by buyer to the bank on the $60,000 loan; that seller would retain possession of the property until 1 February 1975, but in the event she failed to repurchase the property she would remove all her personal belongings from the property and surrender the property to buyer on or before 15 February 1975; that seller was privileged to try to sell the property and in the event she secured a purchaser for all or any part of the land for an amount sufficient to repurchase from buyer, she would give buyer first refusal to buy at the price offered by the prospective purchaser. The bank also filed a copy of the deed from Evelyn Poston to Morgan-Schultheiss, a copy of the $60,000 note to the bank from Morgan-Schultheiss, a copy of the deed of trust securing the note, and a copy of the instrument substituting Clarence V. Mattocks as trustee under the deed of trust.

Morgan-Schultheiss filed a response to the motion setting up the same matters and things averred in its answer to the complaint. The Postons filed no response, nor did they file any affidavits in opposition to the motion.

Judge Wood conducted a hearing on the motion and "heard the evidence presented by the plaintiff and by the defendants, Morgan-Schultheiss, Inc., Evelyn H. Poston and Janice E. Poston." On 8 April 1976, he entered an order in #76CVS1402 concluding that no genuine issue existed as to any material fact, and granted summary judgment in favor of plaintiff and ordered (1) plaintiff shall have judgment against Morgan-Schultheiss, Inc., in sum of $60,000 plus interest, (2) plaintiff is entitled to possession of the property for the purpose of enforcing its rights under the deed of trust, (3) Evelyn H. Poston and Janice E. Poston shall immediately vacate the property and surrender possession to plaintiff, (4) the substituted trustee shall proceed to foreclosure sale and the sale should be free and clear of any and all claims to the property on the part of

the Postons, (5) Morgan-Schultheiss, Inc., shall be entitled to exercise its equity of redemption by paying the indebtedness, with interest and costs.

To the entry of this judgment on 8 April 1976 Evelyn H. Poston and Janice E. Poston excepted and gave notice of appeal.

The action of Evelyn H. Poston against Morgan-Schultheiss, Inc. (#76CVS2096) was filed on 17 February 1976. The pertinent portions of the complaint are as follows:

"3. Plaintiff Evelyn H. Poston, did, on or about the first day of August, 1974, execute and deliver to the defendant corporation herein a certain deed which was in form a warranty deed, a copy of which is attached hereto and marked Exhibit 'A' and incorporated herein by reference, said deed being recorded in deed book 2741, page 890, Guilford County, North Carolina.

4. The above-mentioned deed was executed contemporaneously with the execution of an agreement, a copy of which is attached hereto and marked Exhibit 'B' and incorporated herein by reference, said Exhibit 'B' has been once amended by amendment marked as Exhibit 'C,' a copy of which is attached hereto and incorporated herein by reference; plaintiff is informed, believes and alleges that the deed mentioned in paragraph 3 above, the written agreements mentioned herein above in paragraph 4, and a letter written to Morgan, Byerly, Post and Herring, attorneys at law, attached hereto as Exhibit 'D' and incorporated herein by reference, do collectively comprise the agreement between the plaintiff and the defendant, together also with certain verbal representation among the parties hereto and the individual agents of the corporate defendant and a certain deed of trust from said corporate defendant in favor of High Point Bank and Trust Company on the face amount of sixty thousand and no/100 ($60,000.00) dollars and being of record in deed of trust book 2696, page 357, in Guilford County, North Carolina.

5. All of the above-mentioned recorded instruments of conveyance, agreements, extensions and renewals, do, when taken together, clearly show that it was the intent of all parties involved that the deed from plaintiff Evelyn H.

Poston, to the corporate defendant should have the effect of a mortgage deed or security instrument, leaving an equity of redemption in Evelyn H. Poston, plaintiff, and should not be construed as a warranty deed, taking absolute effect as a conveyance of fee simple title to the corporate defendant.

6. Plaintiff is further informed, believes and alleges that for the reasons set out above, the above-mentioned deed should be reformed in order to give it effect of a mortgage or deed of trust only and no foreclosure should be allowed except on terms that are both just and equitable under said instrument as it would be reformed."

Plaintiff further alleged that the reasonable fair market value of the property is $150,000 and that defendant will be unjust'y enriched if the deed is not reformed into a mortgage or deed of trust and foreclosure conducted; that a clause allowing her to redeem was omitted by reason of ignorance and mistake on her part induced by fraud, duress, undue influence and imposition on the part of or on behalf of defendant. She prayed that the deed be reformed and that she be allowed to assume the obligation of defendant to the bank and be given 90 days during which she would not be subject to foreclosure by the bank. With the complaint, she filed a notice of lis pendens.

Defendant answered, denying the material portions of the complaint, but admitting the execution of the deed, agreement, and extension of time for the option to repurchase. It set up the defense of estoppel and, in the alternative, asked that should the court reform the deed, the court order a sale of the lands and direct that from the proceeds of sale the $60,000 note and all accumulated interest be paid and then defendant be repaid all interest paid by it to the bank upon the note.

Counterclaims to quiet title, for rents, in ejectment, and for abuse of process were included in the answer.

On 27 February 1976, defendant moved for summary judgment in #76CVS2096. Notice of the motion was served on plaintiff on 16 March 1976. The notice set out the depositions, interrogatories, affidavits, etc., on which defendant would rely at the hearing of the motion.

On 30 March 1976, defendant moved for entry of default by plaintiff and judgment against plaintiff for failure to plead

to the counterclaims. Default was entered on 30 March 1976 upon each of the four counterclaims asserted by defendant and default judgments were entered on the counterclaims. In the judgment as to the first counterclaim, the notice of lis pendens was vacated. The judgments on the second and fourth counterclaims left the matter of damage for determination. These were subsequently set aside, and plaintiff was given an extension of time to 3 May 1976 within which to plead.

On 8 April 1976, Judge Wood allowed defendant's motion for summary judgment in #76CVS2096 and vacated the notice of lis pendens. From this order, plaintiff, Evelyn H. Poston, excepted and gave notice of appeal.

On 13 May 1976, defendant again moved for entry of default and default judgment supporting its motion with an affidavit. Copies were served on plaintiff's then attorney of record. Entry of default was entered and plaintiff excepted. Defendant filed written "motion and application for default judgment" and copy, together with copy of notice setting the motion for hearing on 24 May 1976, was served on plaintiff's counsel. Plaintiff responded to the motion and opposed it on the ground that a final judgment dismissing the action had been filed on 8 April 1976 from which plaintiff had appealed. On 24 May 1976, Judge Long entered default judgments on the four counterclaims. Plaintiff excepted and gave notice of appeal as to each judgment.

On 9 June 1976, plaintiff moved to set aside the default judgments. The motion was heard 28 June 1976, and order entered denying the motion on 2 July 1976. No exception was taken to this order and no notice of appeal given.

On 1 July 1976, plaintiff applied for and was given additional time within which to serve "Record on Appeal from the Default Judgment dated May 24, 1976." By order dated 2 August 1976, another extension to 30 days after 2 August 1976 was granted.

With respect to the appeal from the summary judgment entered in each case on 8 April 1976, the time allowed for service of the record on appeal expired 18 May 1976. An additional 45 days was granted on 12 May 1976, and another 30 days was granted on 2 July 1976. On 2 August 1976, the time was again extended for "20 additional days after August 2, 1976."

On 4 September 1976, after the time for serving the record on appeal from the default judgments had expired, counsel for plaintiff moved that the appeals be consolidated and that the court recommend to this Court that an additional reasonable time be granted for filing the record on appeal. The court entered an order consolidating the appeals; extending the time for serving the record on appeal to 15 September 1976; and requesting this Court to grant a reasonable additional time.

The order of 2 August 1976 extending the time for serving record on appeal bears no filing date, nor does the 4 September 1976 motion and order, although all other motions and orders do bear a filing date. It appears from the record that these were not in the Clerk's file. In any event, on 17 August 1976, defendant moved to dismiss plaintiff's appeal for failure to perfect. This motion was granted by an order entered 30 August 1976 by Judge Rousseau. Plaintiff excepted and gave notice of appeal.

Jenkins, Lucas, Babb & DeRamus, by F. Gaither Jenkins and Judson D. DeRamus, Jr., for appellants, Evelyn H. Poston and Janice E. Poston.

Haworth, Riggs, Kuhn, Haworth & Miller, by John Haworth, for High Point Bank & Trust Company, appellee.

Frank B. Wyatt for Morgan-Schultheiss, Inc., appellee.

MORRIS, Judge.

It is apparent from the record that appellants have been represented throughout this litigation by a succession of attorneys. While each counsel undertaking to represent appellants has been able and competent, the entry and withdrawal of so many different attorneys would obviously account for the confused state of the record. It appears that counsel on appeal did not represent appellants until after the order of 2 August 1976 was entered but did prepare the last motion for extension of time, consolidation, and request for recommendation of the trial court to this Court.

We believe a more orderly procedure requires the disposition of the appeal in the case of *High Point Bank and Trust Company v. Morgan-Schultheiss, Inc., Clarence V. Mattocks, Evelyn H. Poston, and Janice E. Poston.* Appellants' only as-

signment of error as to this appeal is that the court erred in entering summary judgment.

[1] As a part of their argument under this assignment of error, appellants contend that with respect to the proceedings of 7 April 1976—the hearing on the motion for summary judgment—any order entered without the participation of their counsel was void. Appellants take the position that the court had the duty to see that their counsel of record had properly withdrawn pursuant to Rule 16 of the Superior and District Court Rules. Rule 16 provides:

> "No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court."

As between the attorney and his client, the relationship may, in good faith, be dissolved at any time, but the attorney may not be released from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation. *Smith v. Bryant,* 264 N.C. 208, 141 S.E. 2d 303 (1965).

[2] The record indicates that the hearing on the motion for summary judgment was held at the 29 March 1976 Civil Session of Guilford Superior Court. The notice thereof indicated that the motion would be calendared for hearing at that session with the hearing to begin at 10 o'clock on 5 April 1976 or as soon thereafter as the matter could be heard. Prior to that time the only document indicating that appellants were represented by counsel was a stipulation extending the time to plead. This stipulation was signed by counsel for the bank and by Norman B. Smith, attorney for Evelyn H. Poston and Janice E. Poston. The stipulation is not dated, but it extended the time to file answer or otherwise plead to and including 29 March 1976. It was filed on 1 April 1976. Defendants Postons' answer was filed on 31 March 1976 and was signed by each of them without any indication that they were represented by counsel.

The transcript of the evidence taken at the hearing reveals that upon questioning by the court Janice Evelyn Poston testi-

fied: "We do not have an attorney." Evelyn H. Poston was examined by the court. She testified: "Our attorney at this point is Mr. Wesley Bailey of Winston, who could not be here this morning. Last evening Mr. Norman Smith told my daughter that the only reason he discontinued representing us was the fact that Mr. Roy Morgan and Mr. Schultheiss said they would sue him if he continued representing us. We have not paid Mr. Wesley Bailey a fee because we just talked by telephone. We first talked with Mr. Bailey yesterday. I am appearing today without counsel." Nowhere else in the record does Mr. Bailey's name appear. Nor does Mrs. Poston's testimony reveal an attorney-client relationship. Thereafter the Postons were apparently represented by Paul B. Stam, Sr., for a short while and then Renn Drum, Jr., for a short while. No order releasing any counsel appears of record. It is obvious that Mr. Smith withdrew from representing appellants, if he ever did in fact represent them for any purpose other than obtaining a stipulation for extension of time within which to plead, some time prior to the scheduled hearing. The motion for summary judgment was served on Mr. Smith as counsel for the Postons on 10 March 1976, but on 15 March 1976 the notice of hearing was served upon the Postons. This would indicate that the Postons were not then represented by Mr. Smith or any other counsel. The cross-claims of Morgan-Schultheiss were also served on the Postons individually. The answer of the Postons, although filed after the time for answer had expired, was signed by them and filed by them *in propria persona* on 31 March 1976. The record is clear that this is not a situation where counsel withdraws on the day of hearing and leaves the client surprised and without time to obtain counsel. Nor is there any indication that they were prejudiced by the fact that they were not represented by counsel. Mrs. Evelyn Poston testified that she is a graduate of Guilford College and Janice Poston testified that she had completed two years of college. Neither is uneducated and both are obviously women of intelligence. Neither asked for a continuance. Neither offered any complaint that they had no counsel. They proceeded to offer evidence with respect to the value of the land and with respect to the transaction with Morgan-Schultheiss and the events leading up to it.

Under the circumstances of this case, we are of the opinion that the court was under no duty to have appellants' "counsel of record" present or see that he had properly withdrawn pur-

suant to Rule 16. In this situation, there was no "counsel of record" within the contemplation of the rule. We note that counsel for appellants limits this contention to the bank case. There is nothing in the record of the *Poston v. Morgan-Schultheiss* case to indicate that Evelyn Poston had counsel for any purpose at all until after the summary judgment was entered. She signed and filed her own complaint attaching to it the exhibits she indicated would be attached and signed and filed the notice of lis pendens. Indeed, lack of counsel has not been an issue with either appellant until now. We hold that the argument is without merit.

We turn now to the substantive feature of appellants' assignment of error. At oral argument, counsel for appellants conceded that he could not with any authority argue that the plaintiff is not entitled to judgment against Morgan-Schultheiss in the sum of $60,000 plus interest and costs nor that it is not entitled to foreclosure under the terms of the deed of trust. He does argue that a genuine issue of fact exists with respect to the ownership of the acreage contending that the question of the intention of the parties to the absolute deed accompanied by the collateral written agreement to reconvey upon payment of a specified sum of money within a specified time should be submitted to the jury. This contention is based upon these grounds: (1) If the grantor remains in possession of the land, the factual presumption is raised that a mortgage and not an absolute deed was intended. (2) Appellants at all times prior to the execution of the instruments indicated they wanted a loan. (3) Appellants introduced evidence that the land was worth $150,000 and the $60,000 consideration paid by Morgan-Schultheiss was clearly inadequate. (4) Evidence, undisputed, showed the grantor to be in financial distress. (5) Where the agreement to reconvey accompanying the deed is written rather than oral, no fraud, mistake, undue influence or ignorance need be shown; and where the execution of a deed in absolute form and a written agreement to convey raise doubt and ambiguity, the transaction is construed to be a mortgage.

In support of its motion, plaintiff filed a copy of the deed from Evelyn H. Poston to Morgan-Schultheiss, a copy of the $60,000 note from Morgan-Schultheiss to the bank and a copy of the deed of trust securing the note. It also filed a copy of

an agreement between Evelyn H. Poston and Morgan-Schultheiss. That agreement is as follows:

"NORTH CAROLINA
GUILFORD COUNTY

THIS AGREEMENT entered into this 30th day of July, 1974, by and between EVELYN H. POSTON, hereafter referred to as SELLER, and MORGAN-SCHULTHEISS, INC., a North Carolina Corporation, hereafter referred to as BUYER.

WITNESSETH:

SELLER is the owner of her homeplace and approximately 25.8 acres on Vickery Chapel Road in Jamestown, North Carolina, and has this date delivered to BUYER a warranty deed for the same.

NOW, THEREFORE, for and in consideration of the sums to be paid and in further consideration of the mutual promises made each to the other, it is agreed:

(1) Upon the title to said lands being approved by BUYER'S attorney or by BUYER'S bank's attorney, BUYER shall secure a loan in the sum of $60,000.00 and give as security for the same a Deed of Trust on the land.

(2) All liens and encumbrances against said land, except for the Deed of Trust to Perpetual Savings & Loan Association, shall be paid and satisfied of record at time of closing.

(3) J. V. Morgan, Attorney, shall hold as Trustee, a sufficient amount of the purchase price to satisfy the Perpetual loan until such time as the same is satisfied of record. It is the intent of the parties to leave that Deed of Trust on record, with the payments thereon being made by SELLER'S husband under a Court Order until such time as it is necessary to pay and cancel the same of record in order to give BUYER a title to said lands, subject only to the Deed of Trust to High Point Bank and Trust Company.

(4) On or before the 1st day of February, 1975, BUYER hereby gives SELLER an option to repurchase

said land upon SELLER paying to BUYER the sum of $65,000.00 plus all interest and other charges paid by BUYER to the bank on the $60,000.00 loan and plus any necessary attorney fees and other charges paid by him in connection with this transaction. In this event, the Deed of Trust to High Point Bank and Trust Company shall be paid in full by BUYER and SELLER shall receive from J. V. Morgan, Trustee, any funds in his hands under Paragraph Three (3) above.

(5) During the period before February 1, 1975, SELLER shall retain possession of said land and the buildings thereon. In the event she does not repurchase said land, she shall remove all of her personal belongings located thereon and shall give full possession to BUYER on or before February 15, 1975. Any personal property not removed on or before February 15, 1975, shall belong to BUYER.

(6) During the period prior to February 1, 1975, SELLER shall have the right to exert her best efforts to sell said land. In the event she secures a purchaser for all or any part of said lands, for an amount sufficient to repurchase the same from BUYER, she shall give BUYER first refusal to buy the same at the price offered by the prospective purchaser.

WITNESS the hands and seals of the parties this 30th day of July, 1974.

/s/ Evelyn H. Poston (SEAL)
Evelyn H. Poston, Seller

MORGAN-SCHULTHEISS, INC., Buyer

By: /s/ Roy G. Morgan
President

ATTEST:
/s/ G. E. Schultheiss
Secretary"

In support of its motion for summary judgment in #76CVS2096, Morgan-Schultheiss filed an affidavit of Roy Morgan, President of the Corporation, and the deposition of J. V. Morgan, attorney, together with deposition exhibits, copies

of agreements executed by the Postons and one Bennett, copies of corrrespondents in the matter, copy of the deed, deed of trust and note, and lists of debts and worthless checks of the Postons.

Both motions were heard together. The deposition of J. V. Morgan detailed the transactions had by him as attorney for Mrs. Poston. She and her daughter went to see Mr. Morgan on 12 April 1974. During a conference of some two hours, Mrs. Poston advised Mr. Morgan that North Carolina National Bank in Greensboro was foreclosing on a mortgage on her land and homeplace in Jamestown, that High Point Bank and Trust held a mortgage on a portion of the land and was threatening foreclosure, and held three notes on which they were starting suit, that Wachovia Bank in Greensboro had a claim against her, that a motel in Greensboro had started suit against her for room rental, and that several other actions had been started against her to secure money judgments for failure to pay accounts. Although Mrs. Poston was not sure of the figures, it appeared that she owed at that time between $50,000 and $70,000. There were approximately 25 acres in Jamestown on which was situate, as Mr. Morgan discovered by personal examination, a large old dilapidated house and some outbuildings. Mrs. Poston wanted to secure a long term loan on the property. The discussion revealed that her income was insufficient to make the payments on the loans she already had. Mr. Morgan suggested that she try to sell off some of the vacant land. She said she might be interested but would prefer to save the entire tract. Since she indicated she was related to some of the personnel at High Point Bank and Trust Company, Mr. Morgan suggested that she try to work out a loan there. She did and was unsuccessful. It developed that she had rented a car and had failed to pay therefor and a warrant had been issued for her arrest in addition to several warrants outstanding against her daughter for worthless checks. Mrs. Poston told Mr. Morgan that some men in Greensboro had offered her $8,000 per acre for the land. He strongly recommended that she sell at least 10 acres, retain the homeplace, and pay her debts. At her request, he contacted the people she said had made the offer but was told that no $8,000 per acre offer had been made. Two of those called said they might be interested in all the land at a reasonable price and would call back. One person contacted was a real estate dealer who said he would like to list the property. He said he had never told Mrs. Poston it was worth

$8,000 per acre but it might be worth $4,000 per acre. He never, however, came up with any prospects. Mr. Morgan recontacted one of the persons who had indicated an interest and wanted Mrs. Poston to give him her best price. She would not authorize less than $8,000 per acre and would sell 10 acres. When Mr. Morgan reported this to Mr. Lewis, the prospect, he said he was not the least bit interested.

During these negotiations North Carolina National Bank went forward with its foreclosure and the high bid was just enough to pay that mortgage and a prior one. Mr. Morgan advanced Mrs. Poston sufficient funds with which to raise the bid and extend the time to find a purchaser for the land. Both Mrs. Poston and Mr. Morgan contacted several people but were not successful. The land was resold, and to secure more time, Mr. John Haworth, Trustee for High Point Bank and Trust Company, raised the bid at the last moment.

Mr. Morgan then received a call from Robert Hodgman, an attorney in Greensboro, who said his client, Mr. Bennett, would be interested in buying the entire tract. A conference was arranged between Bennett and Mrs. Poston. Her daughter was present, as were the attorneys for the parties. This was early May of 1974. Mr. Bennett made an offer, and Mrs. Poston asked if he would make her a loan. He said that under no circumstances could he do that. After a lengthy conference, Mrs. Poston agreed to sell if Mr. Bennett would give her an option to repurchase at the end of a year. After further phone calls and negotiations, Mr. Bennett agreed but for not more than six months. The necessary papers were prepared, including the agreement to allow her to repurchase. The purchase price was $30,000. Mr. Bennett was to pay the outstanding first mortgage to Perpetual Savings and Loan. She was to have the privilege of repurchasing at any time before 11 September 1974 by paying Mr. Bennett $31,000 plus any interest and other charges he might have paid on money borrowed to buy the land, attorney fees and other charges in connection with the transaction. She was to retain possession of the property and if she did not exercise the option, he was to pay her the amount due on the Perpetual Savings and Loan deed of trust. Should she find another purchaser, Mr. Bennett was to be given the opportunity

to buy at that price. Mrs. Poston signed the agreement and the deed and a letter to Mr. Morgan's firm as follows:

"This is to acknowledge that we employed you as our attorney on April 12, 1974, to represent us in connection with the sale of the land in Jamestown, foreclosures, suits and warrants outstanding and unpaid debts.

Obligations now due by us are set out on the attached Exhibit A which is made a part of this letter.

We hereby authorize you to do the following:

(1) Deliver the deed and close the transaction agreed upon with George Alton Bennett, III, a copy of said agreement being attached hereto as Exhibit B which is made a part of this letter.

(2) Receive from George Alton Bennett, III, the $30,000.00 payment and to disburse the same through your Trust Account as follows:

(a) Pay the amounts due per items 1 through 10 as shown on Exhibit A in the total amount of approximately $26,737.24.

(b) Pay to Evelyn H. Poston the balance in your hands after the above matters have been closed.

(3) To make a court appearance in the criminal cases listed and to dispose of those cases in your discretion.

(4) Assist us in securing a buyer or buyers for the subject real estate, subject to our approval of the sales price and the amount of land sold.

It is understood and agreed that the attorney fee paid to you shall cover your legal services in the past and for a period of 120 days from this date. At the end of that period, we release you from any further duties to us unless we see fit to employ your services in other matters after that date.

(5) Notify C. W. Poston that the Perpetual loan has been paid in full and that he is to thereafter make the payments to Evelyn H. Poston as set out in the Court Order.

(6) Receive from Robert S. Hodgman, 222 Commerce Street, Greensboro, North Carolina, his entire files pertaining to all matters he has represented us in. In consideration thereof, we fully and completely release Mr. Hodgman as our attorney and do release and forever discharge him from any and every right, claim or demand which we might have or might hereafter have against him on account of, connected with, or growing out of his representing us as our attorney. We authorize you to give him a signed copy of this letter. We understand that he will represent George Alton Bennett, III, in future transactions.

You have fully explained to us that High Point Bank and Trust Company is foreclosing the lot and suing us on their notes; that other claimants will probably secure judgments against us and that they will be liens on the real estate if we get title back into our name; that Internal Revenue Service claims may be liens against the land and/or against our income. You have further explained to us that the transaction with George Alton Bennett, III, is strictly a stop-gap measure to give us time to try to sell portions of our land and redeem it under our option to repurchase and that all of this must be done within the 120 day period; otherwise, we have sold the land for a total of $40,000.00.

Yours truly,
/s/ Evelyn H. Poston
Evelyn H. Poston

/s/ Janice E. Poston
Janice E. Poston"

This transaction was not consummated, because Mr. Bennett could not borrow the purchase price from his bank. Mr. Morgan so advised Mrs. Poston, and they continued to try to find a purchaser. She told Mr. Morgan that she placed an ad in a New York paper, advertising it as an ancestral homeplace.

Finally in July, Morgan-Schultheiss showed some interest in the property. Mr. Roy Morgan was interested because he had bought some land very near it but there was some acreage between his and the Poston property and he wanted to buy both pieces. Mrs. Poston was contacted, the figures were again totalled and, since judgments and other liens against the prop-

erty had by then been recorded, more money was needed. Morgan-Schultheiss agreed to pay $60,000. Mrs. Poston inquired whether it would give her an option to repurchase as Mr. Bennett had agreed to do. They were not interested, but after several conferences, agreed to give her a six months option to repurchase at $65,000 plus all interest and charges Morgan-Schultheiss had incurred. Again she was to retain possession, have the privilege of attempting to find another purchaser and give Morgan-Schultheiss the first refusal to buy at that price. She executed all the necessary papers including the same letter which had been written in connection with the Bennett transaction with only names and amounts changed. Morgan-Schultheiss borrowed $60,000 from High Point Bank and Trust Company, paid it to Mr. Morgan for Mrs. Poston, and he disbursed it to her creditors and lienholders, retaining $8,000 in trust to pay the Perpetual Savings and Loan in the event her former husband defaulted in his obligation to make monthly payments thereon. The transaction was consummated. Mr. Morgan paid from his trust account all the debts, worthless checks, costs, etc., listed on the attachment to Mrs. Poston's letter including attorneys fees of $4,000 (which fee included a fee for title search and certification of title to High Point Bank and Trust Company for Morgan-Schultheiss), and gave Mrs. Poston his firm's trust check #M6311, dated 7 August 1974, for $4,893.43 designated as "balance of proceeds of sale of land."

On 7 January 1975, Mr. Morgan wrote Mrs. Poston reminding her that her option to repurchase expired 1 February. Thereafter, Mr. Morgan received a call from Charles Dameron, a Greensboro lawyer, stating that Mrs. Poston had consulted him and inquired whether he could obtain an extension of time. Mr. Morgan contacted Morgan-Schultheiss and they finally agreed on an extension to 3 March 1975 upon a $200 consideration. The extension was prepared by Mr. Morgan, signed by Morgan-Schultheiss, and forwarded to Mr. Dameron. The extension also provided for a payment of $500 to Robert Hodgman, Mrs. Poston's "former attorney." She executed the agreement, and Mr. Dameron returned an executed copy to Mr. Morgan. In subsequent telephone conversations, Mr. Dameron advised Mr. Morgan that he was working with Mrs. Poston, wanted names of people Mr. Morgan had contacted and other information. Finally, by letter dated 21 February 1975, Mr. Dameron forwarded to Mr. Morgan a letter signed by Mrs. Poston au-

thorizing the payment of $500 fee to Mr. Dameron from the $8,000 held in trust by Mr. Morgan. On 3 March 1975 Mr. Kent Lively, a Greensboro attorney, called Mr. Morgan stating that Mrs. Poston had consulted him and asking for the facts of the situation. Mr. Morgan had no further contact or knowledge of the status of the matter. He did learn, when he was handed a copy of her complaint, that she was claiming the transaction was not a sale. Mr. Morgan was unaware that Mrs. Poston was in ill health during the spring, summer, and fall of 1974. She never told him she had high blood pressure and phlebitis. He did know she was worried. He revealed to her the name of the prospective purchaser the first time he talked to her about the Morgan-Schultheiss sale. She thought she could work out a sale of the land between them. Although she originally wanted a loan, she became reconciled to the impossibility of obtaining one. He never formed an opinion of the value of the land, but one realtor told him he would list it for $4,000 per acre. Another said it would be worth $3,000 per acre because it would not perk.

Both Mrs. Poston and her daughter were allowed to testify in open court. Both identified the papers executed by Mrs. Poston in connection with the Bennett transaction which was never consummated and the Morgan-Schultheiss transaction. Janice testified that her mother "never agreed to sell the whole thing." She further testified that Mr. Morgan would not disclose the name of the buyer but insisted that her mother sign the deed. She said that when they thought the Bennett deal was going through, she wrote some more checks which were worthless. They repeatedly told Mr. Morgan they wanted a loan and he told them they had a loan. She testified "one of the reasons I am taking the position that it was a loan and not a sale of the real estate is because my mother and I had been under some emotional stress and strain."

Mrs. Poston testified that on one occasion a minister from Greensboro had promised to buy a lot for $6500 and they wrote some checks on the strength of that, but when he went and looked at the property he wanted to buy it all, and she was not willing to sell all of it. She testified to several offers, none of which materialized, that after the Bennett deal fell through she advertised five or seven acres in the New York Times, that Mr. Morgan would not tell her the name of the prospective purchaser but the deal would be similar to the Bennett deal, that

she told him she wanted no part of that. She said when he called to tell her the papers were ready, she told him she wanted a loan. At his suggestion, she went to his office to discuss it. She was in a state of complete exhaustion and her eyes were blurred. Mr. Morgan told her the paper she signed was a loan. She further testified that they were prepared within 30 days to pay the entire loan, plus interest to the High Point Bank, that she was graduated from college but did not read the papers she signed, and they were not explained to her. Apparently, neither Mrs. Poston nor her daughter raise any question with respect to the amount of their debts which Mr. Morgan paid, but both testified to the fact that they were in financial distress.

In *O'Briant v. Lee*, 214 N.C. 723, 200 S.E. 865 (1939), perhaps the leading case in this State with respect to this problem, the Court, speaking through Barnhill, J. (later C.J.), said

> ". . . when it does not affirmatively appear on the face of the instruments that they were intended as security, and such fact cannot be fairly inferred therefrom, the actual intent of the parties at the time is the controlling criterion in determining the true nature and effect of the instruments; and that, in establishing this intent, the debtor has the right to prove by evidence *dehors* the instruments that the transaction was in fact between debtor and creditor for the security of a loan.
>
> If there was a debt, either antecedent or presently created, the instrument must be construed to constitute a mortgage, unless a contrary intent clearly appears upon the face of the instruments. If this fact does not appear, then the continued possession of the property by the grantor; the inadequacy of the consideration; that the negotiations originated out of an application for a loan; the circumstances surrounding the transaction; and the conduct of the parties before, at, and after the time of the execution of the instruments are some of the circumstances to be considered.
>
> But the contention is here made that there is no reciprocal obligation resting on the grantors to redeem; that it is entirely optional with them as to whether they shall exercise the right to repurchase within the time stipulated; that it does not appear upon the face of the papers that there is any personal obligation on the part of the grantors to

pay the amount of the alleged loan and interest. This is not essential. Evidence of the indebtedness is not required to be in writing. It may be proven by parol. Furthermore, such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. In the cases where the question has arisen whether the transaction was one of purchase or of security and the instruments disclosed a debt in the amount of the alleged purchase price and no other sum is paid it has been held that this fact determines conclusively the character of the transaction as a mortgage. (Citations omitted.)" *Id.* at 732-33, 200 S.E. at 871-72.

In *Ferguson v. Blanchard,* 220 N.C. 1, 16 S.E. 2d 414 (1941), the plaintiff alleged that a warranty deed and option to repurchase constituted a security transaction. There plaintiffs' intestate and his wife had given two deeds of trust to secure a $20,000 debt to defendant. They defaulted in payment and conveyed the land to defendant. As a part of the transaction, an agreement was entered into between them giving plaintiffs' intestates the right to repurchase for $22,500, the agreed amount of the debt and interest. They were given the right to sell the property on or before 19 June 1929 for $22,500 plus interest and taxes and if more than that was realized plaintiff should receive 90% of the excess, and also the right to sell the timber. The two deeds of trust were cancelled. In 1926 they sold a portion of the land for $28,740 and received $2,000 in cash and notes for the balance secured by a deed of trust on the portion sold. Defendant joined in the deed of conveyance and took the notes, although there was no allegation that payment was ever received on them. Defendant denied that the transaction constituted anything other than a sale with an option to repurchase. A receiver was appointed and found facts from which he concluded that the transaction constituted a sale and not a mortgage. In affirming, the Court said:

"It is true that when a debtor conveys land to a creditor by deed absolute in form and at the same time gives a note or otherwise obligates himself to pay the debt, and takes from the grantee an agreement to reconvey upon payment of the debt, the transaction is a mortgage. *Robinson v. Willoughby,* 65 N.C., 520. But if the agreement leaves it entirely optional with the debtor whether he will pay the

debt and redeem the land or not, and does not bind him to do so, or continue his obligation to pay, the relationship of mortgagor and mortgagee may not be held to continue unless the parties have so intended. The distinction is pointed out in *O'Briant v. Lee*, 212 N.C., 793, 195 S.E., 15, where *Connor, J.*, speaking for the Court, quotes with approval from 41 C.J., 325, as follows: 'If it is a debt which the grantor is bound to pay, which the grantee might collect by proper proceedings, and for which the deed to the land is to stand as security, the transaction is a mortgage; but if it is entirely optional with the grantor to pay the money and receive a reconveyance, he has not the rights of a mortgagor, but only the privilege of repurchasing the property.' And in Pomeroy's Equity Jurisprudence (sec. 1194) it is said: 'Where land is conveyed by an absolute deed, and an instrument is given back as a part of the same transation, not containing the condition ordinarily inserted in mortgages, but being an agreement that the grantee will reconvey the premises if the grantor shall pay a certain sum of money at or before a specified time, the two taken together may be what on their face they purport to be—a mere sale with a contract of repurchase, or they may constitute a mortgage.'

Whether any particular transaction amounts to a mortgage or an option of repurchase depends upon the real intention of the parties, as shown on the face of the writings, or by extrinsic evidence, and the distinction seems to be whether the debt existing prior to the conveyance is still left subsisting or has been entirely discharged or satisfied by the conveyance. If no relation whatsoever of debtor and creditor is left subsisting, the transaction is a sale with contract of repurchase, since there is no debt to be secured. Pomeroy's Equity Jurisprudence, sec. 1195." *Id.* at 7-8, 16 S.E. 2d at 418.

See also Ricks v. Batchelor, 225 N.C. 8, 33 S.E. 2d 68 (1945).

In *McKinley v. Hinnant*, 242 N.C. 245, 87 S.E. 2d 568 (1955), the Court referred to *O'Briant, Ferguson*, and *Ricks, supra*, for discussion of the applicable principles of law and noted that whether the transaction amounts to a mortgage or a sale with option to repurchase depends on the real intention of the parties, " . . . and the distinction is whether the debt

existing prior to the conveyance is still subsisting, or has been satisfied by the conveyance. If the relation of debtor and creditor still continues, equity will regard the transaction as a method of securing a debt—and hence a mortgage." *Id.* at 251, 87 S.E. 2d at 573. The Court further noted that if the value of the property conveyed is much greater than the consideration for the deed, this is a factor tending to show that the transaction was intended to be a mortgage.

Hardy v. Neville, 261 N.C. 454, 135 S.E. 2d 48 (1964), presents a fact situation strikingly similar to the case *sub judice.* Plaintiffs instituted an action to have the court declare that a deed and two agreements between the parties established a mortgagor-mortgagee relationship between them and to have the grantees required to accept payment of the amount due and cancel the deed. The land had been sold to defendant Lock, and defendants Neville by answer averred that the amount due the plaintiffs from the sale had been deposited for them in the office of the Clerk of Superior Court. Plaintiffs moved for judgment on the pleading, but the court did not rule on this motion. The parties agreed that the court might find the facts, apply the law, and render judgment. At the conclusion of the hearing, the court, without finding facts, nonsuited the plaintiffs and dismissed the action. Plaintiffs' motion for judgment on the pleadings was based on their contention that the allegations of the complaint and admission in defendants' answer conclusively showed that the transaction was in fact security for a debt and inequity a mortgage. Justice Higgins, writing for a unanimous Court, reviewed the averments in the answer. Prior to 1 January 1961, plaintiffs were heavily indebted and threatened with the foreclosure of two deeds of trust on their farm. They applied to defendants Neville for financial help. At that time, their indebtedness amounted to $8,736.70. The answer contained an itemization of their debts. After extensive discussion and negotiations, plaintiffs entered into an agreement with defendants Neville under which plaintiffs executed a deed to defendants Neville conveying certain real estate, and the plaintiffs and defendants Neville entered into a "contract in the nature of an option" by the terms of which defendants Neville agreed to reconvey the property to plaintiffs upon the payment by plaintiffs to them of $8,736.70 plus interest, with all taxes paid on the property paid by the Nevilles and all insurance premiums advanced by the Nevilles. Plaintiffs were not able to repurchase

during the time set, and a second option was given "extending the time for payment in order to give the plaintiffs additional opportunity to redeem the real estate referred to in this cause." This second contract was attached to and made a part of defendants' answer. It provided if plaintiffs were unable to repurchase by the time set, the farm would be sold (at public auction after advertisement for two weeks in a designated newspaper if the parties could not agree on a private sale) and the proceeds over and above $8,736.70 plus interest, taxes and insurance would be divided equally.

The Court noted some of the factors to be considered in determining whether the transaction constituted a sale or a mortgage: whether the relationship of debtor-creditor existed and continues to exist after the conveyance; whether the grantor is in distress at the time of the transaction; and whether the consideration for the conveyance was the value of the land or exactly the amount of the advancement by grantees. The Court said the defendants' answer made out " . . . a clear case of debtor-creditor relationship between the Hardys and the Nevilles. The Nevilles held the legal title as security for their debt. The Hardys owned the equity of redemption. Both together, but neither alone, could sell and convey a good title to the purchaser." *Id.* at 458, 135 S.E. 2d at 51. The Court held that the trial court erred in failing to allow plaintiffs' motion for judgment on the pleadings.

[3] When evidence and materials presented to the court on the motions for summary judgment are tested against the principles enunciated in the foregoing cases, we think the result must be that a genuine issue of material fact was presented. There can be no doubt but that Mrs. Poston was in financial distress. Nor is it controverted that she was desperately attempting to secure a loan. The deposition of Mr. Morgan details the various debts outstanding, and Mrs. Poston's evidence is not materially in conflict. Mr. Morgan's deposition revealed that the $4,000 fee paid by Mrs. Poston included the fee for title search and certification of title to the bank furnishing the $60,000 to Morgan-Schultheiss. The deposition of Mr. Morgan reveals that the lowest value of the property would be $77,400. Evidence for the Postons would indicate a value in excess of $150,000. A more serious conflict arises with respect to the intent of the parties. Mrs. Poston insists that she thought a loan was being arranged and that she never agreed to sell all

of her property. Further, she insists that not until after the transaction was concluded and at a later date did she learn that there could be some question about the true nature of the transaction. While it does seem apparent from the record before us that, in any event, nothing short of a miracle would be necessary for Mrs. Poston to raise the money to redeem the property, it is not the province of the trial court on a summary judgment motion nor this Court on appeal to pass on the credibility of the evidence. Suffice it to say that we are of the opinion that the materials presented at the hearing on the motions for summary judgment present a question which must be determined by a jury. Since the record does not separate the materials and evidence presented as to each case, we must assume that the court considered the same evidence and materials and documents on each motion, so that the result would be the same in each case, i.e., the motion for summary judgment in each case should have been denied. We are not unaware of the position taken by Morgan-Schultheiss that the oral evidence presented by the Postons was inadmissible and the court properly disregarded it. We think the comment made by Judge Parker in *Chandler v. Savings & Loan Assoc.*, 24 N.C. App. 455, 461, 211 S.E. 2d 484, 489 (1975), is appropriate:

> "In passing, we note that although Rule 43(e) of the Rules of Civil Procedure does permit the court to hear oral testimony in ruling upon a motion for summary judgment, '[t]his procedure should normally be utilized only if a small link of evidence is needed, and not for a long drawn out hearing to determine whether there is to be a trial.' 6 Moore's Federal Practice, 2d Ed., ¶ 56.02[9], p. 2042. In discussing the use of oral testimony at a hearing on a motion for summary judgment, the same treatise points out that receiving evidence at the hearing, as distinguished from considering supporting affidavits or depositions which are normally required to be filed before the hearing,
>
> > 'may not give the other party a fair opportunity to rebut; and this is particularly important in the case of the party opposing the motion for summary judgment.
> >
> > 'Also the summary judgment procedure is apt to be wasteful and burdensome if the summary judgment hearing is a protracted hearing, in effect a trial, to

> determine that a trial must be held.' 6 Moore's Federal Practice, 2d Ed., ¶ 56.11[8], P. 2206."

While it would certainly have been much preferable had Mrs. Poston presented her evidence in affidavit form, we think the fact that she was not represented by counsel and obviously financially unable to obtain counsel is a circumstance to be considered and which was considered by the court in admitting her evidence.

[4] With respect to the default judgments entered on the four counterclaims of Morgan-Schultheiss in # 76CVS2096 *(Poston v. Morgan-Schultheiss)*, plaintiff in that action, Mrs. Poston, contends that the default judgments were entered after the entire action, including the counterclaims, had been dismissed on defendant's motion for summary judgment. Therefore, argues Mrs. Poston, an appeal having been taken and not abandoned, the court acted without jurisdiction. We cannot agree. The complaint and notice of lis pendens in this action were filed 17 February 1976. Defendant filed its answer on 27 February 1976. The answer contained four counterclaims. On the same day, defendant filed its motion for summary judgment. The motion obviously related only to plaintiff's action, because under G.S. 1A-1, Rule 56(a), motion for summary judgment on the counterclaims could not have been validly filed until after the expiration of 30 days from the "commencement of the action" asserted by the counterclaims. We think it abundantly clear that the motion for summary judgment, filed the same day as answer setting up counterclaims, was directed only to plaintiff's principal action. Summary judgment may be entered upon less than the entire case. *See Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E. 2d 267, *cert. den.*, 289 N.C. 615, 223 S.E. 2d 392 (1976); *Rentals, Inc. v. Rentals, Inc.*, 26 N.C. App. 175, 215 S.E. 2d 398 (1975); *Patrick v. Hurdle*, 16 N.C. App. 28, 190 S.E. 2d 871, *cert. den.*, 282 N.C. 304, 192 S.E. 2d 195 (1972). Plaintiff at all times pertinent to this portion of this litigation was represented by competent counsel. We are of the opinion, and so hold, that the court did have jurisdiction to enter the orders of default judgments on 24 May 1976 from which plaintiff appeals, and the orders with respect to the second, third, and fourth counterclaims are affirmed.

[5] We reach a different conclusion with respect to the order on the first counterclaim, but for a different reason. The first

counterclaim is entitled "First Counterclaim to Quiet Title." It simply alleges that the transaction complained of was a sale by warranty deed of the lands described to defendant, that plaintiff claims an interest adverse to defendant, that plaintiff's claim is valid neither in law nor in fact, that plaintiff's claim is adverse to defendant and the notice of lis pendens constitutes a cloud on defendant's title, and asks that the cloud be removed and defendant declared the owner in fee of the property. This amounts to no more than a denial of the allegations in plaintiff's complaint. It is not in effect a counterclaim and requires no answer by plaintiff. Since plaintiff is not required to answer the First Counterclaim, entry of default judgment for failure to answer was in error and must be vacated.

Appellant also appeals from an order dated 30 August 1976, dismissing her appeal. All parties agree that the order was entered through mistake. Counsel for Morgan-Schultheiss, the movant, states that he was not served with nor provided with copies of the various motions and orders extending time for appellant, but that the original court file clearly reveals that proper orders were entered upon motions duly made. The order dismissing the appeal is vacated.

From the matters appealed from, we hold as follows:

In case No. 76CVS1402 *(Bank v. Morgan-Schultheiss, et al.)*, the portion of the summary judgment order giving the equity of redemption to Morgan-Schultheiss, Inc., is reversed. The portion giving Morgan-Schultheiss, Inc., the right to exercise its equity of redemption and concluding that no genuine issue of material fact existed is stricken.

In case No. 76CVS2096 *(Poston v. Morgan-Schultheiss, Inc.)*, the order granting defendant's motion for summary judgment is reversed. The default judgment as to the first counterclaim is vacated. The default judgments as to the second, third and fourth counterclaims are affirmed.

In case No. 76CVS2096, the order dismissing the appeal is vacated.

Both cases are remanded for further proceedings in accordance with this opinion.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA EX REL UTILITIES COMMISSION; NORTH CAROLINA NATURAL GAS CORPORATION, APPLICANT; AND ALUMINUM COMPANY OF AMERICA, INTERVENOR v. FARMERS CHEMICAL ASSOCIATION, INC., PETITIONER

No. 7610UC825

(Filed 15 June 1977)

Gas § 1— supplier's purchase of emergency gas — no use by customer — surcharge imposed on customer — error

The Utilities Commission erred in finding and concluding that defendant, a nitrogen fertilizer manufacturer, was served or benefited from its gas supplier's purchase of emergency gas and in requiring that defendant pay a surcharge to cover the increased cost of the emergency gas where the evidence tended to show that defendant never agreed to purchase emergency gas and was willing to shut down when it had used up its allotment of existing gas, though that became unnecessary when the flow of gas to defendant's supplier unexpectedly increased, and defendant in fact never used any of the emergency gas purchased by its supplier.

APPEAL by petitioner, Farmers Chemical Association, Inc. from order of the North Carolina Utilities Commission entered 3 June 1976 in Docket No. G-21, Sub 148. Heard in the Court of Appeals 17 February 1977.

Farmers Chemical Association, Inc. owns a nitrogen fertilizer manufacturing complex located near Tunis, North Carolina. In its manufacturing process it requires 29,200 Mcf of natural gas per day. It has a twenty year contract for firm natural gas service with its sole supplier, North Carolina Natural Gas Corporation.

Farmers Chemical uses natural gas entirely for "feedstock" and "process" purposes, as a raw material that is converted into nitrogen fertilizer and as a super heating fuel to effectuate this conversion.

In recent years, there have been substantial curtailments in Transcontinental Gas Pipe Line Corporation's flowing volumes. Transco allocates gas to its customers, including North Carolina Natural Gas on a seasonal basis. The 1975-76 winter season ran from 16 November 1975 through 15 April 1976. In order to allocate the existing supply of gas, the Utilities Commission adopted a system of priorities. When a distribution

company does not have enough gas available to supply all its customers, those customers with the highest priorities will be supplied and those with the lowest will not. There are twenty priority classes, with classes R.1 and R.2 having the highest priority and class A having the lowest. In the winter of 1975-76 supplies of natural gas were inadequate and the priority system was put into effect.

On 22 December 1975 North Carolina Natural Gas Corporation (NCNG) filed an application with the Commission, in which it stated that it had obtained 1,441,362 Mcf of natural gas from Michigan Consolidated Gas Company (Michigan) at a cost of $1.89613 per Mcf. This was an emergency purchase designed to supplement the supplies of gas which NCNG received from its regular supplier, Transcontinental Gas Pipe Line Corporation (Transco). The price of the gas purchased from Michigan was higher than that of the gas which NCNG regularly received from Transco. To recover this additional cost, NCNG requested permission to impose a surcharge of 24.7¢ per Mcf on all gas sold to its customers, except gas used by residential customers and gas used for feedstock purposes by Farmers Chemical Association, Inc. (FCA).

In an order dated 6 January 1976, the Commission approved NCNG's proposed surcharge, but required NCNG to impose it on all gas sold to its customers except gas used by residential customers. On January 7 NCNG filed tariffs in accordance with the Commission's order. The tariffs were "effective for billings on or after January 7, 1976."

On 2 February 1976 FCA petitioned for reconsideration of the Commission's order of 6 January 1976. On 24 March 1976 the Commission held a hearing on FCA's petition. At the hearing FCA offered evidence tending to show that it operates a manufacturing plant in Tunis. At this plant it uses large quanties of natural gas, and a substantial portion of this gas is used for feedstock purposes—that is, as a raw material in the manufacture of other products. Because of the nature of its manufacturing process, FCA cannot operate without gas, and cannot operate when the gas supply is significantly below their total requirements. FCA cannot operate at a profit when the price of gas is as high as that paid by NCNG to Michigan for its emergency purchase. Because of this, FCA would prefer to close down rather than use high-priced emergency gas. On

6 November 1975 there was a meeting of NCNG and FCA officials. NCNG advised FCA that because of the nationwide gas shortage, its regular supplies of gas from Transco had been curtailed, and it probably would be unable to supply all of FCA's gas requirements for the winter. Since FCA cou'd not significantly reduce its daily use of gas, NCNG and FCA agreed that FCA would operate until January 3 and then close down. On February 12 FCA would reopen and operate until its available gas for the winter was exhausted. NCNG officials mentioned the possibility of an emergency gas purchase, and FCA officials stated that they could not afford to use high-priced emergency gas and would rather close their plant. On 1 December 1975 NCNG notified FCA that it had made an emergency purchase from Michigan, and on December 8 FCA wrote to NCNG reiterating that it had not desired or agreed to such a purchase. During the winter NCNG received certain additional supplies of gas from Transco, in excess of those it had expected to receive. Because of these additional supplies from Transco and the emergency purchase from Michigan, NCNG had enough gas to supply all of FCA's requirements for the winter, and FCA did not have to close down at any time. In fact, the additional supplies from Transco alone were sufficient to supply all of FCA's requirements, and FCA would have been able to operate throughout the winter even if there had been no purchase of emergency gas from Michigan. FCA offered evidence tending to show that the Utilities Commission had participated in a proceeding before the Federal Power Commission, dealing with the prices to be charged for emergency gas purchases. In this proceeding the Utilities Commission advocated "rolled-in" pricing. Under the system of rolled-in pricing, when a company purchases emergency gas at a cost which is higher than the cost of its regular gas supplies, the extra cost of the emergency gas is borne by all of the company's customers.

NCNG offered evidence tending to show that it received 13,458,000 Mcf of natural gas from Transco in the winter of 1975-76, and this amount was sufficient to meet all of FCA's requirements, without resorting to the emergency gas purchased from Michigan. However, the emergency gas was necessary in order to supply other customers of lower priorities.

The Commission staff offered in evidence a table showing the distribution of natural gas received by NCNG in 1975-76, Ex. 3. The table shows that NCNG received 13,458,000 Mcf

from Transco and 1,383,708 Mcf from Michigan, Ex. 3. Of this total amount, 1,118,760 Mcf were sold to customers of lower priority than FCA; 4,438,400 Mcf were sold to FCA; and 8,906,413 Mcf were sold to customers of higher priority than FCA, Ex. 3. The remaining 378,135 Mcf were used for purposes designated in the table as "Storage (Injection)" and "Company Use & Unacc. (2%)," Ex. 3.

In an order dated 3 June 1976, the Commission reaffirmed its order of 6 January 1976, making the surcharge applicable to all gas sold by NCNG to non-residential customers.

The Commission made detailed findings of fact, including the following:

"11. At the levels of supply existing up to and through the first part of January, 1976, NCNG, under Commission priorities for curtailment, curtailed, by the percentages shown in Nery's Exhibit 3, all high priority industrial and commercial customers. During that period Farmers Chemical continued to operate at 100% of its requirements. Farmers Chemical's Tunis plant requires 29,200 mcf per day to operate.

12. At the time the contract was made, NCNG made the only emergency purchase for the winter season 1975-76 to serve high priority industrial and commercial customers, and there are the customers of NCNG which benefited from the temporary emergency purchase.

* * *

14. The emergency purchase by NCNG from Michigan Consolidated enabled NCNG to serve not only Farmers Chemical but industrial and commercial customers in lower priorities.

15. Farmers Chemical received 100% of its natural gas requirements from NCNG for the entire 1975-76 winter season up to and including the date of this Order. No other industrial or commercial customer of NCNG received 100% until January 15, 1976, when several of them did so.

16. By telegram of December 1, 1975, NCNG notified Farmers Chemical of its intent to make an emergency pur-

chase of natural gas supply and indicated the approximate amount of the surcharge.

* * *

18. The emergency surcharge for all industrial and commercial customers of NCNG for this emergency purchase is approximately 18.5¢ per mcf.

19. All industrial and commercial customers of NCNG benefited from the emergency purchase by NCNG from Michigan Consolidated for the winter season 1975-76."

The Commission then stated in detail its conclusions, including the following:

"There is at issue in this proceeding and for determination by the Commission the pricing of a short-term emergency purchase by NCNG of natural gas. Farmers Chemical contends (1) that it should either be exempt from the emergency surcharge because of restorations to NCNG which occurred sometime after the contract was entered for the emergency purchase or (2) that all customers, including residential customers, should have to pay the emergency surcharge if Farmers Chemical has to pay for it.

Farmers Chemical raises certain positions taken by the Commission before the Federal Power Commission and contends that the same should be applicable in this proceeding. The efforts of the Commission before the FPC were on behalf of all natural gas users in North Carolina and especially Farmers Chemical since Farmers Chemical was forced to experience curtailment for one month in the 1974-75 winter season. The efforts of the Commission were an attempt to obtain the largest possible volumes of natural gas supplies for North Carolina users. The proceeding only involved settlement purposes, and volumes were the primary consideration. The Commission's action in this proceeding is not inconsistent with positions taken before the FPC.

The questions before the Commission in this case must turn on the decision of NCNG management at the time the contract with Michigan Consolidated was entered into sometime in late November or early December, 1975.

Faced with the most critical projected curtailment in the history of the company, we conclude that it was prudent of the management of NCNG to make the emergency purchase for the 1975-76 winter season from Michigan Consolidated. At that time Mr. Wells, Vice President of NCNG, indicated that the emergency purchase was made for NCNG's high priority industrial and commercial customers and that the time framework for this decision was 'definitely crucial.'

While we do not regard the notice by NCNG to Farmers Chemical as important to the determination of the issues of this proceeding, the Commission observes that by telegram of December 1, 1975, NCNG advised Farmers Chemical of the possibility of the emergency purchase and the approximate amount of the projected surcharge. Farmers Chemical knew at that time and certainly not later than January 8, 1976, when the first billing was received that it would be receiving volumes from the emergency purchases.

In the brief filed by counsel for Farmers Chemical, the company indicates on November 6, 1975, it 'agreed with NCNG to operate on then known volumes of curtailment until approximately January 3, 1976, and then close' the Tunis plant. Farmers Chemical continued to receive natural gas supplies throughout the entire 1975-76 winter season and should be obligated to pay for those supplies.

To allow an exemption would be unlawful under G.S. § 62-140.

We recognize that Farmers Chemical uses natural gas for feedstock purposes and cannot operate its plant at Tunis without natural gas. Farmers Chemical is the only customer of NCNG that received 100% of its plant requirement for the winter season 1975-76 to date and in particular during the periods of curtailment from October, 1975, through January 15, 1976.

Under the facts of this case, it is clear that residential customers would not have been curtailed for any period and, therefore, did not benefit directly from the emergency purchase. It is equally clear that Farmers Chemical and all other industrial and commercial customers did benefit from

the emergency purchase. Accordingly, under the facts of this case, we conclude that it is appropriate to approve the tariffs filed on January 7, 1976, as just and reasonable and to deny the petition of Farmers Chemical for reconsideration."

The Commission therefore ordered:

"1. That the Petition for Reconsideration filed by Farmers Chemical in this proceeding be, and the same hereby is, denied.

2. That the tariffs filed by NCNG on January 7, 1976, and heretofore approved by the Commission are approved under this Order and affirmed."

Farmers Chemical Association appealed.

Sanford, Cannon, Adams & McCullough, by William H. McCullough, H. Hugh Stevens, Jr., and Charles C. Meeker, for the petitioner appellant.

North Carolina Utilities Commission by Commission Attorney Edward B. Hipp and Deputy Commission Attorney Maurice W. Horne, for the applicant appellee.

Joyner & Howison, by Henry S. Manning, Jr., for the intervenor appellee.

MARTIN, Judge.

Farmers Chemical assigns as error the action of the Commission in finding and concluding that Farmers Chemical was served by or benefited from NCNG's purchase of emergency gas. It contends there is no competent, material and substantial evidence in view of the entire record as submitted to support such findings and conclusions.

Upon appeal, the authority of the reviewing court to reverse or modify the order of the Commission, or to remand the matter to the Commission for further proceedings, is limited to that specified in G.S. 62-94, which includes the authority to reverse or modify such order on the ground that it is unsupported by competent, material and substantial evidence or is arbitrary or capricious. When the Commission's findings are supported by competent, material and substantial evidence, they are binding upon the appellate court. *Utilities Comm. v. Telephone Co.*, 281

N.C. 318, 189 S.E. 2d 705 (1972). See *Comr. of Insurance v. Automobile Rate Office,* 30 N.C. App. 427, 227 S.E. 2d 603 (1976), *modified* and *remanded* 292 N.C. 1, 231 S.E. 2d 867 (1977).

The Commission found

> " . . . NCNG made the only emergency purchase for the winter season 1975-76 to serve high priority industrial and commercial customers, and there are the customers of NCNG which benefited from the temporary emergency purchase. . . . All industrial and commercial customers of NCNG benefited from the emergency purchase by NCNG from Michigan Consolidated for the winter season 1975-76."

Among the conclusions reached by the Commission, the following appears: "It is equally clear that Farmers Chemical and all other industrial and commercial customers did benefit from the emergency purchase."

Calvin B. Wells, Vice President with NCNG, recognized the restrictive requirement of Farmers Chemical when he testified:

> " . . . they cannot operate when the gas supply is significantly below their total requirement, and so we had to develop a procedure which would let them operate for a certain number of days and given that amount of gas for the whole winter and be down for the other days and yet not let them operate so long that it would build up a deficit and become an undue risk for the other customers in case of a cutback later on by Transco and this is why we established the first date of cutoff as being January 3. . . . At the November 6 meeting, it was agreed that the first operating period for Farmers Chemical would be from November 16 to January 3, 1976. That meeting was *predicated upon then known entitlements from Transco.*"

John A. Lawrence, Vice President and General Manager of Farmers Chemical, testified:

> "At the time of the November 6 meeting, NCNG's winter entitlement was 10,337,000 Mcf. This figure did not include emergency volumes. This entitlement represented NCNG's winter entitlement as per the Transco Interim Settlement Agreement.

> Based upon such entitlement, NCNG said the Tunis plant for the 1975-76 winter season in 0.1 priority could be served 2,003,876 Mcf, or 45% of our requirements. On the basis of 29,200 Mcf per day, NCNG in terms of days of the 1975-76 winter period could serve FCA for 68.6 days of the 152-day winter period.
>
> The agreement as to how the FCA plant at Tunis would run from the beginning of the winter period, November 16, 1975, was that the Tunis plant would be allowed to take an average of 29,200 Mcf per day from November 16, 1975, through January 3, 1976.
>
> If gas consumption at the Tunis plant averaged less than 29,000 Mcf per day, the unused portion of the gas could be used to extend the operating period for up to three days or through January 6, 1976. Assuming no additions to Transco's supply and no extra additions to Transco's supply and no extra gas was available as a result of a warm winter, the Tunis plant would be shut down at the end of the first winter period, i.e., between January 3 and January 6, and would remain down for three weeks. The plant would then reopen and run until February 12 or the balance of the winter, depending upon availability of gas. It was further understood that if Transco made restorations to its gas supply prior to January 3, and NCNG had not experienced an abnormally cold winter, the first winter period would be extended depending upon NCNG's flexibility."

Thus, the evidence is abundantly clear that Farmers Chemical was operating between 16 November and 6 January on an allotment of gas by NCNG from its (NCNG) known entitlement from Transco as of 6 November. Emergency gas or increased entitlement from Transco was unnecessary to enable NCNG to supply Farmers Chemical the 2,003,876 Mcf or 45% of its winter requirement to be used between 16 November and 3 January. It is true that Farmers Chemical operated at 100% capacity during this period but it operated on its winter share of the known entitlement of NCNG as of 6 November.

The order of the Commission was content to state that Farmers Chemical operated on 100% capacity without making sufficient findings that would explain its operating procedure.

Furthermore, we do not find that during the winter season, NCNG was without sufficient flowing gas to supply Farmers Chemical with 100% service. The Commission found that:

> "Transco made restoration of flowing gas volumes to NCNG on November 13, 1975, for the 1975-76 winter period in the amount of 1,019,000 mcf. This increased somewhat NCNG's ability to serve Farmers Chemical from 45% for winter service to 65% for winter service. On December 10, 1975, Transco made another restoration to NCNG for the 1975-76 winter season of 608,000 mcf. On January 15, 1976, Transco made a further restoration to NCNG for the 1975-76 winter season of 1,494,000 mcf."

What the Commission overlooked is the fact that the allotment to Farmers of its 45% (2,003,876 mcf) share of the known entitlement of NCNG was sufficient to serve Farmers Chemical at 100% capacity until 3 or 6 January. The 13 November, 10 December, and 15 January restorations provided NCNG with sufficient flowing gas to serve Farmers Chemical its remaining requirement for the period commencing 6 January until the end of the winter season. (29,200 Mcf per day times 152 day winter season equals 4,438,400 Mcf which is 100% allotment.)

As we interpret Nery's exhibit 3, the percentages therein stated affecting Farmers Chemical relate to the percentages available for the winter season, November 16, 1975, to April 15, 1976. For instance, the 45% relates to the amount Farmers Chemical is entitled for the 152 day winter season to be used in a 68.8 day period commencing 6 November. The other percentages simply show an extension of the days allowed with the restoration and with both the restoration and the emergency gas for the period 16 November 1975 to 15 April 1976.

In its brief the Commission stated, in discussing Nery's exhibit 3, as follows:

> "This exhibit clearly demonstrates that under the supplies as they actually became available, Farmers Chemical *would have been curtailed* 45% on October 3, 1975; 65% on November 13, 1975; *greater than* 93% on December 10, 1975 and those undisputed circumstances used *hindsight. Even with restoration* of flowing gas, Farmers Chemical and other industrial customers were curtailed for those percentages. Yet the record clearly shows, and the appellant does

not dispute the fact, that Farmers Chemical continued to take 100% of its natural gas requirements throughout the winter season."

Under column October 3, 1975, of Nery's exhibit 3, appears the figure of 2,003,876 (45%). Mr. Wells, testified:

". . . they [Farmers Chemical] cannot operate when the gas supply is significantly below their total requirement, and so we had to develop a procedure which would let them operate for a certain number of days and given that amount of gas for the whole winter and be down for the other days. . . . At the November 6 meeting, it was agreed that the first operating period for Farmers Chemical would be from November 16 to January 3, 1976. That meeting was predicated *upon then known entitlements from Transco* . . . that used up most of the 69 days supply that Farmers Chemical had coming based on that supply and short period of time, based on that supply on January 24th and then run for a few days and shut down for the rest of the winter."

Thus, the 2,003,876 or 45% entitlement of Farmers Chemical was the winter allotment as of October 3, 1975, and by agreement on 6 November was to be used between 16 November and 3 January, shut down for three weeks and resume for a few days and then shut down for the winter.

We understand the amounts and percentages reflected in Nery's exhibit 3 under the columns November 13, 1975, December 10, 1975, and January 15, 1976, were not curtailments but merely showed the amounts of increase of entitlement to Farmers Chemical by restoration of flowing gas and emergency gas and the percentages of entitlement as of those dates for the entire winter season. They project the percentages of availability as of those dates for use during the entire winter season.

Mr. Wells further stated: "There were restorations by Transco on November 13 and December 10. *It is correct* that that would have extended the operating period." Thus, neither restoration of flowing gas nor emergency gas was necessary for Farmers Chemical between 16 November and 3 January. The restorations of flowing gas simply extended the operating period of Farmers Chemical from 3 January to the end of the

winter season and was sufficient without the emergency gas for the needs of Farmers Chemical.

We are unable to agree with the statement of the Commission in its brief that:

> "If the emergency purchase had been excluded it is obvious that the curtailment for Farmers Chemical and other industrial customers would have been substantially deeper at December 10, 1975."

Whatever effect this had on "other industrial customers" is not before us. However, we repeat, as of December 10, 1975, Farmers Chemical was operating on its winter entitlement as of 6 November agreement and was not dependent at that time upon either restoration of flowing gas or emergency gas. It was simply using 100% of its 45% winter allotment.

The fact that Farmers Chemical was operating on an entitlement which would enable them to operate at 100% capacity for 68.8 days by agreement with NCNG is further demonstrated by a telegram sent to Farmers by Arthur P. Gnam, Jr., Vice President Operations of NCNG dated 1 December. In the telegram Farmers Chemical was notified that by reason of the purchase of emergency gas the new entitlement of the Tunis plant "is 3,676,173 mcf or 124 days service at 29,200 mcf per day. . . ."

The record reveals that Farmers Chemical never agreed to purchase emergency gas and were willing to shut down when its 45% allotment was exhausted. Had it not been for the restoration of the flowing gas they would have had to shut down or purchase emergency gas. It was the good fortune of Farmers Chemical that restoration of flowing gas came in time to enable them to continue operations after 3 January. It must have been apparent to the Commission that there was no competent evidence that Farmers Chemical used emergency gas but they say that Farmers Chemical benefited from its purchase. The Commission failed to find facts that support such conclusion. However, the Commission makes the novel assertion that:

> "The questions before the Commission in this case must turn on the decision of NCNG management at the time the contract with Michigan Consolidated was entered into sometime in late November or early December, 1975."

The Commission found that:

> "[A]t the time Mr. Wells, Vice President, of NCNG, indicated that the emergency purchase was made for NCNG's high priority industrial and commercial customers and that the time framework for this decision was 'definitely crucial.'"

The action of Mr. Wells was a business venture that did not obligate an unwilling customer to use the gas. Farmers Chemical's unwillingness to purchase the emergency gas was made clear prior to its purchase by NCNG.

While we recognize the obligation of a utility adequately to serve its customers, we are not aware of a requirement that obligates the action taken by NCNG. The Commission correctly found as a fact that "NCNG has a legal obligation to serve all of its customers under the priorities approved by the Commission and under available supplies from Transco." Of course, NCNG holds a certificate to serve subject area and along with that obligation comes the necessity to purchase a sufficient supply of gas to serve them. NCNG's legal obligation must be a function of availabilities and priorities. Farmers Chemical was under a long term contract with NCNG for service. It was entitled to its share of flowing gas according to its priority. It asked for nothing more. Emergency gas should not have been purchased for Farmers Chemical against its consent. Especially is this so when Farmers Chemical is bearing part of the cost of supplying gas to lower priority customers and is helping to subsidize the increased cost to residential customers. The Commission has failed to find facts that demonstrate a benefit to Farmers Chemical.

In our discussion of the evidence we have not undertaken to say what weight the Commission should give to the testimony of the various witnesses. We have referred to evidence that, if believed by the Commission, would support essential findings that were not made. The credibility of the evidence and the weight to be given it was for the determination of the Commission. *Utilities Comm. v. Telephone Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974); *Utilities Comm. v. Power Co.*, 285 N.C. 398, 206 S.E. 2d 283 (1974).

In addition to those already discussed, the Commission made no findings and conclusions on the following important issues in the case:

1. Whether on November 6, 1975 Farmers Chemical and NCNG agreed that appellant would accept its fifty-five percent (55%) winter curtailment by operating at full capacity until January 3, 1976, and then closing down completely for various periods thereafter;

2. Whether the three Transco restorations permitted Farmers Chemical to operate at one hundred percent (100%) capacity throughout the 1975-76 winter without resorting to the use of any emergency gas;

3. Whether Transco Interim Settlement established prices for emergency gas volumes incrementally and treated such gas as being injected last into the pipeline system for the period covered by such settlement;

4. Whether Farmers Chemical put NCNG on notice in November and December, 1975 that it did not want any emergency gas; and

5. Whether residential customers should be excluded from paying their share of the emergency surcharge.

"A failure to find facts essential to a determination of the rights of the parties necessitates a remand to the . . . agency charged with that responsibility." *Utilities Commission v. Membership Corporation,* 260 N.C. 59, 69, 131 S.E. 2d 865, 871 (1963).

Such findings and conclusions are necessary to enable this Court to determine whether the Commission had performed the duty imposed by statute. The matter is remanded to the Commission to make necessary findings and conclusions on which it may base its order.

Reversed and remanded.

Judges MORRIS and VAUGHN concur.

JEANETTE FINNEGAN ROSS v. GEORGE JAY ROSS

No. 761DC888

(Filed 15 June 1977)

1. **Rules of Civil Procedure § 12— motion for more definite statement — discretion of court**

The allowance or denial of a motion for a more definite statement rests in the sound discretion of the trial judge, and his ruling thereon will not be overturned on appeal absent a showing of abuse of discretion.

2. **Rules of Civil Procedure § 12— motion for more definite statement — when denied**

So long as a pleading meets the requirements of G.S. 1A-1, Rule 8, and fairly notifies the opposing party of the nature of the claim, a motion for a more definite statement will not be granted.

3. **Divorce and Alimony § 18.3— alimony pendente lite — sufficiency of complaint**

Plaintiff's complaint seeking alimony *pendente lite* was sufficient to comply with the notice requirements of G.S. 1A-1, Rule 8, where it alleged that defendant assaulted and beat her, threatened her physically, appropriated her personal assets, forced her to abandon the home on a specified date, and has since failed to provide for her; therefore, defendant's motion for a more definite statement was properly denied.

4. **Divorce and Alimony § 18.9— alimony pendente lite — dependent spouse — means to subsist — insufficient evidence**

Plaintiff failed to introduce evidence from which the court could properly conclude that she was the dependent spouse and was without sufficient means to subsist during the pendency of the action and the court erred in awarding plaintiff alimony *pendente lite*, where plaintiff's evidence as to her financial condition tended to show that she is presently employed as a sales clerk and earns $72.00 per week; that she lives in a furnished apartment owned by her mother and pays no rent; and that she has a car payment of $122.00.

APPEAL by defendant from *Chaffin, Judge*. Order entered 6 July 1976 in District Court, DARE County. Heard in the Court of Appeals 10 May 1977.

On 4 June 1976, plaintiff instituted this action against defendant seeking alimony pendente lite, divorce from bed and board, a writ of possession of the family business, and attorney fees. Defendant moved (1) to dismiss the complaint for failure to state a claim upon which relief could be granted and (2) for a more definite statement. A hearing was held, and

defendant's motion for a more definite statement was denied. Plaintiff then proceeded to introduce evidence as to her claim of alimony pendente lite. Defendant offered no evidence. Judge Chaffin entered an order which found facts and provided as follows:

"1. That the plaintiff, Jeanette Finnegan Ross, and the defendant were married on December 18, 1970; that she is a resident of Buxton, North Carolina, and that defendant is also a resident of Buxton, North Carolina, having lived there since 1973.

That the plaintiff owns jointly with the defendant a business in Buxton known as 'Jiminy Cricket's Sub Shop' on property leased by them as husband and wife from Junior Ray Rood and Mary Alethia Rood. That the business was financed by funds arranged by her, to wit: In November, 1972, $2,000.00 borrowed by the plaintiff through her mother, Janet G. Finnegan, from Virginia National Bank and used to pay existing family debts of both plaintiff and defendant in order to clear their credit for the forthcoming business venture; in January, 1973, $2,500.00 borrowed from her school teacher credit union (Princess Ann-Virginia Beach Credit Union), the funds to be applied to the building contractor renovating the existing building under general building plans drawn by the drafting instructor at her high school. This note was also signed by plaintiff's mother, Janet G. Finnegan, as the defendant was unemployed at the time; in February, 1974, $2,000.00 withdrawn by plaintiff from her school teacher retirement fund; and $10,000.00 borrowed from Miss Helen Muriel Travis. All these funds were used to purchase restaurant equipment, stock, and to renovate the existing building on the leased premises, or otherwise arrange for the opening of the business known as 'Jiminy Cricket's Sub Shop.' That defendant did not contribute any money toward the business, and plaintiff has never been repaid any of the money advanced by her.

That the plaintiff learned the sub shop business in March, 1972 by working part-time in the Zero Sub Shop, Little Sicily's Restaurant, and Jimmy's Pizza House, all restaurants in Virginia Beach, and thereafter she instructed defendant concerning the operation of Jiminy Cricket's Sub

Shop. Plaintiff said the business was started in June, 1973, and that she worked in the business during the summer of 1973 and 1974.

And that during this time she lived with defendant as husband and wife in the downstairs apartment of a house rent free which was owned by her mother in Buxton; that plaintiff's brother, Michael Finnegan, lived in the upstairs apartment.

That domestic difficulties with defendant first began during the winter of 1972 while the parties were living in Virginia Beach, Virginia, when defendant in a violent rage assaulted and beat her, that he threw her through the opening between the kitchen and living room of their home, knocked her down and beat her on the back with his fist; that this assault occurred during an argument over defendant quitting his job as a salesman with Eastern Auto Company in order to be free during the hunting season and that each time defendant quit his job he remained unemployed for 3-4 months during which time plaintiff supported the family from her school teacher's salary.

That on another occasion during the winter of 1972, also in Virginia Beach, defendant again assaulted her by 'banging' her against the wall in the hallway of their home and on this occasion defendant had his hands around her throat with his thumbs pressed under her chin; that she weighed 108 pounds and was 5 feet 3 inches tall, that defendant weighed 240 pounds and was 6 feet 7 inches tall; and that defendant had a violent and uncontrollable temper.

That defendant continued to abuse and assault her, both physically and by abusive language, after they moved to Buxton and opened 'Jiminy Cricket's Sub Shop'; that during the summer of 1973 while in a fit of temper the defendant pushed her against a door of their apartment and injured her back; that at Christmastime in 1973 while visiting his parents in Edenton, N. C. the defendant in a fit of temper kicked her from their bed in his parents' home and forced her to sleep on the floor. She said the defendant cursed her frequently calling her a 'whore,' 'slut,' and a 'bitch,' and that she was 'ugly' and 'old'; and that defendant committed these verbal abuses against her both in their apartment and in the presence of others in Jiminy

Cricket's Sub Shop. That in the spring of 1975 defendant again assaulted her by kicking her while in a theatre in Military Circle Mall. That on occasions these assaults left bruises on the upper part of her arms. That defendant threatened to break the legs of her brother Michael Finnegan, if she exposed him for mistreating her, and also to have her father and her uncle 'taken care of.' That the defendant continued to abuse her in this manner and forced her to leave their home and business on May 22, 1975.

That defendant promised to pay her for her support and maintenance in the way of alimony the sum of $100.00 each week during those months Jiminy Cricket's Sub Shop was open and $200.00 each month when the business was not open and that he also promised to make payments of $122.00 per month on the 1974 Cutlass Oldsmobile owned by plaintiff.

That defendant made payments of $100.00 per week to her from June 1, 1975 through September 1975, and that he has failed and refused to make further payments for maintenance and support since that date, except $60.00 in December, 1975, even though she had requested money from the defendant for her maintenance and support because she was unable to work because of her poor health. She further testified that defendant had secretly attempted to have her automobile repossessed.

That the plaintiff had signed a contract to teach school during the 1976 school year, but was forced to resign after teaching only one month because of her poor health and ulcers; that since that time she had worked only part-time as a substitute teacher and had also worked in a restaurant. That at present she was working as a sales clerk in a gift shop in Buxton earning $2.00 per hour for 36 hours each week. Plaintiff said she last requested financial assistance from defendant at Christmastime in 1975 and that he gave her $60.00; that at that time she had no money and was without a job. Plaintiff testified that she knew the business during the season had a net weekly income of approximately $700.00 per week, which profit the defendant was keeping for himself and that the defendant had refused to give her an accounting.

That defendant had refused to permit her to return to work in Jiminy Cricket's Sub Shop.

2. Michael Finnegan testified that he is the brother of the plaintiff and that he occupied the upstairs apartment of his mother's house in Buxton when plaintiff and defendant lived in the downstairs apartment; that he knew that the plaintiff and defendant occupied the downstairs apartment and knew their voices; he testified that he had heard the defendant call plaintiff a 'whore,' 'slut' and 'bitch' and that he had seen bruises on the upper part of her arms. He further testified that he had worked at Jiminy Cricket's Sub Shop more than one year after the business opened and he had seen the defendant drive plaintiff from the business shouting to her to 'get out.' He further testified defendant had a violent temper and on one occasion that defendant had physically attacked her.

3. Charles Lloyd Gray testified that he is a resident of Buxton and is employed by Cape Hatteras Electric Supply Company in charge of sales and service of air conditioning and refrigeration equipment. That he has known the defendant since 1973 and knows that he has a violent temper; that he has witnessed violent displays of temper by defendant at employees of Jiminy Cricket's Sub Shop and that during the summer of 1973 heard defendant curse the plaintiff in Jiminy Cricket's Sub Shop, call her a 'bitch' and order her to 'get out' of the shop. That during the summer of 1974 he heard defendant again curse plaintiff and call her a 'bitch,' and this occurred during an argument in the apartment occupied by plaintiff and defendant and the witness did not know what the argument was about. That during the fall of 1974 he witnessed another display of violent temper by defendant concerning the repossession of house furniture loaned to plaintiff and defendant by the father of the witness and that on this occasion defendant cursed both the witness and the father of the witness. That as recently as three weeks ago he heard defendant curse one of the employees of Jiminy Cricket's Sub Shop.

4. Helen Muriel Travis testified that she is a resident of Virginia Beach and that she had loaned $10,000.00 towards the establishment of Jiminy Cricket's Sub Shop. That she had loaned the money because of her interest in the plain-

tiff and Michael Finnegan and that plaintiff and defendant had signed the promissory note.

5. Janet G. Finnegan testified that she is a resident of Virginia Beach and mother of the plaintiff; that she had personal knowledge concerning the financing of Jiminy Cricket's Sub Shop and that the source of the funds testified by plaintiff was true.

6. That the defendant did not testify or offer any evidence.

7. That upon the aforegoing facts, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

A. That the plaintiff is the dependent spouse within the meaning of NCGS 50-16.1(3), who is actually substantially dependent upon the defendant for her maintenance and support or is substantially in need of maintenance and support from the defendant and the defendant is the supporting spouse within the meaning of NCGS 50-16.1(4).

B. That during the marriage, the plaintiff has been a faithful and dutiful wife of the defendant and contributed of her time, energy and earnings to the defendant.

C. That the marital difficulties between the parties for the reasons hereinafter alleged were without fault or provocation on the part of the plaintiff.

D. That the plaintiff, as the dependent spouse, is entitled to alimony and other relief, due to the actions and conduct of the defendant to the plaintiff, which actions were without fault of provocation on the part of the plaintiff in that prior to the institution of this action, the defendant, by cruel and barbarous treatment, has endangered the life of the plaintiff; the defendant has offered such indignities to the person of the plaintiff as to render her condition intolerable and life burdensome; the defendant has wilfully failed to provide the plaintiff with necessary subsistence according to his means and conditions so as to render the condition of the plaintiff intolerable and life of the plaintiff burdensome and the defendant is guilty of abandonment of the plaintiff.

E. That the defendant is an able-bodied man, in good health and physical condition, earning or capable of earning a substantial income.

F. That the defendant is a large man and that the plaintiff is a small woman and the defendant on occasions is a man of violent temper and by his actions and conduct has placed the plaintiff in fear of her welfare, health and safety.

G. That the plaintiff, as the dependent spouse, is without funds or sufficient means to subsist during the prosecution of this action or to pay counsel fees in the prosecution of her action.

H. That the defendant is capable of making the alimony pendente lite payments as required.

I. That the plaintiff is entitled to the relief requested on the grounds alleged in the complaint and the evidence offered appears to be sufficient to entitle the plaintiff to the relief sought and the plaintiff was and is in substantial need of alimony pendente lite for her support and maintenance from the defendant.

J. That the plaintiff does not have sufficient means to support and maintain herself pending the trial of this action or to pay attorneys fees to prosecute said action on her behalf.

K. That the plaintiff, as the dependent spouse, has not sufficient means whereupon to subsist during the prosecution of the suit and to defray the necessary expenses thereof.

L. That the dependent spouse is entitled to the relief demanded in the action in which the application pendente lite is made.

M. That the writ of possession prayed for in the complaint does not apply under the existing facts and circumstances and applicable law.

Based on the aforegoing Facts and Conclusions of Law, IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That the defendant pay to the plaintiff in the way of alimony pendente lite the sum of $100.00 per week through the Office of the Clerk of Superior Court, commencing on

Friday, July 9, 1976 pending the trial of this case on its merits or until further orders of the Court;

2. That the defendant pay to the plaintiff's attorneys, Russell E. Twiford and Wallace R. Gray, a reasonable attorneys' fee in the sum of $350.00 for professional services rendered to date, said amount to be paid through the Office of the Clerk of Superior Court, within 30 days from date and costs of this action to be taxed by the Court;

4. That this matter be subject to further orders of the Court pending trial of this case on its merits."

Defendant appeals from this order. Other relevant facts are set out in the opinion below.

Twiford, Seawell, Trimpi and Thompson, by Russell E. Twiford and Wallace R. Gray, for plaintiff appellee.

LeRoy, Wells, Shaw, Hornthal, Riley and Shearin, P.A., by Roy A. Archbell, Jr., for defendant appellant.

MORRIS, Judge.

[1] By his initial assignment of error, defendant contends that the trial judge erred in denying his motion for a more definite statement. Of course, the grant or denial of a motion for a more definite statement rests in the sound discretion of the trial judge, *Mitchell v. E-Z Way Towers, Inc.*, 269 F. 2d 126 (5th Cir. 1959), and his ruling thereon will not be overturned on appeal absent a showing of abuse of discretion.

[2] Rule 12(e) provides that a motion for a more definite statement is proper only when ". . . a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading . . ." The motion is the most purely dilatory of all the motions available under the Rules of Civil Procedure. Myers & Humphreys, Pleadings & Motions, 5 Wake Forest Intra. L. Rev. 78 (1969). It is not favored by the courts and is sparingly granted because pleadings may be brief and lacking in factual detail, and because of the extensive discovery devices available to the movant. Shuford, N. C. Civil Practice & Procedure, § 12-14, p. 111 (1975). So long as the pleading meets the requirements of Rule 8 and fairly notifies the opposing party of the nature of the claim, a motion for a more definite statement

will not be granted. 1A Baron & Holtzoff, Federal Practice & Procedure, § 362, p. 413 (1960); 2A Moore's Federal Practice, § 12.18, p. 2389 (1975), and cases cited therein.

[3] Defendant argues that the complaint failed adequately to notify him of the "transactions, occurrences, or series of transactions or occurrences intended to be proved" as required by Rule 8(a)(1), North Carolina Rules of Civil Procedure. We cannot agree. The complaint alleged in pertinent part:

> "VII. That during their marriage, without fault or provocation on the part of the plaintiff, the defendant offered such indignities to the person of the plaintiff, the dependent spouse, as to render her condition intolerable and life burdensome; that the defendant, by cruel and barbarous treatment endangered the life of the plaintiff; that the defendant abandoned the plaintiff by abusive treatment; assaulted and beat the plaintiff; cursed and used vulgar language toward the plaintiff; threatened her physical safety; took her personal assets and maliciously turned the plaintiff out of doors or forced her to abandon their home on May 22, 1975.
>
> VIII. That the defendant is a large man, possesses a violent temper and when aroused has assaulted and struck the plaintiff, as a result of which the plaintiff is in fear of her safety and well-being.
>
> IX. That the defendant is an able-bodied man, in good health and physical condition and capable of earning a substantial income, 31 years of age, and since May 22, 1975 has wilfully failed to provide for the plaintiff with necessary subsistence according to his means and conditions so as to render the condition of the plaintiff intolerable and life of the plaintiff burdensome. That the defendant is guilty of constructive abandonment of the plaintiff."

The case of *Manning v. Manning*, 20 N.C. App. 149, 201 S.E. 2d 46 (1973), upon which defendant relies, involved a complaint which is clearly distinguishable from the one in the present case. In *Manning*, the plaintiff wife's complaint employed the exact language of G.S. 50-16.2 and alleged only that the defendant husband treated her cruelly and offered indigni-

ties to her person. This Court held the pleading to be insufficient, stating that

> ". . . [the complaint] does not mention any specific act of cruelty or indignity committed by the defendant. It does not even indicate in what way defendant was cruel to plaintiff or offered her indignities. For all the complaint shows, the alleged cruelty and alleged indignities may consist of nothing more than occasional nagging of the plaintiff or pounding on a table. Such a complaint does not give defendant fair notice of plaintiff's claim. It is merely an 'assertion of a grievance,' (North Carolina Rules of Civil Procedure, Rule 8, Comment (a) (3)), and it does not comply with Rule 8(a)." *Id.* at 155, 201 S.E. 2d at 50.

In the present case, however, plaintiff alleged that defendant assaulted and beat her; that he cursed and used vulgar language toward her; that he threatened her physically; that he appropriated her personal assets; and that he forced her to abandon the home on 22 May 1975 and has since failed to provide for her. We believe, and so hold, that plaintiff's allegations were sufficient to comply with the notice requirements of Rule 8. *E.g., Brewer v. Harris,* 279 N.C. 288, 182 S.E. 2d 345 (1971); *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970); *Roberts v. Whitley,* 17 N.C. App. 554, 195 S.E. 2d 62 (1973). Defendant's remedy for any additional facts consisted of the utilization of discovery and was not a Rule 12(e) motion for a more definite statement. This assignment is overruled.

[4] Defendant's sixth assignment of error relates to the trial judge's conclusions of law. He particularly objects to Conclusion "A" in which the judge found that plaintiff was the dependent spouse within G.S. 50-16.1(3) and that defendant was the supporting spouse within G.S. 50-16.1(4). Defendant contends that the evidence was insufficient to support this conclusion and the subsequent conclusions based thereon. We are constrained to agree.

G.S. 50-16.3 provides that in order to obtain alimony pendente lite, the applicant must be (1) a dependent spouse, (2) entitled to the relief demanded in the action, and (3) without sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof. *Hogue v. Hogue,* 20 N.C. App. 583, 202 S.E. 2d 327 (1974). The facts required by the statutes must be alleged and

proved before the order of alimony pendente lite is properly entered. *Guy v. Guy,* 27 N.C. App. 343, 219 S.E. 2d 291 (1975).

Plaintiff's evidence as to her financial condition tended to show that she is presently employed as a sales clerk in a gift shop and earns approximately $72 per week; that she lives in a furnished apartment owned by her mother and pays no rent; and that she has a car payment of $122.

Assuming, *arguendo,* that plaintiff has established that she is entitled to a divorce *a mensa et thoro,* she failed to introduce evidence from which the judge could conclude, as he did, that she was the dependent spouse and was without sufficient means to subsist during the pendency of the action and defray its expenses. In *Cabe v. Cabe,* 20 N.C. App. 273, 201 S.E. 2d 203 (1973), this Court held that the mere showing of some of the wife's expenses does not necessarily establish that she is a dependent spouse. Brock, C.J., writing for the Court, stated:

> "It seems obvious that she has other monthly expenses but the court is not permitted to speculate, as to the amount. The courts are not blind to the fact that day to day living is expensive, but each person's situation is different. Each case presents different circumstances and the burden is upon the applicant for alimony, or alimony pendente lite, to offer evidence to establish the need in each case." 20 N.C. App. at 275, 201 S.E. 2d at 204-05.

Because plaintiff failed to carry her burden in the present case, it was error for the trial judge to enter an award for alimony pendente lite. Consequently, it was likewise error to make an award of counsel fees. *Newsome v. Newsome,* 22 N.C. App. 651, 207 S.E. 2d 355 (1974); *Manning v. Manning, supra.*

In view of our ruling, we do not reach defendant's other assignment of error.

Reversed and remanded.

Judges HEDRICK and ARNOLD concur.

NORMAN V. SWENSON v. ALL AMERICAN ASSURANCE COMPANY

No. 7626SC903

(Filed 15 June 1977)

1. **Corporations § 3.1— meeting to elect directors — restraining order sought — no jurisdiction of court**

Since G.S. 55-71 applies only to contested corporate elections after the fact but the petition in this case sought to restrain the holding of a stockholders' meeting for the election of directors, no proper proceeding under the statute was before the trial court, and the court therefore had no jurisdiction over respondent or the subject matter of the action.

2. **Rules of Civil Procedure § 4— failure to issue summons — no jurisdiction in trial court**

The trial court did not acquire jurisdiction over the person of respondent or the subject matter of the action, though the petition in this case which sought to restrain the holding of a stockholders' meeting for the election of directors was sufficient to meet the requirements of a complaint, since no summons was issued as required by G.S. 1A-1, Rule 4.

APPEAL by respondent from *Falls, Judge.* Order entered (out of session) on 29 July 1976, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 May 1977.

On 19 July 1976, petitioner, a minority stockholder of respondent, filed a petition asking for the issuance of a temporary restraining order restraining respondent from holding the substitute annual meeting of stockholders called by respondent for 21 July 1976. He alleged that respondent suffered a $6,320,000 net loss for the year ended 31 December 1975 resulting in a decrease in shareholders' equity; that respondent was placed in rehabilitation by order of the Superior Court on 4 November 1975, and the rehabilitation was terminated by order of the court on 7 May 1976; that on 10 July 1976, petitioner received notice of a substitute annual meeting, proxy statement, and annual statement; that prior to receipt of this material, petitioner had no knowledge of the proposed meeting or of the proposed nominees for election as directors; that the Board of Directors had approved "multiple transactions" of respondent which resulted in enormous losses to respondent and its shareholders; that the proposed nominees for directors were directors when the enormous losses were sustained; that petitioner, with the purpose of soliciting proxies from other minority stock-

holders in the hope of placing one or more representatives of that group on the Board of Directors, went to respondent's office in Charlotte on 13 July 1976 for the purpose of inspecting the record of shareholders; that Mr. Russell E. Walton, Senior Vice-President, was out of the office and his secretary knew nothing of any record of shareholders, but advised petitioner that she would have Mr. Walton call him; that that afternoon Mr. Walton called and advised petitioner that he could see the record of shareholders but could not copy or make notes; that the next morning, 14 July 1976, petitioner returned to the office and was required to sign a notice limiting him to inspection of the records only; that petitioner proceeded to examine the record of more than 5,000 individual shareholders and informed some of them of the limitation imposed by respondent; that on the afternoon of 14 July 1976, petitioner was informed by respondent that he would be allowed to copy and make notes, but by that time the time within which to solicit proxies was too limited; on 15 July 1976, he consulted attorneys; that although petitioner had obtained proxies for 15,928 shares in addition to the 1597 shares owned by him, additional proxies could be obtained if time were available; that respondent's refusal to allow petitioner to copy the shareholder's record was wrongful, contrary to law and respondent's by-laws; that because of the wrongful conduct petitioner had been denied his lawful right to examine the shareholder list and solicit proxies; that the rights and interests of other minority stockholders would be irreparably hurt if the substitute annual meeting is held on 21 July 1976.

No summons was issued or served with the petition, nor has summons since been served on respondent.

On 19 July 1976, the court entered a temporary restraining order restraining respondent from holding the substitute annual meeting on 21 July 1976, and requiring respondent to appear at Superior Court on 28 July 1976 " . . . to show cause, if any there be, why Respondent did not keep on file at its registered office subject to inspection by any shareholder at any time during usual business hours its record of shareholders for ten days prior to July 21, 1976, why it refused to permit Petitioner to copy from said record of shareholders, why it required him to sign a commitment that his examination of the shareholder record was restricted, and to set another date for holding said Substitute Annual Shareholders Meeting".

On the date of hearing, 28 July 1976, petitioner filed a supplemental petition. Based on allegations contained therein, he asked the court, in addition to the relief prayed for in the original petition, to declare that the proxy statement of respondent contained false and misleading statements, failed to disclose information required by law, was a fraud on respondent's shareholders and was null and void; that the opening and adjourning of a meeting on 21 July 1976 violated the temporary restraining order issued on 19 July 1976; to order that a substitute annual meeting be held, fixing the date therefor, fixing the record date for determining stockholders entitled to vote; that a new notice of that meeting be given with new proxy material; that the new proxy materials contain certain specified matter; that respondent be required to pay the costs of preparing and mailing the notices and proxy materials requested by petitioner; and that respondent pay reasonable counsel fees. Respondent had had no notice of the filing of this supplemental petition and was not given a copy thereof until the day of the hearing.

On the same day, respondent filed a Rule 12(b) motion for dismissal on the grounds that the court had no jurisdiction because (1) no summons had ever been issued or served on it; (2) no civil action had been commenced by petitioner or was properly pending before the court; and (3) all questions raised were moot, since the 21 July meeting had not been held but only adjourned to 31 July 1976.

Respondent, on the same day, also filed a motion that counsel for petitioner be disqualified from representing the petitioner because said counsel had represented respondent from 30 July 1975 through 30 June 1976 and had been paid by respondent $145,603.02 in legal fees. (An additional statement of $10,863.27 for services had not been paid because it was in dispute.) Respondent further alleged that counsel for petitioner had been privy to all types of corporate information and the present temporary injunction obtained by counsel for petitioner directly involves matters relating to the company during the period petitioner's counsel represented respondent.

After filing these motions, respondent filed its "Response to Temporary Restraining Order and Notice of Hearing".

The evidence introduced at the hearing consisted of petitioner's original petition, petitioner's supplemental petition, respondent's response to the temporary restraining order and

notice of hearing, and respondent's affidavit. The court heard argument of counsel for the parties and entered its order filed 29 July 1976 in which it found facts and made conclusions of law. Based thereon, it denied respondent's motion to dismiss; denied its motion to disqualify petitioner's counsel, dissolved the temporary restraining order; ordered respondent to hold its substituted annual meeting on 15 September 1976; set 15 August 1976 as the record date for shareholders' entitlement to vote; required notice of the meeting to be mailed to shareholders no less than 15 days prior to 15 September 1976; directed respondent to include with the notice and its proxy material the proxy material to be prepared by petitioner and to pay all expenses of the printing and mailing thereof; and directed respondent to cause to be prepared and keep on file at its Charlotte office a record of its shareholders available for inspection by the shareholders as required by law.

Respondent appealed from this order.

Cansler, Lockhart, Parker & Young, P.A., by Thomas Ashe Lockhart, Joe C. Young, and Winford R. Deaton, Jr., for petitioner appellee.

Stern, Rendleman, Isaacson & Klepfer, by Robert O. Klepfer, Jr., and Arthur A. Vreeland, for respondent appellant.

MORRIS, Judge.

By its assignments of error one through eight, sixteen and seventeen, respondent challenges the jurisdiction of the court over the subject matter of the litigation and the person of respondent. Since this, without question, is the threshold issue arising on this appeal, we shall first address it.

The court found that "(t)his is a summary proceeding filed by Petitioner Norman V. Swenson pursuant to the provisions of North Carolina General Statutes 55-71, to determine a controversy with respect to the election of directors at Respondent's Substitute Annual Meeting proposed to be held on July 21, 1976, and an application to this Court to order a substitute meeting to be held as and for the annual meeting of Respondent's shareholders pursuant to provisions of North Carolina General Statutes 55-61(b). . . . "

G.S. 55-71 is entitled "Proceeding to determine validity of election or appointment of directors or officers". Portions pertinent to this appeal are:

"(a) Any shareholder or director of a domestic corporation may commence a summary proceeding in the superior court to determine any controversy with respect to any election or appointment of any director or officer of such corporation. . . .

. . .

(c) The proceeding shall be commenced by filing a verified petition in the superior court directed to the resident judge or any judge holding court in the district.

(d) The petition shall include:

(1) The name of the county and court in which the proceeding is brought, and the title to the proceeding, which shall include as respondents the corporation, *the person or persons whose purported election or appointment is questioned, and any person other than the petitioner, whom the petitioner alleges to have been elected or appointed.*

(2) A plain and concise statement of the facts constituting the grounds for contesting the validity of the election or appointment, and a prayer for the relief sought.

(e) . . . No summons shall be necessary, but a copy of the notice and petition shall be served upon each respondent at least 10 days prior to the hearing. . . .

. . .

(f) Upon or after the filing of the petition and issuance of the notice the judge may, upon application, issue an interlocutory order *restraining the directors or officers whose election or appointment is challenged from acting, and may make such other order as he may deem proper with respect to the directors or officers who shall hold the*

contested offices pending the determination of the matter in controversy.

. . .

(h) Upon completion of the hearing the judge, in determining the matter, may:

(1) *Declare the result of the election* or appointment in controversy;

(2) *Order a new election* or appointment *and include in such order provisions with respect to the directors or officers who shall hold the contested offices until a new election is held* or appointment is made;

(3) Determine the respective voting rights of shareholders and of persons claiming to own shares. . . . " (Emphasis supplied.)

[1] Appellee contends that this action properly was brought under this statute without the necessity for the issuance of a summons. It is true that the statute provides that no summons shall be necessary but the petition shall be served on the respondents. However, the statute is remedial in character, *Thomas v. Baker,* 227 N.C. 226, 41 S.E. 2d 842 (1947), and is applicable only if its provisions apply to the remedy sought. Here, the petition seeks to restrain the holding of a stockholders' meeting for the election of directors. The statute provides a method of leaving a corporation in *status quo* so the corporate business can be continued while the validity of an election *already held* is determined. The wording of the statute clearly indicates that it applies only to contested elections after the fact and not to prospective meetings for the holding of election. The court is given the power to *restrain the officers whose election is challenged from acting* or to enter other orders with respect to the officers or directors who shall *hold the contested offices* pending the determination of the controversy. After hearing, the court may *declare the result of the election,* or order a new election making provisions with respect to those holding the contested offices pending the election and determining the rights of shareholders at the new election. The statute in its entirety is directed at determining rights and duties resulting from an election held which is contested as to its validity. We fail to see how it has any applicability as to the situation in the present case. There is no person named the validity of whose election

petitioner challenged, nor could there have been because no election had been held which petitioner could challenge.

Petitioner further argues that if a proper proceeding under G.S. 55-71 was not before the court on the original petition, the supplemental petition alone was a proper application to the court under G.S. 55-61 to sustain the relief granted. This statute provides that if the scheduled annual meeting of stockholders is not held, a substitute annual meeting may be called, or the judge of the superior court of the county where the corporation has its registered office may, upon the application of any shareholder, order a substitute annual meeting to be held. Here, the corporation had called a substitute annual meeting. It was this meeting which petitioner sought to have restrained. Even if this statute were applicable, and we cannot perceive that it is, it would avail petitioner nothing. Respondents had no notice whatever of the supplemental petition until the day of the hearing.

Since we have held that no proper proceeding under G.S. 55-71 was before the court, the real question presented by this appeal is whether there was a civil action pending in which the court acquired jurisdiction to enter an order granting any relief. *Freight Carriers v. Teamsters Local,* 11 N.C. App. 159, 180 S.E. 2d 461, *cert. den.,* 278 N.C. 701, 181 S.E. 2d 601 (1971), is analogous and furnishes guidance. In that case the trial court issued a temporary restraining order upon the affidavit of an officer of plaintiff. No complaint was filed and no summons issued. Successive orders were entered, including show cause orders and orders holding indivduals members of defendant in contempt. The plaintiff contended that, by virtue of G.S. 1A-1, Rule 65(b), a temporary restraining order is given a status different than a civil action filed pursuant to G.S. 1A-1, Rule 3, and that a temporary restraining order may be issued upon an affidavit if it clearly appears from specific facts set forth in the affidavit that immediate and irreparable injury or loss will result to the applicant if the order is not issued. We held that "Rule 3 and Rule 65(b) must be construed *in pari materia;* procedure under Rule 65(b) is permissible only *after* an action is commenced as provided by Rule 3." *Id.* at 161, 180 S.E. 2d at 463.

In this State there is but one form of action for the enforcement or protection of private rights or for the redress of private wrongs. That form of action is, by statute, denominated a civil action. G.S. 1A-1, Rule 2.

[2] "A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing." G.S. 1A-1, Rule 3. This rule also provides for certain instances when an action may be commenced by the issuance of a summons with the filing of a complaint in 20 days. We agree with petitioner that petition filed herein meets the requirements of a complaint. Nevertheless, this avails him nothing. G.S. 1A-1, Rule 4, is clear and unambiguous in its requirement that "(u)pon the filing of the complaint, summons *shall* be issued forthwith, and in any event within five days . . . " (Emphasis supplied.) It is interesting that the comment following the statute notes that "(t)his section contemplates a continuance of the present practice of ordinarily having a summons issue simultaneously with the filing of the complaint. The five-day period was inserted to mark the outer limits of tolerance in respect to delay in issuing the summons." "Service of summons, unless waived, is a jurisdictional requirement." *Kleinfeldt v. Shoney's Inc.*, 257 N.C. 791, 794, 127 S.E. 2d 573, 575 (1962).

Here, the court acquired no jurisdiction over the person of respondent or the subject matter of the action and hence was without authority to enter any order granting any relief.

The order must be vacated.

Reversed and order vacated.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. HENRY DALLAS TUTTLE

No. 7622SC1058

(Filed 15 June 1977)

1. Criminal Law § 66.10— jailhouse confrontation — in-court identification properly allowed

Though a one-on-one jailhouse confrontation between defendant and a robbery victim was unquestionably suggestive, it did not lead unfairly to mistaken identification and the trial court properly allowed the victim to make an in-court identification of defendant where the evidence tended to show that the victim viewed defendant in daylight on two occasions on the day of the robbery and conversed with him

both times; both encounters lasted three or four minutes; the witness observed the robber's features while they were conversing on both occasions; the victim's description given to a deputy sheriff was sufficiently thorough, and defendant made no attempt by cross-examination or otherwise to show that the description given by the victim prior to confrontation in the jailhouse was not an accurate description of the defendant; at the confrontation in the jailhouse the witness immediately recognized the defendant as the man who had robbed him and so informed police officers; and five or six days elapsed between the time of the crime and the confrontation.

2. **Criminal Law § 102.6— jury argument of district attorney — no prejudice to defendant**

Defendant was not prejudiced by the trial court's failure to sustain his objection to the district attorney's remark that "if I didn't believe this was a case worth trying, I have got the power to throw it out," since the court on numerous occasions properly admonished both the district attorney and the defendant's attorney and gave curative instructions to the jury.

3. **Criminal Law § 86.2—defendant's prior convictions — admissibility of testimony for impeachment**

The trial court did not err in failing to sustain objections to two questions asked of defendant on cross-examination about prior convictions, since a criminal defendant who takes the stand may be asked about prior convictions for the purpose of impeachment; moreover, defendant was not prejudiced where he testified that he had been convicted of misdemeanor larceny when he in fact had pled guilty, since a guilty plea is the equivalent of a conviction.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 5 August 1976 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 12 May 1977.

Defendant pled not guilty to common law robbery.

Prior to trial defendant moved to suppress in-court identification testimony by Howard Leonard, the victim of the alleged robbery, and by witnesses John and Emmett Edwards, and also testimony to out-of-court identification of defendant's photograph. Based upon the testimony of these men and of Deputy Lester Bass, the court found the following facts: Around 1:45 p.m. on 2 April 1976, a young black male visited Mr. Leonard's gas station and grocery store on two occasions. On the first occasion, John and Emmett Edwards were also at the station and saw this person, who purchased two quarts of oil from Mr. Leonard. Mr. Leonard conversed with this person, who stayed at least three or four minutes. This person returned a short time later, told Mr. Leonard he wanted to purchase some

gasoline, followed him inside the store, placed one arm around his neck, threatened him with a tire tool, and robbed him of about $150.00. All of these events took place in daylight.

Two days later Deputy Bass spoke with Mr. Leonard about the robbery, and Leonard identified the robber as a young black male, height, 5'8" or 5'9", weight in excess of two hundred pounds, chunky build, bushy hair, and driving a bronze or beige colored veicle that appeared to be a Cadillac. Five or six days after the robbery Deputy Bass telephoned Mrs. Leonard and asked her to tell her husband to come to the jail to determine whether he could identify a person in custody whom the police believed to be the robber. This person was the defendant. About 9:00 p.m. Mr. Leonard arrived at the jail, saw a young black male sitting in a waiting area, and immediately recognized him as the robber. (Deputy Bass testified that defendant was the only black person then sitting in the lobby.) He also identified a car in the parking lot as the one used by the robber.

At some subsequent time Mr. Leonard and John and Emmett Edwards were shown nine photographs. Mr. Leonard stated that number seven was a picture of the man who robbed him, and John and Emmett Edwards stated that number seven was a picture of the man they had seen at Mr. Leonard's store on the day of the robbery. Defendant offered no evidence at *voir dire*. Defendant's motions to suppress were denied.

At trial the State's evidence tended to show the same as set forth above.

The defendant's evidence tended to show that on 2 April 1976 he was unemployed, and from about 7:00 a.m. to 3:00 p.m. he and his son were at relatives' homes.

The jury found defendant guilty as charged, and defendant appeals from judgment imposing imprisonment.

Attorney General Edmisten by Associate Attorney Claudette C. Hardaway for the State.

J. Calvin Cunningham for defendant appellant.

CLARK, Judge.

[1] Defendant first assigns error to the denial of his motion to suppress the in-court identifications and the photographic identification.

The practice by law enforcement officers of showing suspects singly to persons for the purpose of identification, oft-referred to as "the one-on-one confrontation," is usually in violation of constitutional due process and has been widely criticized. *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed. 2d 1199 (1967); *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968). However, the one-on-one confrontation does not render inadmissible the in-court identification if the identification had an origin independent of the illegal confrontation. In *State v. McNeil,* 277 N.C. 162, 176 S.E. 2d 732 (1970), the court ruled admissible the identification testimony of a young rape victim where law officers took the defendant to a public school for her to see him. The court pointed out that at the time of this confrontation there was abundant evidence against the defendant, and that the school confrontation was for the purpose of confirming the identification made by two boys. See also *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7 (1971); *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Huffman,* 7 N.C. App. 92, 171 S.E. 2d 339 (1969).

When the admissibility of in-court identification is challenged on the ground that it is tainted by an out-of-court identification made under constitutionally impermissible conditions, the trial judge must conduct a *voir dire* to determine the admissibility of the evidence and make appropriate findings of fact. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972). If the facts found on *voir dire* are supported by competent evidence and the conclusions of law are supported by the findings of fact, they are conclusive on appellate courts. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975). The test under the due process clause as to the constitutionality of pretrial identification procedures is whether the totality of circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification as to offend fundamental standards of decency, fairness, and justice. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). In order to exclude the in-court identification testimony, it must appear not merely that the pretrial procedures were illegally suggestive and conducive to mistaken identification, but also that such procedures were so suggestive and conducive to mistaken identification that any in-court identification is irreparably tainted. *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed. 2d 1149 (1967); *cf. State v. Henderson, supra.* In *Henderson,* the court evaluated

the reliability of the in-court identification upon the basis of factors enumerated in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed. 2d 401 (1972). Those factors are: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Applying the facts found in the case before us to the *Neil* and *Henderson* standards we note the following: (1) The witness viewed the defendant in daylight on two occasions on the day of the robbery and conversed with him both times. The first encounter lasted three or four minutes; the second encounter occurred a short time later and also lasted three or four minutes; (2) The witness observed the criminal's features while they were conversing on both occasions and on the second occasion "had nothing to do but look at his face" when grabbed by the throat; (3) the description given to Deputy Bass was sufficiently thorough, and defendant made no attempt by cross-examination or otherwise to show that the description given by Mr. Leonard prior to the confrontation in the jailhouse was not an accurate description of the defendant; (4) At the confrontation in the jailhouse the witness immediately recognized the defendant as the man who had robbed him and so informed the police officers; (5) Five or six days elapsed between the time of the crime and the confrontation.

The one-on-one jailhouse confrontation was unquestionably suggestive, but considering the totality of the circumstances in this case we do not find it led unfairly to mistaken identification. We conclude that there was competent evidence to support the findings of fact, and that the findings of fact support the judge's conclusion that the in-court identification was reliable and of independent origin.

Within this same argument, defendant, in disregard of North Carolina Rules of Appellate Procedure 10(c) and 28(b)(3), groups two additional assignments involving separate principles of law. Defendant contends that the in-court identification of his vehicle as that of the robber by Mr. Leonard was tainted by the pretrial procedures at the jailhouse. No authority is cited to support the application of the rules pertaining to

pretrial identification of persons to pretrial identification of property, nor is any argument or reason advanced for such application. We therefore consider this assignment abandoned under Rule 28(b)(3).

The final assignment grouped under the first argument is that the judge erred in denying defendant's motion to suppress the admission of a group of photographs shown prior to trial to Messrs. Leonard and John and Emmett Edwards. The record reveals that these photographs were never offered in evidence or shown to the jury. A new trial will be granted only for error which is prejudicial or harmful. *Whitley v. Richardson*, 267 N.C. 753, 148 S.E. 2d 849 (1966). Even if we were to concede error in the judge's denial of defendant's motion to suppress, which we do not, we fail to see how such error could have prejudiced or harmed defendant. We see no merit to defendant's assignment of error concerning the denial of the motion to suppress.

[2] Defendant's next assignment of error is that several remarks and actions of the district attorney violated "the rules of fair debate" and prejudiced defendant's case. We note at the outset that error should be assigned not to the remarks of the district attorney, but rather to the actions thereon taken or not taken by the judge. It appears from the record that on several occasions the conduct of both the district attorney and defense counsel indicated a lack of maturity and judgment. But for the admonitions of the trial judge, a circus atmosphere might have prevailed. At one point the judge cautioned,

> "Gentlemen, I don't know. We may have to proceed with the trial of this case without either attorney being present. I want you to clearly understand it at this time. Do not exchange comments. Object, and the other party stop talking so that I may rule. . . . "

The only remark of the district attorney to which objection was not sustained or for which admonition and instruction was not given occurred during jury argument. The district attorney stated that "If I didn't believe this was a case worth trying, I have got the power to throw it out." Defendant relies upon *State v. Smith*, 279 N.C. 163, 181 S.E. 2d 458 (1971), wherein a similar remark was made, for the proposition that failure to sustain an objection to this remark constitutes reversible error. That case is distinguishable from this one because there the

remark that the solicitor knew "when to ask for the death penalty and when not to" was one small part of an argument which the court characterized as a "tirade" with "inflammatory and prejudicial effect." Although it would have been better had defendant's objection been sustained, in view of the numerous instances in which the judge properly admonished both attorneys and gave curative instructions to the jury, we conclude there was no prejudicial error in the failure to sustain defendant's objection. We find no merit to this assignment of error.

[3] Defendant's next assignment of error is to the failure of the court to sustain objections to two questions asked the defendant on cross-examination about prior convictions. Defendant cites as authority *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), which is entirely inapposite since that case holds only that a defendant may not be cross-examined about *indictments* for the purpose of impeachment. It is well established and was reaffirmed in *Williams* that a criminal defendant who takes the stand is subject to cross-examination the same as any other witness and may be asked about prior convictions for the purpose of impeachment. *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606 (1943). In the present case, defendant was asked if he had been convicted of misdemeanor larceny and over objection he answered yes. On appeal counsel argues that this was error because defendant had not been convicted but had pled guilty. Counsel is apparently unaware of a long line of cases wherein it has been ruled that a guilty plea is the equivalent of a conviction. See 4 Strong, N. C. Index, Criminal Law § 23, p. 91, n. 79 (3d ed. 1976). Defendant's response to the second question was that he had not been convicted; the State was bound by this answer and made no attempt to prove otherwise. Therefore, we fail to see any prejudice to defendant from the failure to sustain that objection. We find no merit to this assignment of error.

Defendant's final argument incorporates four assignments of error to the charge. Again, since these assignments raise separate issues of law, they were not properly grouped in accordance with Rule 10(c). The general rule is that there is not error if the charge, when read as a whole, presents the law to the jury in such manner as to leave no reasonable cause to believe that the jury was misled or misinformed. We have carefully examined defendant's arguments, and we conclude that the charge did fully, adequately and without chance of mis-

information present the law to the jury. We find no merit to the assignments of error concerning the charge.

No error.

Judges MORRIS and PARKER concur.

REA CONSTRUCTION COMPANY v. THE ERVIN COMPANY

No. 7626SC862

(Filed 15 June 1977)

Guaranty § 1— guaranty of account — acceptance of principal debtor's note — no release of guarantor

Defendant was not released from its guaranty of payment of the principal debtor's account with plaintiff by plaintiff's acceptance of the principal debtor's note for the amount due on the account where the note was executed some 18 months after defendant breached its contract with plaintiff by denying it had guaranteed the account and refusing to pay plaintiff after the account had become past due, the principal debtor paid the installments due on the note except for the final installment, and the validity of defendant's guaranty was judicially determined some 10 months after the final installment became due, since (1) it is clear that defendant did not intend to pursue the principal debtor until the validity of the guaranty had been judicially determined, which was 10 months after the "extension" granted by plaintiff had expired, and (2) after defendant breached its contract, plaintiff exercised ordinary business prudence in successfully attempting to mitigate its damages.

APPEAL by plaintiff from *Thornburg, Judge.* Judgment entered 26 April 1976 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 April 1977.

Plaintiff brought this action to recover on an account it alleges was guaranteed by defendant.

The case was tried by the court without a jury.

Plaintiff does not bring forward and argue any assignments of error directed to the facts as found by the court. The facts so found may be summarized (except where quoted) as follows:

Plaintiff is engaged in the sale of asphalt to other paving contractors. In February, 1971, Queen City Paving Company

was a paving contractor buying asphalt from plaintiff that was used in paving work performed by Queen City for defendant. Defendant was engaged in real estate development and contracted with Queen City for the pavement of streets and driveways in some of its subdivisions.

In February, 1971, Queen City's account with plaintiff was overdue in the amount of $18,739.15. Plaintiff advised Queen City that additional assurance of payment was required.

On 17 February 1971, the President of Queen City requested defendant to guarantee payment to plaintiff of Queen City's current account. The manager consulted with other employees of defendant, including an officer of the corporation. Thereafter, on company stationery, the manager wrote the following letter to plaintiff:

> " 'This letter is to advise you that The Ervin Company will guarantee payment of the current asphalt account of Queen City Paving Company for work done by Queen City Paving Company for The Ervin Company and its subsidiaries.' "

The court's findings continued:

> "8. After Plaintiff received the February 17, 1971 letter, it continued to sell asphalt to Queen City on open account with the same terms.
>
> 9. At the time of receipt of this February 17, 1971, letter, Plaintiff also set aside Queen City's pre-February 1971 balance of $18,739.15 and began maintaining a separate bookkeeping identity for this indebtedness;
>
> 10. From February 17, 1971, Queen City paid for its asphalt purchases from Plaintiff on a current basis until June or July 1971 at which time it again failed to pay for asphalt within 30 days of purchase;
>
> 11. There were no communications between Plaintiff and Defendant with respect to this February 17, 1971, letter until payment by Queen City started getting slow again at which time Plaintiff's office manager began communicating with another employee of Defendant who was in charge of approving payment of Queen City's invoices to Defendant and Plaintiff demanded payment of Queen City's indebtedness to it by Defendant in October 1974; [1971?]

12. Plaintiff's demand prompted a meeting between officers of the parties and Queen City on October 29, 1971, at which time Defendant advised Plaintiff that B. I. Bates had been acting without authority in writing the February 17, 1971, letter to Plaintiff, that Defendant would not voluntarily pay any amounts to Plaintiff by reason of the letter, and that the matter would have to be settled in a court of law;

13. On October 29, 1971, Queen City's account with Plaintiff for the period from February 1971 forward was past due in the amount of $34,613.37;

14. At this October 29, 1971 meeting, Plaintiff, Defendant and Queen City did agree that it was in the best interest of all of them that an effort be made to salvage the business of Queen City; and, thereafter, Queen City continued to do paving for Defendant with asphalt supplied by Plaintiff and billed directly to Defendant, which arrangement involved substantial amounts from time to time, all of which were paid by Defendant to Plaintiff, and continued until late 1973 or 1974;

15. Even though there were discussions at this October 29, 1971 meeting of the previously accrued indebtedness, specifics concerning payment or its interrelationship with the new arrangements were never agreed to;

16. During the period November 1971 up to June 1973, Plaintiff assumed financial control of Queen City but during this period no credit whatever was given for any part of the past due indebtedness of Queen City to Plaintiff;

17. On June 22, 1973, Plaintiff accepted the promissory note of Queen City payable to its order in the amount of $53,292.52 for 'credit extended on open account' and consisting of the pre-February 1971 balance of $18,739.15 and the February-October 1971 balance of $34,613.37;

18. Said promissory note provided for interest at the rate of 8% per annum and for the payment of the principal due in three installments over a period extending until June 1975;

19. Defendant was neither informed nor consulted about Plaintiff's agreement to convert Queen City's open

account indebtedness to this installment note and never agreed thereto;

20. The first installment due under the terms of this note in the amount of $23,292.52 plus interest was due on August 1, 1973, and was paid by Queen City; the second installment in the amount of $15,000 plus interest was due on June 22, 1974, and was also paid by Queen City; the third installment in the amount of $15,000 plus interest was due on June 22, 1971, but had not been paid as of the date of the trial of this action;

21. During the period November 1973 up to and including the trial of this action, Plaintiff continued to do business with Queen City."

The court made conclusions of law, as follows:

"1. By reason of the February 1971 letter and the course of dealing between Plaintiff and Defendant from February 17, 1971, to October 29, 1971, Defendant did guarantee indebtedness of Queen City to Plaintiff.

2. Notwithstanding Defendant's guarantee, the agreement between Plaintiff and Queen City embodied in Queen City's note to Plaintiff dated June 22, 1973, constituted a binding obligation, materially altered the terms of the obligation guaranteed by Defendant, and operated to release Defendant from liability on its guaranty of the open account indebtedness.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff have and recover nothing of Defendant in this action and that the costs hereof be taxed to the Plaintiff."

From the entry of that judgment, plaintiff gave notice of appeal. There were no cross-assignments of error by defendant.

Fleming, Robinson & Bradshaw, P.A., by Richard A. Vinroot and C. Richard Rayburn, Jr., for plaintiff appellant.

Caudle, Underwood & Kinsey, by William E. Underwood, Jr., for defendant appellee.

VAUGHN, Judge.

The arguments in the briefs concentrate on whether defendant was released from its guaranty by plaintiff's acceptance of Queen City's note. Plaintiff argues that there were no material alterations in Queen City's obligations and that the execution of the note did nothing to prejudice defendant. Plaintiff further argues that the facts show that the note was taken with at least the implied assent of defendant. Defendant argues that the mere acceptance of the note, without the assent of defendant as surety, operated to discharge the surety without a showing of prejudice. Defendant further argues that the facts show that defendant was prejudiced.

The trial judge's conclusion of law No. 2 was obviously based on the following well established rule:

> "It is well settled that if the creditor enters into any valid contract with the principal debtor, without the assent of the surety, by which the rights or liabilities of the surety are injuriously affected, such contract discharges the surety. A familiar instance of this is where a creditor binds himself not to sue for or collect the debt for a given time, and thereby puts it out of the power of the surety to pay the debt and sue the principal debtor." *Deal v. Cochran,* 66 N.C. 269, 270.

A reason for the rule is that the surety cannot be deprived of his right to pay the debt and immediately proceed against the principal for indemnity. *Chemical Co. v. Pegram,* 112 N.C. 614, 17 S.E. 298. *See* Restatement, Security, sections 128 and 129.

The rule is sound. The question is whether it comes into play on the facts of this case. We conclude that it does not.

The facts as found by the trial judge are not disputed on appeal. Neither is his conclusion that defendant guaranteed the account. The judgment, therefore, discloses the following: Defendant guaranteed the account on 17 February 1971. On 29 October 1971, the account was past due. Plaintiff demanded that defendant pay the account. Defendant denied that it had guaranteed the account and refused to recognize that it had any obligation to plaintiff. Thereafter defendant did nothing to protect its rights against the debtor. On 22 June 1973 (nearly 18 months after defendant had refused plaintiff's demand for

payment) the debtor, in consideration of the account, executed a note to plaintiff for the amount of the account. The debtor paid the installments as due except for the final payment that became due on 22 June 1975. The present suit was started against defendant on its guaranty on 4 January 1974, and (with defendant continuing to deny the existence of this guaranty) judgment was entered on 26 April 1976. That judgment judicially determined the validity of defendant's guaranty about 10 months after the "extension" granted by plaintiff had expired. We conclude that defendant breached its contract with plaintiff on 29 October 1971, and it is clear [finding of fact No. 12] that it did not intend to pursue the principal debtor until the validity of the guaranty had been judicially determined. After defendant breached its contract, plaintiff exercised ordinary business prudence in successfully attempting to mitigate its damages. Of this, defendant will not be heard to complain.

That part of the judgment dismissing plaintiff's action is reversed and the case is remanded for entry of judgment awarding plaintiff the unpaid balance due on the account.

Reversed and remanded.

Chief Judge BROCK and Judge CLARK concur.

IN RE: THE LAST WILL AND TESTAMENT OF EMILY WARD GRADY

No. 767SC897

(Filed 15 June 1977)

1. **Wills § 28— construction — intent of testator**

As a general rule in construing wills courts will try to determine and conform to the testatrix's intentions, and the intent will be gleaned from the four corners of the will and will be given effect unless that intent is contrary to some rule of law or at variance with public policy.

2. **Wills § 28— interpreting particular words — rules of construction**

In interpreting particular words in wills, technical words are presumed to have been used in their technical sense; however, where there is evidence of a contrary intent in the will, even technical words will be construed to mean what the testator intended them to mean

despite the fact that identical words have received a contrary construction in other cases.

3. **Wills § 28— devise to applicant's estate — meaning of "estate"**

Where deceased's will provided that certain property should go to applicant "for her lifetime only" and that "at her death it is to go to her estate in Fee Simple," "estate" meant that aggregate of property which applicant might leave at her death, or the property belonging to the applicant which would be administered by the courts upon her decease.

4. **Wills § 33— property to go to devisee for life and then to estate in fee simple — Rule in Shelley's Case — fee simple to devisee**

Where the will of testatrix devised a house and lot to the applicant for her lifetime only and provided further that "at her death it is to go to her estate in Fee Simple," it is unnecessary to determine whether the devise to applicant's estate granted a testamentary power of appointment or a limitation to applicant's heirs, since, in either case, the Rule in Shelley's Case would apply to convert applicant's life estate and the remainder to her heirs into a fee simple estate in the applicant, enabling applicant presently to convey fee simple title.

APPEAL by applicant from *Tillery, Judge.* Judgment entered 2 September 1976 in Superior Court, WILSON County. Heard in the Court of Appeals 11 May 1977.

On or about 7 December 1973 Emily Ward Grady died testate in Wilson County. In her will, which was admitted to probate on 13 December 1973, the deceased devised to Cynthia Ward Grady, her only child and applicant herein, certain real property. The particular devise read as follows: "My house and lot on West End Ave., Wilson, N. C., I would like to give to Cindy for her lifetime only. This is to provide a place she can call home. I ask that she keep up the property's appearance in keeping with the community. At her death it is to go to her estate in Fee Simple."

At sometime during 1975 applicant decided to sell the West End Avenue property. Donald Barnes, the prospective purchaser, refused to consummate the transaction on the grounds that Cynthia could not transfer fee simple title to the property.

Pursuant to G.S. 1-253 the applicant instituted proceedings to clear her title by applying for a declaration of her rights under the deceased's last will and testament. The cause was heard in superior court before Judge Tillery, who adjudged that the deceased's will passed only a life estate to the applicant and did not pass fee simple title.

H. Bruce Hulse and Duke & Brown, by J. Thomas Brown, Jr., for the applicant.

BROCK, Chief Judge.

Except for the last sentence thereof, the wording of the devise clearly gives applicant a life estate in the West End Avenue property. The questions before this Court are whether that interest is enlarged by the language of the last sentence passing the property to applicant's "estate" in fee simple at her death. And if it is enlarged, is it so enlarged as to enable applicant to convey a fee simple title?

[1] As a general rule in construing wills, courts will try to determine and conform to the testatrix's intentions. The intent will be gleaned from the four corners of the will and will be given effect unless that intent is contrary to some rule of law or at variance with public policy. *House v. House,* 231 N.C. 218, 56 S.E. 2d 695 (1949). The provision in question states: "At her [applicant's] death it is to go to her [applicant's] estate in fee simple." From this disposition one intention is clear. The testatrix intended to and did in fact permanently pass the house and lot out of testatrix's estate. The provision establishes that no reversionary interest back to testatrix's estate at the applicant's death was intended.

[2] The question remaining is what interest, if any, was given to the applicant by the devise of the property to applicant's "estate in fee simple" at the termination of her life estate. To answer the question, the meaning of the word "estate" as used in the devise must be determined. Each word used by a testator presumably has some meaning. *In Re Wilson's Will,* 260 N.C. 482, 133 S.E. 2d 189 (1963). In interpreting particular words, technical words are presumed to have been used in their technical sense. However, where there is evidence of a contrary intent in the will, even technical words will be construed to mean what the testator intended them to mean despite the fact that identical words have received a contrary construction in other cases. *Clark v. Connor,* 253 N.C. 515, 117 S.E. 2d 465 (1960).

[3] The word "estate" has more than one meaning and is susceptible to more than one construction. "Its legal signification must be ascertained from the context, or an examination of all the provisions of the instrument in which it appears." *Reid v. Neal,* 182 N.C. 192, 199, 108 S.E. 769, 772 (1921). In the pres-

ent case the use of the word "estate" is in a context which indicates that the testatrix intended that, after applicant's life estate, the house and lot were to devolve as any other property applicant might have at her death. In other words, "estate" means that aggregate of property which applicant might leave at her death, *Reid v. Neal, supra,* or the property belonging to the applicant which would be administered by the courts upon her decease. 28 Am. Jur. 2d, Estates, § 1, p. 70.

[4] Interpreting the provision in this manner, one of two alternative dispositions of the property at applicant's death may have been intended. First, applicant has only a life estate while she lives. But since the property is to be considered hers at her death, the testatrix has, by implication, given the applicant (testatrix's only child) an unrestricted power to dispose of the property by will. A power may be created by express words or by implication of law, and no technical language need be used. *Powell v. Woodcock,* 149 N.C. 235, 62 S.E. 1071 (1908). In the event applicant failed to dispose of the property by will, it would pass to applicant's heirs by descent under the laws of intestate succession. Secondly, by passing the house and lot to applicant's estate, the testatrix may not have intended to let applicant dispose of the property as she wished by will. Testatrix may have intended disposition of the property to remain in the family by descent to applicant's heirs under the laws of intestate succession. We need not, nor do we, decide whether the devise to applicant's estate granted a testamentary power of appointment or a limitation to applicant's heirs. Under either circumstance the outcome of this case is the same.

Construing the provision in the will *as granting to the applicant a power to appoint by will,* the next level of examination concerns the consequences of applicant's attempt to convey the property by deed. A devisee of a life interest with a testamentary power of disposition not coupled with any trust or beneficial interest to others may release or extinguish the right to exercise the power, and the execution and delivery to another of a warranty deed by the devisee constitutes an estoppel and precludes him from exercising such power. *Voncannon v. Hudson Belk Co.,* 236 N.C. 709, 73 S.E. 2d 875 (1953). Thus the applicant in this case can release her testamentary power or be estopped from exercising it by an *inter vivos* conveyance of the property to another.

A comparison of *Voncannon v. Hudson Belk Co., supra,* with the present case is instructive. In *Voncannon* the testator devised his wife realty "for the remainder of her natural life and then at her death to be disposed of according to her wishes." The Supreme Court construed the devise to be a life estate with a power of disposition in the wife. There was no gift over in case the devisee failed to exercise the power. Thus, upon failure to exercise the power, the property reverted to the testator's estate, there to pass to his heirs by intestate succession. The wife sold the property. The testator's heirs joined with her in the deed. The Court held that the deed passed good fee simple title in that the wife transferred her life interest, the heirs transferred the remainder in fee, and by executing the deed, the wife released her power to dispose of the property by will.

The present case would be governed by *Voncannon* if there were a reversionary interest to the testatrix's estate, and under *Voncannon* applicant could pass clear title. This is so because applicant is the heir of the testatrix who would take by intestacy. Thus, by releasing her testamentary power by deed, the remainder in fee would vest in her, and her life estate would merge therein. However, the testatrix's devise to applicant in this case is such that there is no reversionary interest. If the property is not disposed by applicant's will, it passes to her heirs under the laws governing intestacy.

At this point it is relevant to consider the Rule in Shelley's Case. The rule applies to an instrument which conveys a life estate to a person with a remainder to his heirs. The word "heirs" means those persons who would take the property on the death of their ancestor intestate. Any remainder found to have this meaning, whether the word "heirs" is used or not, calls for an application of the rule. *Nobles v. Nobles,* 177 N.C. 243, 98 S.E. 715 (1919). Absent an exercise of a testamentary power in the present case, the provision "to her estate in fee simple" would leave a remainder to applicant's heirs—those who would take her property by descent on the death of the applicant intestate. By executing a deed, the applicant would release her testamentary power so as to estop her from ever exercising it. Such a deed from her would convey fee simple title because, with the testamentary power released, the Rule in Shelley's Case operates to convert her life estate and the remainder in

her heirs to a fee simple estate in her. *In Re Wilson's Will, supra.*

Construing the provision "to her estate" *as excluding a power to appoint by will,* the devise still places the house and lot in the aggregate of applicant's property that would be administered by the courts. Under this construction the testatrix has created a remainder in applicant's heirs because any property of a decedent that does not pass by will descends under the laws of intestate succession. For the same reasons as stated above, the Rule in Shelley's Case would apply under this construction to convert applicant's life estate and the remainder to her heirs into a fee simple estate in the applicant, enabling applicant presently to convey fee simple title.

Under this particular set of facts and circumstances and under either construction of "to her estate," applicant has the present ability to convey the house and lot in fee simple.

The judgment is reversed, and the case is remanded for further appropriate proceedings.

Reversed and remanded.

Judges HEDRICK and MARTIN concur.

BENTLEY MACHINERY, INC. v. PONS HOSIERY, INC., J. P. PONS AND STANLEY PONS

No. 7625SC893

(Filed 15 June 1977)

1. **Bills and Notes § 16— amount of deficiency — refusal to strike alleged hearsay testimony**

In an action to recover upon the guaranty of a note given for the purchase of machinery, defendants were not prejudiced by the court's refusal to strike as hearsay the testimony of plaintiff's witness as to the amount of the deficiency where other competent evidence enabled the court to calculate with mathematical certainty the amount of the deficiency and supported the court's findings with respect to the deficiency.

2. **Uniform Commercial Code § 15— exclusion of implied warranties — no breach of express warranty**

In an action on a note given for the purchase of machinery, defendants were not entitled to an offset for breach of warranty where

the purchase contract excluded any implied warranty of merchantability and fitness as permitted by G.S. 25-2-316(2) and the evidence supported the court's finding that defendants failed to prove that plaintiff breached its express warranty that the goods were free from defects in materials and workmanship.

APPEAL by defendants, J. P. Pons and Stanley Pons, from *Ervin, Judge.* Judgment entered 20 January 1976 in Superior Court, CATAWBA County. Heard in the Court of Appeals 11 May 1977.

Plaintiff, Bentley Machinery, Inc., instituted this action to collect the balance due on a note executed by defendant, Pons Hosiery, Inc., to cover the purchase price of certain machinery sold to Pons Hosiery and to enforce the agreement of the individual defendants, J. P. and Stanley Pons, guaranteeing payment of the purchase price. Defendant Pons Hosiery filed no answer, but the individual defendants filed an answer wherein they alleged among other things:

". . . [S]hould the Court hold said defendants liable for the amount prayed by the plaintiff that the defendants be given and allowed a set-off and/or credit for:

(a) All payments previously made on said machinery by defendants collectively.

(b) The reasonable resale value of said machinery since the plaintiff seeks to recover possession of said machinery.

(c) All expenses incurred by said defendants for repairs and/or additions to said machinery including but not limited to:

(1) Replacement of sock separation unit;

(2) Replacement of motors and drivers.

(d) Credit for returned sock separator which was defective.

(e) Any and all other lawful credits and setoffs to which the defendants are entitled."

While the action was pending Pons Hosiery filed a petition in bankruptcy, and the plaintiff repossessed and sold the machinery. With the consent of the parties the court entered a

partial summary judgment on 28 April 1975 wherein the court stated that the only issue for trial was the amount of the individual defendants' liability under the guaranty agreement.

At the trial, before the judge without a jury, plaintiff offered evidence tending to show the following:

In 1973 defendant Pons Hosiery purchased from plaintiff 40 sock knitting machines for a total purchase price of $453,575.30. Pons Hosiery paid $23,640 of the purchase price and executed a promissory note for the balance. Under the terms of the promissory note, Pons Hosiery was to make fifty-nine monthly payments of $10,003.88 and then one payment of $10,003.75. Defendants, J. P. and Stanley Pons, signed an agreement guaranteeing payment of the purchase price of the machines. The purchase sales contract, promissory note and security agreement were all admitted into evidence. Donald M. Collins, plaintiff's regional sales and service manager for North Carolina, testified that Pons Hosiery made its last payment on the machinery in June, 1974, and that at that time the gross amount owed on the note was $530,205.51 and that the net principal balance was $397,039. Plaintiff incurred expenses of $4,725.72 in repossessing the machinery on 25 January 1975. The forty machines were sold to Mayo Hosiery for $400,000. Plaintiff incurred expenses of $12,393.75 in installing the machinery at Mayo's plant. Plaintiff sold the forty "separators" for $55 each.

Defendants offered evidence tending to show the following:

Pons Hosiery purchased from plaintiff forty sock knitting machines together with "separators" which separate the socks produced by the machinery. The separators malfunctioned continually in that they did not separate the socks but twisted them. As a result of the malfunctioning separators one or two machines were inoperative for several hours a day and Pons expended $1,000 in labor and parts in an attempt to solve the problem and had to hire three extra fixers at a weekly salary of $300 and three extra knitters at the hourly wage of $3.00 to $3.50. The hydraulic drive units of the knitting machines were defective and Pons Hosiery suffered $5,000 to $6,000 in damages as a result. The supports for the feed striper bracket assembly were too weak to support themselves, and Pons Hosiery had to repair them at a cost of $25 to $30 per machine. The

cables of the knitting machines repeatedly slipped out of the nipples in which they were secured causing damage to the machines. The total damage caused by this problem was $18,000-$19,000. Ordinarily a yarn rack is included with each knitting machine of the type sold to Pons Hosiery. Plaintiff agreed to give Pons Hosiery a $140 credit in lieu of each rack, but never gave them the credit. A collection can is standard equipment with the type machine sold to Pons Hosiery, but Pons Hosiery did not receive any cans and had to buy forty used cans at $17 each.

The trial judge made detailed findings of fact with respect to plaintiff's claim and included therein the partial summary judgment entered on 28 April 1975. The trial court concluded that defendants were indebted to the plaintiff in the amount of $31,988.71, and that plaintiff was not indebted to defendants in any amount on defendants' claim for a setoff.

From the judgment that plaintiff recover from defendants $31,988.71, defendants appealed.

Cagle & Houck by Joe N. Cagle and William J. Houck for plaintiff appellee.

McMurray, Triggs & Hodges by C. Gary Triggs for defendant appellants.

HEDRICK, Judge.

[1] Defendants contend the trial court erred in denying their motion to strike the testimony of the witness Collins regarding "any deficiencies on the grounds the testimony was hearsay and therefore not admissible." Assuming *arguendo* that this question is properly supported by an assignment of error and exceptions duly noted in the record, we are of the opinion that the court committed no prejudicial error, since the promissory note, which was properly admitted into evidence, evidencing the purchase price, interest rate, amount of monthly payments, and total monthly payments, coupled with the fact stipulated in the consent order (partial summary judgment) that, "The Defendant Pons Hosiery, Incorporated has not made any payment to Plaintiff under the terms of the Note and Security Agreement since June of 1974 . . . , " enabled the court to calculate with mathematical certainty the amount of the deficiency. There is plenary competent evidence in the record to support the court's

findings of fact with respect to the amount of the deficiency, and these findings support the order that defendants are indebted to plaintiff under the guaranty agreement in the amount of $31,988.71.

[2] By assignments of error 9 and 14, defendants contend the court erred in finding and concluding that defendants are not entitled to recover on their offset for damages resulting in plaintiff's alleged breach of warranty. In their brief defendants simply argue that the evidence discloses that the plaintiff breached the implied warranties of merchantability and fitness for a particular purpose and the express warranty that the goods were "free from defects in materials and workmanship."

G.S. 25-2-316(2) in pertinent part provides as follows:

> ". . . [T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that 'There are no warranties which extend beyond the description on the face hereof.' "

The purchase sales contract in the present case contains the following conspicuous provision:

> "Except for the warranty of title, no warranty of merchantability, fitness, nor other warranty (whether expressed, implied or statutory) is made by the seller, except that it warrants the goods to free from defects in materials and workmanship in normal use and service. . . ."

Construing this provision in light of G.S. 25-2-316(2), we are of the opinion that the contract excluded any implied warranty of merchantability and fitness for a particular purpose, and that the only warranty made by the plaintiff was the exclusive express warranty that the machines were free from defects in materials and workmanship in normal use and service. The evidence supports the court's finding that defendants failed to prove that the plaintiff breached this exclusive express warranty, and the finding supports the conclusion that defendants

are not entitled to recover any amount from plaintiff as an offset to its claim.

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. RICHARD L. DAVIS

No. 771SC8

(Filed 15 June 1977)

1. **Constitutional Law § 50— denial of speedy trial — showing required**

A defendant has been denied his right to a speedy trial and the prosecution must be dismissed when (1) there has been an atypical delay in issuing a warrant or in securing an indictment, (2) defendant shows that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State, and (3) defendant shows that the length of the delay created a reasonable possibility of prejudice.

2. **Constitutional Law § 51— no atypical delay between offense and indictment — no denial of speedy trial**

There was no atypical delay in securing an indictment against defendant where the evidence tended to show that the offense in question occurred on 11 November 1974; the SBI subsequently began an investigation of the case; and an indictment was returned against defendant in April 1975; therefore, defendant failed to show a denial of his right to a speedy trial.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 30 June 1976 in Superior Court, GATES County. Heard in the Court of Appeals 12 May 1977.

Defendant was tried for the felonies of forgery and uttering a forged instrument.

In summary, the State offered evidence tending to show the following:

Defendant was employed as a salesman for a wholesale grocery company. On 11 November 1974, one of the firm's customers, Mrs. Eure, gave him a check in the amount of $543.07, the amount of the invoice for which it was given in payment. Mrs. Eure suspected that defendant had altered other

checks. She immediately notified the bank of the issuance of the check and the amount thereof. Defendant altered the check so that it would call for the payment of $843.07, and caused it to be presented for payment. An employee of the bank immediately noticed that the check called for payment of $843.07 instead of $543.07. Mrs. Eure was notified and payment on the check was stopped. The check was preserved and introduced as evidence.

There was evidence tending to show that defendant had altered a number of other checks that Mrs. Eure had given him.

Defendant offered evidence tending to show that he did not alter the check. He contended that the check was drawn for $300.00 more than the invoice so that, at Mrs. Eure's request, he could give her $300.00 in cash. He said that it was a common practice for Mrs. Eure to issue checks for more than the invoice and receive the difference in cash. He followed the same practice with other customers.

Defendant was convicted of both charges and judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Associate Attorney Catharine Biggs Arrowood, for the State.

Carter W. Jones, by Ralph G. Willey III, for defendant appellant.

VAUGHN, Judge.

Defendant's principal argument is that the cases should have been dismissed because he was not "afforded a speedy trial in conformity with the Fifth, Sixth and Fourteenth Amendments."

A hearing was held on defendant's motions to dismiss. Defendant does not except to any of the judge's findings of fact that were made in the orders denying the motions. Instead, he entered a general exception to each of the orders.

[1] A defendant has been denied his right to a speedy trial and the prosecution must be dismissed when:

1. There has been an atypical delay in issuing a warrant or in securing an indictment, and

2. Defendant shows that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State, and

3. Defendant shows that the length of the delay created a reasonable possibility of prejudice. *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274.

[2] In the case before us the offense occurred on 11 November 1974. The next day defendant's employer talked with defendant about the check. Defendant told his employer that he gave Mrs. Eure change for check. On 15 November 1974, defendant met with his employer, Mrs. Eure, Mrs. Eure's attorney and her accountant. At that meeting, defendant was also accused of altering about 150 checks that had been given him by Mrs. Eure. He admitted altering some of the checks but said that he did so because, after the checks were written, Mrs. Eure decided she wanted some cash. Mrs. Eure told him that he had never given her cash. At that meeting Mrs. Eure's attorney told defendant that in his opinion a criminal offense had been committed and that the matter would be handled by the solicitor. Subsequently, the local agent of the State Bureau of Investigation began an investigation of the case. In April, 1975, the grand jury of Gates County returned a bill of indictment against defendant charging him with forgery and uttering the check in question. A capias was issued and defendant was arrested on 29 April 1975. There had been previous sessions of the grand jury in January and in March. On these facts we hold that there was not an atypical delay in securing the indictment. Moreover, there is absolutely no evidence that there was any unnecessary delay for the convenience of the State, or that defendant was prejudiced. To obtain dismissal because of preindictment delay, there must be a positive showing of all of the three circumstances set out in *State v. Johnson, supra.* Defendant has failed to show the existence of any of them. There is also no merit to defendant's contention that he was not afforded the opportunity for a speedy trial after the indictment.

The only other exception brought forward is Number 7 in which he contends that the State failed to comply with a discovery order. The exception is without merit.

No error.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM GILLIAM, JR.

No. 762SC999

(Filed 15 June 1977)

Criminal Law §§ 157, 163.1— record on appeal — judgment — exceptions to instructions— certification by clerk

An appeal in a criminal case is dismissed for failure to comply with the Rules of Appellate Procedure where a copy of the judgment was not included in the record on appeal as required by App. R. 9(b)(3); exceptions to the court's instructions did not identify the portions in question by brackets or by any other clear means as required by App. R. 10(b)(2); and the record on appeal was not settled before certification of the clerk of court in violation of App. R. 11(e).

APPEAL by defendant from *James, Judge.* Judgments entered 28 July 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 4 May 1977.

In case No. 76CR904 defendant pled not guilty to charges of driving 120 m.p.h. in a 55 m.p.h. zone and of driving in excess of 55 m.p.h. and at least 15 m.p.h. over the legal limit while fleeing or attempting to elude arrest. In case No. 76CR905 defendant pled not guilty to charges of reckless driving and of failing to stop for a police light and siren.

The court granted defendant's motion to dismiss on the charge of failing to stop for a police light and siren, but denied similar motions as to the other three charges. The jury found defendant guilty of the other three charges. The record includes court minutes for 28 July which purport to relate the disposition of the two cases. The record includes a judgment in 76CR904 but does not include a judgment in 76CR905.

Defendant appeals.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward for the State.

Milton E. Moore for defendant appellant.

CLARK, Judge.

An appeal is subject to dismissal for failure to comply with the North Carolina Rules of Appellate Procedure. *Ledwell v. County of Randolph,* 31 N.C. App. 522, 229 S.E. 2d 836 (1976).

It is clear from the argument in defendant's brief concerning the charge on reckless driving that he intended to appeal from the judgment in case No. 76CR905. Rule 9(b)(3)(vii) provides that "the record on appeal in criminal actions shall contain . . . copies of the verdict and of the judgment. . . . " A copy of the judgment in No. 76CR905 was not included in the record on appeal. The "minutes" of the court that were included are not a substitute for a copy of the judgment. A judgment is a necessary part of the record. *State v. Willis,* 285 N.C. 195, 204 S.E. 2d 33 (1974). When a necessary part of the record has been omitted, the appeal will be dismissed. *State v. Dobbs,* 234 N.C. 560, 67 S.E. 2d 751 (1951); 4 Strong N. C. Index, Criminal Law § 157.2 (3d ed. 1976).

Defendant also violated Rule 10(b)(2) with respect to the appeal from No. 76CR905. Rule 10(b)(2) provides that "An exception to instructions given the jury shall identify the portion in question by setting it within brackets or by any other clear means of reference." Defendant's assignment of error with respect to the charge on reckless driving is based upon five (5) exceptions. Each of these exceptions is listed at the end of a paragraph. There are no brackets or any other feature to indicate whether the preceding phrase, sentence, paragraph, or paragraphs are the subject of the exception.

The appeal from No. 76CR904 as well as that from No. 76CR905 is subject to dismissal for violation of Rule 11(e). Rule 11(e) provides that

> "Within 10 days after the record on appeal has been settled by any of the procedures provided in this Rule 11, the appellant shall present the items constituting the

record on appeal to the clerk of superior court for certification. . . . "

The clear implication of this rule is that the record must be settled before certification. In the present case the record was certified on 26 October 1976 and settled on 27 October 1976. The appellate court must be assured that it has before it the certification of the clerk to the settled record, not the certification of the clerk to a record presented by the appellant. It is the duty of the appellant to see that the record is properly made up and transmitted. *State v. Stubbs,* 265 N.C. 420, 144 S.E. 2d 262 (1965).

For these several violations of the Rules of Appellate Procedure, the appeal is

Dismissed.

Chief Judge BROCK and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. RANDOLPH DEAN FLYNN

No. 7710SC22

(Filed 15 June 1977)

Searches and Seizures § 3— warrant — failure of magistrate to sign affidavit jurat

In a hearing on a motion to suppress evidence seized pursuant to a warrant on the ground that the magistrate failed to sign the jurat of the affidavit to obtain the warrant, the court properly admitted testimony by the affiant and the magistrate regarding the absence of the magistrate's signature on the jurat; furthermore, the court properly concluded that the warrant was valid where it found upon supporting evidence that the affiant was sworn to the affidavit and that the magistrate's signature was omitted therefrom by inadvertence.

APPEAL by defendant from *Herring, Judge.* Judgment entered 15 October 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 31 May 1977.

Defendant was charged in a proper bill of indictment with the possession of marijuana with intent to distribute.

Before trial defendant moved to suppress evidence obtained by a search warrant on the grounds that the affidavit upon which the search warrant was issued was not verified. The motion was denied, the defendant entered a plea of guilty, and a judgment that the defendant be committed as a youthful offender for 3 years was entered.

Pursuant to G.S. 15A-979(b) defendant appealed from the denial of the motion to suppress.

Attorney General Edmisten by Associate Attorney Isaac T. Avery III for the State.

William A. Smith, Jr., for defendant appellant.

HEDRICK, Judge.

At the hearing on defendant's motion to suppress the State was allowed, over defendant's objection, to offer evidence concerning the absence of the magistrate's signature on the "affidavit of an application" for the search warrant executed in this case. At the hearing Officer Beliveau, the affiant, and T. W. Adams, the magistrate, both testified that Officer Beliveau was sworn to the affidavit by the magistrate, and that the magistrate's signature was omitted from the jurat by inadvertence.

The defendant offered no evidence at the hearing on his motion to suppress.

The trial court made detailed findings with respect to the issuance of the search warrant and included therein that the affiant was sworn to the affidavit, and that the magistrate's signature was omitted therefrom by inadvertence. The trial court concluded that the search warrant was in all respects proper and denied defendant's motion to suppress.

Defendant contends that the court erred in admitting the evidence of the affiant and the magistrate regarding the absence of the magistrate's signature on the "affidavit of an application" for the search warrant, and in concluding that the search warrant was valid. Defendant concedes that the trial court did not err in admitting the evidence of the magistrate and the affiant if the search warrant is not invalid on its face. Citing G.S. 15A-244, defendant argues that the search warrant is invalid on its face because the affidavit upon which

the warrant was issued does not bear in writing the magistrate's jurat.

G.S. 15A-244 in pertinent part provides, "Each application for a search warrant must be made in writing upon oath or affirmation." Clearly the search warrant in this case was issued upon an application which was in writing, and the trial court's unchallenged findings clearly establish that the application was made upon "oath or affirmation." The trial judge's findings with respect to the making of the application and the issuance of the search warrant are supported by plenary competent evidence, and the findings support the conclusion that the search warrant was in all respects proper. *State v. Brannon*, 25 N.C. App. 635, 214 S.E. 2d 213 (1975).

The order denying defendant's motion to suppress is

Affirmed.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. JOSEPH MARION HEAD, JR.

No. 7729SC31

(Filed 15 June 1977)

Criminal Law § 114.2— jury instructions — "evidence further shows" — no expression of opinion

The trial court's use of the phrase, "the evidence further shows," in instructing the jury did not violate G.S. 1-180 and was not reversible error where the court used that phrase three times but at all other times used the phrase, "the evidence tends to show"; the jurors were clearly and emphatically instructed that they were the sole finders of fact; and the judge told the jurors that he was going to use the phrase, "the evidence tends to show," and why he was going to use it.

APPEAL by defendant from *Baley, Special Judge.* Judgment entered 11 August 1976 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 31 May 1977.

Attorney General Edmisten, by Associate Attorney Patricia B. Hodulik, for the State.

J. H. Burwell, Jr., for defendant appellant.

ARNOLD, Judge.

In this case defendant appeals from a conviction of second degree rape of a sixteen-year-old girl. He was originally indicted for rape and crime against nature, and in 24 N.C. App. 564 (1975), this Court awarded a new trial. In 28 N.C. App. 592 (1976), no error was found in defendant's subsequent conviction for the crime against nature.

Defendant argues on this appeal that the trial judge expressed an opinion on the evidence against him because, on three occasions, he prefaced his recapitulation of evidence with the words "the evidence further shows" instead of the customary phrase, "the evidence further *tends* to show."

We have carefully read the judge's entire charge. It is impeccable save in the single respect noted above. The jurors were clearly and emphatically instructed that they were the sole finders of fact. Both before and after his recapitulation of the evidence the judge emphasized that his recapitulation was only a summary, that it was not a complete summary, that each juror should rely on his own recollection of the evidence, and that what the evidence in fact proved was a question which only the jury could answer. The judge particularly emphasized this point, saying before he began his summary,

> "The Court will refer to this evidence as 'the evidence tends to show.' That is a deliberate statement, because it is a matter for you to determine what the evidence actually does show."

Then, at all times during the recapitulation, except the three times to which the defendant objects, the judge used the time-honored phrase "the evidence tends to show."

The judge's three lapses from customary expression were clearly accidental. Because the jurors had been told to expect the accepted phrase, and because they usually heard the accepted phrase, the jurors realized that the deviations were inadvertent and meaningless. The jury's verdict could not have been influenced by these slips of the tongue. In this case the use of the expression "the evidence further shows" did not violate G.S. 1-180 and was not reversible error. *See, State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960); *State v. Montieth,* 23 N.C. App. 498, 209 S.E. 2d 289 (1974), *cert. den.* 286 N.C. 419, 211 S.E. 2d 799 (1975).

We find

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. BETTY AGNEW

No. 762SC894

(Filed 6 July 1977)

1. **False Pretense § 3.1— fraudulent representation — insufficiency of evidence**

The State's evidence was insufficient for the jury in a prosecution of the director of a county Department of Social Services for obtaining money from the county by false pretense where it tended to show that defendant received an advance for expenses for a business trip from a revolving fund of the Department of Social Services, defendant was personally responsible for repayment of the advance, defendant submitted a claim to the county treasurer for reimbursement for the expenses of the trip and was reimbursed by the county treasurer for such expenses, and defendant failed to repay the advance from the revolving account of the Department of Social Services until after an audit of that account was begun, since defendant's request to the county was not to collect twice for the same expenditures and was not a fraudulent representation.

2. **Embezzlement § 6— insufficiency of evidence**

The State's evidence was insufficient for the jury in a prosecution of the director of a county Department of Social Services for embezzlement in violation of G.S. 14-90 where it tended to show that defendant received travel advances of $1,314.64 from a revolving account over a period of less than a year, the revolving account consisted of cash on hand and on deposit, defendant was the custodian of the funds in the revolving account, when advances were repaid they were held as cash on hand or on deposit, records of cash transactions were evidenced by control cards, defendant gave another employee $900.00 on 20 July 1975 to repay advances, this amount was not deposited in the revolving account but was given to the county accountant in payment of several accounts, defendant had in her possession in the Department of Social Services the sum of $414.64 on 15 August 1975 after an audit was commenced, and the $414.64 was deposited in the revolving account on 29 September 1975 after the audit was completed, since, if it be conceded that there was an appropriation or conversion, the evidence was insufficient to show a fraudulent purpose or corrupt intent.

3. Embezzlement § 6— misapplication of county funds — insufficiency of evidence

The State's evidence was insufficient for the jury in a prosecution of the director of a county Department of Social Services for the willful and corrupt misapplication of county funds in violation of G.S. 14-92 where it tended to show only that funds were expended for a punch bowl, a coffee pot, a refrigerator, cakes, pies, gifts for members of the Board of Social Services, and an advance to an employee for vacation expenses and rent, but the State failed to identify the funds expended as those of the county and to offer sufficient proof that defendant willfully and corruptly misapplied the funds.

APPEAL by defendant from *Cowper, Judge.* Judgment entered 3 June 1976 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 7 April 1977.

Defendant was indicted for obtaining $434.63 from Beaufort County and the Beaufort County Department of Social Services by means of false pretenses by representing to them that she had expended her personal funds for a business trip to Boston and was entitled to be reimbursed when in fact she had expended funds from the Beaufort County and the Beaufort County Board of Social Services checking account which funds she failed to repay after obtaining reimbursement from the county. Defendant was also indicted for embezzling $1,300.00 from the county and the Department of Social Services and for misapplying $1,128.94 belonging to the county and the Department of Social Services.

State's evidence tended to show that the Department of Social Services maintained a checking account which was within the sole control of defendant, director of the Department of Social Services; that the account contained federal and state "blind funds," i.e., money received from the Blind Commission for use as the director saw fit in the administration of the Department of Social Services' aid to the blind program; that the account also contained work release funds (funds earned by prisoners on work release to be distributed to their families), foster care funds (funds from other counties for their foster children being cared for in Beaufort County), donations, support payments (court ordered payments for dependent families) and refunds from clients who had been overpaid by the county; that "blind funds" were received and placed into the account until 1971 after which no more such payments were received; that some time shortly after 11 July 1975 a memo was sent to

defendant and the Department of Social Services stating that they were to be audited; that an audit of the account revealed that as of a certain date defendant had outstanding $1,314.64 in "advances" to herself from the account; that of those advances three checks totaling $430.75 had been drawn by defendant on the account to cover the costs of a business trip to Boston in 1974; that defendant also filed a travel voucher with the county auditor for said trip and received $434.63 from him for her alleged expenses on the trip; that the audit also revealed that defendant had expended $1,128.94 from the account for expenses such as food for the staff at staff parties, two coffee pots for the office, gifts and flowers for county commissioners, Department of Social Services' entertainment expenses, magazine subscriptions and dues; that on 20 July 1975, after receiving notice of the audit, defendant gave to one of her employees $900 in cash, telling her it was in repayment of advances made to defendant and instructing the employee to transmit the money to the county auditor which the employee did; and that on 29 September 1975 defendant deposited $414.64 into the account.

Defendant testified that when she became director of the Department of Social Services in 1968 an account containing the "blind funds" was already in existence; that these funds were discretionary and could be used for anything in the administration of the Department of Social Services; that defendant also found money lying around the office from collections for various functions and so, with the Board's approval, defendant consolidated all of the money into one checking account; that also funneled into the checking account were work release funds, foster care funds, donations for specific functions, support payments and client refunds (but these rarely remained in the account, the social worker usually drawing a check on the account immediately after their deposit made payable to the intended recipient and the refunds being paid over to the county auditor); that the account was merely a pass-through account for those funds; that defendant used the remaining funds for office expenses and advances to employees for travel expenses pending their reimbursement by the county, which often took as much as two months; that the Board was aware of and approved the practice of making travel advances; that all advances to employees had been repaid; that defendant repaid part of the advances for the Boston trip by giving $180 in cash to Mr. Randolph, former Chairman of the Board, at a

Board meeting; that the $180 represented $114 given to defendant by two women who shared her hotel room in Boston and $66 for defendant's share of the hotel cost; that Mr. Randolph misplaced the money and for that reason only it was not in the account at the time of the audit; that the money was subsequently found but prior to finding it defendant had the two women give her backdated checks in order to have proof that they had shared expenses; that defendant's office expenditures from the account would eventually deplete the discretionary or blind funds entirely since they have ceased coming in, although defendant does not know how much blind money is in the account; that the $900 payment to Mrs. Modlin together with the $414.64 deposit which was made by defendant after the audit commenced consisted of money which was already in the account in that it was cash on hand; that the "account" consisted of the amount in the checking account, the amount of cash on hand and the amount represented by advances; and that advances were often repaid in cash and the cash then used for some other expenditure without being deposited into the checking account. Four present or former Board members and three present or former county commissioners testified and they corroborated defendant's testimony as to their approval of the office expenditures from the account and their knowledge of defendant's practice of advancing travel funds from the account even though the Commission's policy was for employees to expend their own funds for travel prior to being reimbursed by the county. They further testified that neither the Board nor the county commissioners had adopted a policy governing use of the account but had left it to defendant's discretion; that they did not know exactly what funds were in the account although they knew it contained "blind funds" and referred to the account as defendant's discretionary account; that defendant had asked for bookkeeping help with the account several times; that they knew of the advances and approved them on the basis of their understanding that they would be repaid. Mr. Randolph, a member of the Board from 1969 to 1975 and chairman from 1973 to 1975, testified that he knew the contents of the account and approved defendant's expenditures therefrom while he was chairman and that he knew of no instance where county funds contained in the account did not reach the recipient for whom they were intended. He also corroborated defendant's testimony concerning repayment of her advance for the Boston trip by testifying that at a Board meeting defendant had given him an envelope

containing money, although he did not count it, representing payments to her by two ladies who shared her hotel room in Boston and that he subsequently misplaced the envelope.

Defendant was convicted of all three offenses and sentenced to one year for each offense. The sentences were all suspended for two years upon payment of a total of $5,000 in fines and on condition that she not violate any laws. Defendant appealed.

Attorney General Edmisten, by Associate Attorney Patricia H. Wagner, for the State.

Wilkinson & Vosburgh, by John A. Wilkinson, for the defendant.

MARTIN, Judge.

Defendant contends that the trial court committed error when it failed to grant defendant's motions to dismiss in each of the three cases at the conclusion of all the evidence. We agree with defendant and hold that the evidence was insufficient to survive the motions.

Defendant's motions to dismiss, made at the close of all the evidence, draw into question the sufficiency of all the evidence to go to the jury. See *State v. Hitt,* 25 N.C. App. 216, 212 S.E. 2d 540 (1975).

Our Supreme Court has stated that:

> "There must be substantial evidence of all material elements of the offense charged in order to withstand a motion for judgment of nonsuit. (Citations omitted.) If, considered in accordance with the above mentioned rule, the evidence is sufficient only to raise a suspicion or conjecture as to whether the offense charged was committed, the motion for nonsuit should be allowed even though the suspicion so aroused by the evidence is strong." (Citations omitted.) *State v. Evans* and *State v. Britton* and *State v. Hairston,* 279 N.C. 447, 453, 183 S.E. 2d 540, 544 (1971).

CHARGE OF FALSE PRETENSE

The crime of false pretense is statutory. G.S. 14-100. The essential elements which the State must prove to the satisfac-

tion of the jury beyond a reasonable doubt in order to convict one of the crime of false pretense are as follows:

> "'. . . [A] false representation of a subsisting fact [or of a future fulfillment or event as provided in G.S. 14-100 as amended in 1975], calculated to deceive, and which does deceive, and is intended to deceive, whether the representation be in writing, or in words, or in acts, by which one man obtains value from another, without compensation. . . .'" *State v. Davenport,* 227 N.C. 475, 495, 42 S.E. 2d 686, 700 (1947); see also *State v. Roberts,* 189 N.C. 93, 126 S.E. 161 (1925); *State v. Wallace,* 25 N.C. App. 360, 213 S.E. 2d 420 (1975); *State v. Banks,* 24 N.C. App. 604, 211 S.E. 2d 860 (1975).

[1] The indictment for false pretense and the State's theory of the case seems to be that defendant, after having obtained Social Services' funds to fund the Boston trip, collected the same amount from the county treasurer and accountant and failed to reimbmurse the Department of Social Services for these expenditures until after an audit had begun. It contends that in February 1975 she submitted a claim for reimbursement for travel for $588.78, of which $434.63 was to reimburse her for her trip to Boston; and she did not reimburse the Department of Social Services until 29 September 1975.

Intent is a subjective matter which seldom can be proved by direct evidence but may be inferred from the circumstances existing at the time of the alleged commission of the crime charged. *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17 (1971). The State's evidence affirmatively shows that the Department of Social Services maintained bank account No. 7-099-050. This account was referred to as the "revolving account," which consisted of funds on deposit and cash on hand. It was used for, among other things, advances to personnel of the Department to defray travel expenses pending their receipt of reimbursement from the county. These repayments were sometimes delayed for several months but were eventually all repaid. On 28 February 1975 the county reimbursed defendant for expenses on the Boston trip.

The indictment charges that:

> ". . . [S]he had not expended her personal funds but funds belonging to Beaufort County and the Beaufort County

Board of Social Services maintained in Account Number 7-099-050, and she, the said Betty Agnew, then and there knowing she was not entitled to be reimbursed and upon being reimbursed not placing said reimbursement in Account Number 7-099-050."

The State's evidence shows that the "revolving account" was not altogether money belonging to Beaufort County but came from various sources. The account was in control of the defendant subject only to the approval of the Beaufort County Board of Social Services. Mrs. Agnew made herself an advance from the revolving fund for the Boston trip which was to be paid ultimately by the county and she was responsible for its replacement to the revolving fund. Her request to the county for reimbursement was not to collect twice for the same expenditures but to repay the revolving fund the advance for which repayment she was personally responsible. All the evidence shows that advances from the revolving fund, regardless of who they were made to, were to be repaid and were repaid by the recipient thereof. The county owed Mrs. Agnew travel money for the Boston trip and Mrs. Agnew owed the revolving account of the Social Services Department for advances for the trip. The revolving account of the Social Services Department was never responsible for travel expenditures. It was used only for advances pending reimbursement by the county. The defendant's request for reimbursement was not a fraudulent representation and the motion for nonsuit at the close of all the evidence should have been allowed.

CHARGE OF EMBEZZLEMENT — G.S. 14-90

G.S. 14-90 makes it a felony to embezzle or to fraudulently or knowingly misapply property received by virtue of office or employment. The meaning of fraudulent intent as used in G.S. 14-90 is the intent to willfully or corruptly use or misapply the property of another for purposes other than that for which it is held. See *State v. Howard,* 222 N.C. 291, 22 S.E. 2d 917 (1942); *State v. McLean,* 209 N.C. 38, 182 S.E. 700 (1935).

The bill of indictment charges the embezzlement of $1300.00. In instructing the jury relative to the charge of embezzlement the court stated:

"He further testified that Mrs. Agnew gave him a card listing all advances made by her by check and number and

amount. That the total of these was $1,314.64. That this is the charge of the $1,300.00, the reason for the charge of $1,300.00."

[2] The State's evidence shows that defendant gave Mrs. Modlin $900 in cash on 20 July 1975 to be sent to the county auditor in payment of several accounts. Mr. Green testified: "I determined from an examination of the records that $414.64 did get back into the account on September 29, 1975."

Evidence offered by the State tends to show that expense money was customarily procured from the revolving account to defray authorized travel expense of Social Services employees. Vouchers for repayment by the county were submitted to the county accountant's office. Upon payment the funds were repaid to the Social Services revolving account and thereupon retained either in cash or by deposit in account No. 7-099-050.

The revolving account consisted of both funds on deposit and funds on hand. In his report to the Board of County Commissioners, Mr. Gutfeld stated:

"During our evaluation of internal control, we found that many employees had access to cash receipts and kept them within their control. Management was apparently not aware of the location of all cash funds, and in at least one case did not have access to the cash, due to the fact that an employee was on vacation."

However, the inadequate control of the funds of itself does not import criminality. The funds were on hand, in the possession of the Department of which the defendant was responsible, and were accounted for. We perceive no inference of guilt because the $900 payment to the county was not deposited in the bank nor is there an inference of guilt of embezzlement because the $414.64 was deposited in the bank after an uncompleted audit had commenced. The $414.64 was available in cash for accounting purposes on 15 August 1975. As long as the funds were on hand in the possession of the defendant for disbursement at the proper time, there can be no fraudulent conversion or appropriation.

Mr. Green testified:

"Mrs. Agnew accounted for the money on the Boston trip except for $180.75—she accounted for it in the manner I

have previously testified, that she had given cash to Mrs. Sue Modlin. She said she gave cash to Mrs. Sue Modlin except for $180.75 which was the check to the hotel.

* * *

Mrs. Modlin stated that Mrs. Agnew had given her $900.00 in cash. . . .

* * *

[W]e pinned that date down to about July 20th, I believe.

The total on the tape is $1,314.64. My examination of the records showed only $414.64 was deposited in the account on September 29, 1975. The $900.00 was not deposited into the account.

* * *

Mrs. Modlin said that $900.00 was cash from Mrs. Agnew to be refunded to the account.

* * *

Mrs. Modlin said she did use that money to make refunds to the county accountant.

* * *

The money did not go back into the account. She did take the cash money and pay some refunds to the county accountant's office."

Mr. Gray of the accounting firm of Gutfeld and McRoy, stated:

"The $180.75 was totally accounted for on the following Monday after about a three or four day lag.

* * *

I talked to her about what is on the back of the card. This was the money that she had paid back from her advances and that was returned to Mr. Hodges, the county accountant. It was $900.00.

I don't remember if she told me when the $900.00 was returned to the county accountant but I looked at the date,

I looked back and found out when it was returned. I think it was August 1st, I am not positive.

* * *

This money was turned over with some other money to Mr. Hodges and I traced it to what it was turned over but it was $900.00 of this money was turned over at this time but there was some more money turned over to Mr. Hodges at that time."

The audit report of Mr. Gutfeld shows that on 7 August 1975 Mrs. Agnew, Department of Social Services, had $314.05 cash on hand, checks totaling $180.75 (Agnew $66.61) (Bolton $57.07) (Allen $57.07) and on 15 August Mrs. Agnew had $100.00 cash on hand. Mrs. Agnew informed Mr. Gutfeld that the sum of $100.00 was overlooked when original cash counts were made.

The report further shows that cash receipts received by the county accountant from the Department of Social Services on 1 August were $1,792.24.

State's witness, Sue Modlin, testified:

"Mrs. Agnew gave me $900.00 in cash. I think that was the beginning of August.

I don't remember whether she gave it to me while the Gutfeld audit was underway. I don't remember dates and times. We have been investigated by everybody under the sun and who came when I don't remember.

About the $900.00, I have previously said that the PA-12 receipt refund forms had been typed up, and on this form it indicates the client's name who is making the refund; the amount to be repaid; the program for which the refund is made and the account number, program number; identifying information for our department and for the State Office. These had been prepared and were being held because I had not been able to get with Mrs. Agnew to get the right amounts of money to put with the forms because of the other activities going on within the department.

We had the forms and Mrs. Agnew had $900.00.

I don't know where the $900.00 came from. It was refunds that had been made.

That is what Mrs. Agnew said, refunds that she had paid back, advances that she had paid back.

She said it was advances that she had paid back.

She didn't tell me anything about this $900.00 in advances that she had paid back.

The $900.00 was used to transmit those refunds to Mr. Hodges.

* * *

I am aware of a State policy having to do with the length of time allowed for the repayment of advances that have been received from time to time by various employees of this agency and other similar agencies.

Q. What is that period of time for repayment?

A. Within the fiscal year."

State's exhibit 15 shows 12 advances to and repayment thereof by Mrs. Agnew numbered by check with initialed approval by the chairman of the Board of Social Services. Mr. Gutfeld testified:

". . . [s]he [Mrs. Agnew] stated that she had a card where she listed the advances and repayments, the advances that were made to her and the repayments that were made by her. She exhibited a card to me on that occasion. State's Exhibit Number 15 which you are showing me is the card Mrs. Agnew showed me."

The total of these advances is $1,314.64. State's exhibit 3, a check book, shows by its stubs the advances having been made on 12 July 1974, 10 August 1974, October 10, 1974, October 10, 1974, October 16, 1974, November 30, 1974, November 30, 1974, December 3, 1974, December 20, 1974, February 22, 1975, February 27, 1975, and February 25, 1975. On the stubs we find in red ink a notation that cash for each advance had been refunded to Modlin.

The State has presented evidence which tends to show that Mrs. Agnew received advances from the revolving account in the amount of $1,314.64 over a period of less than one year. On 28 February 1975, she was paid $588.78 for travel expenses for the months of October and November 1974. She gave Sue

Modlin $900.00 in cash on 20 July 1975 which was turned over to the county accountant. She had in her possession in the Department of Social Services the further sum of $414.64 on 15 August 1975. On 29 September 1975 $414.64 was deposited in the revolving account. Further, the controversial item of $180.75 was totally accounted for by the testimony of Mr. Gray. The only conclusion that can be deduced is that Mrs. Agnew was in charge of the revolving account. She had advanced to herself funds to defray travel expenses in the sum of $1,314.64 and paid over to the county accountant $900 and redeposited $414.64. The $900.00 was turned over to the county accountant on 20 July 1975. The Gutfeld audit commenced 7 August 1975 and ended 18 August 1975. The deposit in the revolving account was on 29 September 1975. The audit by Mr. Green commenced in December 1975. It was customary for Social Service employees to obtain advances from the revolving account to defray traveling expenses until they could be reimbursed by the county. The questioned funds were in the possession of the defendant.

Embezzlement has been defined as:

> " '[T]he fraudulent conversion of property by one who has lawfully acquired possession of it for the use and benefit of the owner.' The mere act of converting or appropriating property to one's own use is not sufficient to constitute the offense. In order to convict, the State must not only offer evidence of appropriation, but it must go farther and offer evidence that such act was done with a fraudulent purpose or corrupt intent." *State v. Cohoon*, 206 N.C. 388, 393, 174 S.E. 91, 93 (1934).

The only evidence which would give rise to an inference of a conversion or appropriating was the failure of the defendant to deposit the $900.00 in the bank and the deposit of the $414.64 after the audit began. It will be remembered that the $414.64 was on hand on 15 August 1975 and counted by Mr. Gutfeld. We are not aware of any legal requirement that trust funds must be deposited in a bank although good judgment would so dictate. Conceding *arguendo* there was an appropriation or conversion, we fail to find evidence that such act was done with a fraudulent purpose or corrupt intent. The act of conversion does not raise the presumption of a felonious intent in a prosecution of an indictment for embezzlement. *State v. Cohoon, supra.*

Evidence of fraudulent or corrupt intent is lacking in the case at bar. There is no evidence that defendant used the funds for her benefit. The revolving account consisted of both funds on deposit and cash on hand. From the funds on hand, payment was made to the county accountant in the sum of $900.00. From cash on hand, the sum of $414.64 was deposited in the revolving account. There is no evidence as to when the advanced funds were replaced in the "cash" account. The evidence shows that $900.00 was on hand on 20 July 1975. The control card, (State's exhibit 15), shows the various amounts advanced were repaid and approved by the chairman of the Board of Social Services. There is no evidence that the funds were not turned over to the county accountant at a time when obligated to do so. Cash in the sum of $414.64 was on hand on 15 August 1975 and deposited 29 September 1975.

Thus, the State has proved that advancements were made to employees of the Social Services Department from the revolving account for travel; that defendant was custodian of the funds on deposit and cash on hand; that advancements were repaid and held as cash on hand or on deposit; that records of cash transactions were evidenced by control cards; and that funds were repaid within a year and turned over to the county when obligated to do so.

The law does not build the crime of embezzlement upon such proof, and the motion for nonsuit at the close of all the evidence should have been allowed.

CHARGE OF EMBEZZLEMENT OF FUNDS — G.S. 14-92

[3] The indictment charges that defendant willfully and corruptly used and misapplied $1,128.94 for purposes other than that for which it was held. The State, in its brief, argues that expenditures for a punch bowl, a coffee pot, a refrigerator, cakes, pies, gifts for Board members, and an advance to Sue Modlin for vacation expenses and rent could not be considered a proper use of county funds.

In *State v. Shipman,* 202 N.C. 518, 540, 163 S.E. 657, 669 (1932), the Court defined wilful, corruption, and bad faith as used in the statute, as follows:

> "[W]ilful is defined: 'Proceeding from a conscious motion of the will; intending the result which actually comes to pass; designed; intentional; malicious. . . . In common

parliance, "wilful" is used in the sense of "intentional," as distinguished from "accidental" or "involuntary." But language of a statute affixing a punishment to acts done wilfully may be restricted to such acts done with an unlawful intent.' " (Citations omitted.)

" 'Corruption,' (citation omitted) : 'Illegality; a vicious and fraudulent intention to evade the prohibitions of the law. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.' The word 'corruptly' when used in a statute generally imports a wrongful design to acquire some pecuniary or other advantage." (Citations omitted.)

" 'Bad Faith,' (citation omitted) : 'The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.' Bad faith and fraud are synonymous." (Citation omitted.)

Furthermore, the defendant must have a felonious intent. Unless the intent is proved, the offense is not proved. *State v. Lancaster,* 202 N.C. 204, 162 S.E. 367 (1932).

Over defendant's objection, the court allowed the introduction into evidence of State's exhibit 4-C which was entitled "Beaufort County Social Services Schedule of Unauthorized Expenditures Wachovia Bank and Trust Account 7-099-050." It concludes with the statement: "Total Unauthorized Expenditures $1,128.94." This exhibit lists 54 items bearing "date," "payee," "check number," "for," and "amount." The dates extended from March 16, 1971, to April 1, 1975. Mr. Green testified: "I talked to her [Mrs. Agnew] about State's exhibit 4-C. . . . Her response to these items were items that were paid with the Blind money." State's witness Grady R. Galloway testified:

"The item attached to that memorandum is a check in the amount of $620.00.

* * *

> The check was endorsed by the Director of Social Services, Betty Agnew.
>
> * * *
>
> Any expenditures from this particular fund made by Mrs. Agnew would be left to her discretion . . . if it would enhance the program for the blind.
>
> * * *
>
> We did not find any irregularities in the administration of the program by Mrs. Agnew here in Beaufort County."

State's exhibit 1 is a memorandum from Mr. Galloway and attached thereto is a check from the Commission for the Blind payable to Beaufort County Welfare Director in the sum of $620.00. This is the fund mentioned by Mr. Galloway that was to be used by Mrs. Agnew in her discretion. State's exhibit 20 is entitled "Beaufort County Social Services Department—Undisbursed Bank Deposits—Wachovia Bank & Trust Company Account Number 7-099-050." The first item on exhibit 20 is a deposit from the North Carolina Blind Commission dated April 6, 1971 and was explained as "Federal Earned Administration Fund" and the amount was $360.87. The funds on exhibit 20 totaled $1,266.72 and were from various sources extending from 1971 to June 8, 1975.

We think the State has not only failed to identify the funds expended as those of the county, but has failed to offer proof sufficient to be submitted to the jury that defendant willfully and corruptly misapplied county funds.

After a thorough study and analysis of the evidence, we can see no crime and no competent proof of any crime described in the bill of indictment.

Defendant's motions to dismiss each case at the conclusion of all the evidence should have been allowed.

Reversed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. PATRICIA SMITH AND HILLARD ELMER SMITH

No. 7717SC35

(Filed 6 July 1977)

1. **Criminal Law § 13— right to try person brought within jurisdiction illegally**

Even if defendants were improperly or illegally brought to N. C. after being apprehended in Virginia, this would not affect the right of the State of N. C. to try them and imprison them on felony charges.

2. **Criminal Law § 66.1— in-court identification of defendants — witness's opportunity for observation**

In a prosecution for breaking and entering and larceny, the trial court's finding that a witness's in-court identification was based on his observation of defendants at the crime scene and that he had ample time to observe them was supported by the evidence where it tended to show that the witness was working in his garden across the street from the crime scene; it was daylight on a clear day; the passage of a car back and forth attracted the witness's attention; as the car continued to pass back and forth, the witness had a clear opportunity to observe the driver and passenger; the witness was able to see only the last two digits of the Virginia license plate because a part of the plate was obstructed; the witness heard a noise in the bushes near the house that was broken into; the car in question stopped at that location and a man came out onto the road and told the occupants of the car to hurry back; the car returned and stopped; the witness got into his truck and proceeded to where the car was stopped; two men were putting something in the car; the witness got to within 30 feet of the car; he got a front as well as a side view of the people; the witness pointed out defendants as two of the people he saw on that day; and no one had pointed out either defendant as being suspects in the case.

3. **Husband and Wife § 8— crime committed by wife in husband's presence — no presumption in wife's favor**

When it is shown that a married woman commits a crime in the presence of her husband, she should no longer be entitled to a presumption in her favor that she was compelled to so act.

4. **Husband and Wife § 8— crime committed by wife in husband's presence — presumption in wife's favor inapplicable**

The presumption that a wife who commits certain crimes in the presence of her husband does so under his coercion was not applicable in this prosecution for breaking and entering and larceny where there was no request for instructions with respect to the presumption, and the feme defendant testified in her own behalf denying any participation by her or her husband in the planning or accomplishment of the crime.

State v. Smith

APPEAL by defendant and feme defendant from *Walker, Judge.* Judgment entered 20 August 1976 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 1 June 1976.

Each defendant was charged with breaking and entering and larceny. They entered pleas of not guilty and were convicted by a jury on all charges. Defendant Patricia Smith was sentenced to imprisonment as a committed youthful offender for a term not to exceed 10 years. Defendant Hillard Elmer Smith was sentenced to two consecutive 10-year sentences.

The State introduced evidence which tended to show as follows: On the afternoon of 12 June 1976, Dr. and Mrs. John Stone left their home in rural Rockingham County and travelled to Baltimore, Maryland. When they left, all the doors were locked and the house was "in perfect condition." A neighbor subsequently advised the Stones that their home had been broken into and vandalized in their absence. They returned to discover that a rock had been thrown through the glass in the back door, thereby enabling the vandal to reach in and unlock the door from the inside. Various household items, including jewelry, silverware, two televisions, a movie projector, and a pistol, were taken. Every drawer in each room had been pulled out and thrown on the floor. The items missing were valued at $5,000.

Leonard Ferguson, who was charged as a co-defendant in the case, testified for the State. He stated that on 8 June 1976, he and defendant Hillard Elmer Smith discussed breaking into the Stoneses' house. Late in the afternoon of 12 June, Ferguson, accompanied by his girlfriend Myoka Davis, met both defendants and discussed the break-in. Defendants informed him that they had called the Stoneses' telephone number several times, driven by the house, and feme defendant had stopped to ring the doorbell to insure that no one was at home. The four rode to a wooded area behind the Stone house in Ferguson's car, a dark green 1971 Ford whose trunk had been smashed. Ferguson and defendant got out of the car so as to approach the house through the wooded area. Feme defendant got into the front seat with Davis, and they were instructed to drive up and down the road every 5 to 10 minutes. Davis and feme defendant "knew where we were going and what the deal was."

Upon reaching the rear of the house, defendant picked up a large rock, threw it through the glass portion of the rear

door, and reached in to unlock the door. The two men went inside and began to search for money. They took the silverware, two televisions, and various other items and left the house. They returned through the woods to the road, where they waited until Davis and feme defendant rode by and stopped. Defendant and Ferguson loaded the stolen goods in the car and left.

Myoka Davis corroborated Ferguson's account of the crime. She further testified that, upon learning of Ferguson's arrest for the break-in, she and feme defendant drove to a bridge and threw the stolen jewelry and silverware into the water below.

Joseph M. Robinson testified that he was well acquainted with both defendants. They visited Robinson's house with another man and woman (whom Robinson could not positively identify as Ferguson and Davis). Defendant informed Robinson that he had "good stuff" for sale, whereupon defendant opened the lid of the trunk and showed Robinson silverware contained therein. Robinson told defendant he was not interested in purchasing the silver, and defendant left.

Jacquelin Boyd testified that on 12 June 1976, she visited her sister who lived near Dr. Stone. That afternoon, she was in the yard and saw an old dark green car with its trunk smashed drive up and down the road in front of her sister's house. Boyd also testified that she knew feme defendant and that the girl riding in the car's passenger side "looked like Patricia Smith."

James R. Taylor testified that he lived across the street from Dr. and Mrs. Stone. On 12 June 1976 while picking vegetables in his garden, Taylor noticed a car passing back and forth on the road behind Stoneses' house. "There were two ladies in the car, and it was dark, real dark green, banged up in the back." After the car had passed a number of times, Taylor "heard a racket down in the woods" coming from "next to Dr. Stone's." He saw a man emerge from the woods, come to the road, call to the ladies in the car and tell them "to hurry right back, that he was ready." Taylor instructed his wife to call the police and drove in his pickup truck closer to the wooded area. There, he ". . . saw four people, and there were two men putting stuff in the trunk of the car. One of them, well he was putting a portable television and a suitcase in there as I came

up to him and he slammed the lid down and jumped in and they took off. . . ."

Attorney General Edmisten, by Associate Attorney Amos Dawson, for the State.

C. Orville Light for defendant appellants.

MORRIS, Judge.

[1] By their first assignment of error, defendants contend that the court erred in failing to hear evidence and rule on their motion to dismiss for lack of jurisdiction over the person. The basis for this contention is not clear. The motion states that the defendants were placed in custody in Virginia without probable cause ". . . on the assertion by Rockingham County Deputy Sheriff that said Sheriff's Department had outstanding fugitive warrants from the State of Maryland against these defendants." The brief argues that the warrants are irregular in that each warrant was served by officers in Henry County, Virginia, ". . . and defendants were not brought before hearing, which appears on face of each warrant. Defendants' basic contentions then were fraudulently induced to sign waivers of extradition without advice of counsel." The warrants were issued in Rockingham County, on 15 June 1976, served on 15 June 1976 by an officer of the Sheriff's Department of "Hen-Co.", and a preliminary hearing was held on 2 July 1976 before the District Court, where probable cause was found and the defendants bound over to Superior Court. The motion to dismiss was denied on 17 August 1976 prior to taking of the pleas and trial. Regardless of the lack of clarity with respect to defendants' contention, their position cannot be sustained, for even though they might have been ". . . improperly or illegally brought to North Carolina after being apprehended in Virginia, this would not affect the right of the State of North Carolina to try [them] and imprison [them] on the felony charges. . . ." *State v. Green,* 2 N.C. App. 391, 393, 163 S.E. 2d 14, 16 (1968).

[2] Defendants' assignments of error 2, 3, 4, and 6 are based on exceptions to identification testimony. They first contend that, as to witness Taylor, the evidence disclosed that he did not have sufficient opportunity to observe defendants. They also claim that the court erred in finding that Taylor's in-court identification was based on his observation of defendants and

that he had ample time to observe them. The court found that on the afternoon of 12 June 1976, Taylor was working his garden across the street from the Stone home; that it was daylight on a clear day; that the passage of an automobile back and forth attracted his attention; that it passed back and forth six or seven times and he had a clear opportunity to observe the driver and passenger, both of whom were women; that he looked at the car closely and moved closer to the road to get a better view; that he was only able to see the last two digits of the Virginia license plate because a part of the license plate was obstructed; that the car was dark green, dirty, the trunk was smashed in, and it bore a Virginia license tag; that he twice heard a noise in the bushes near the Stone residence; that the green car stopped at that location and a man came out onto the road and told the occupants of the car to hurry back; that the car returned and stopped; that Taylor, by this time, had gotten in his truck and proceeded to where the car was stopped; that two men were putting something in the car; that he got to a point within 30 feet of the car; that he got a front as well as a side view of the people; that he pointed out Patricia Smith and Myoka Davis as the two women in the car and Leonard Ferguson and Elmer Smith as the two men whom he saw on that date; that no one had pointed out either defendant as being suspects in the case.

From these facts, the court found that the witness had ample opportunity to observe defendants; that there was nothing on voir dire to indicate any suggestion by any person to the witness which would color his identification of either; that there was no evidence of any illegal or unauthorized identification procedures; that the in-court identification was of independent origin based solely on the witness's observation of the defendants on 12 June 1976; and that the identification did not result from any out-of-court confrontation or any out-of-court showing of photographs or other means or from any pre-trial identification procedures which were suggestive or conducive in any way to mistaken identification of either defendant. Although given the opportunity to do so, neither defendant testified on voir dire. The facts found were fully supported by the evidence, and the facts found supported the court's conclusions. These assignments of error are overruled.

On cross-examination, the witness Taylor testified that the officers "brought some photographs over there when they

were in school, high school, but I told the Sheriff that I was not going to identify none of them from those pictures, if I saw them that I would know them but not from that many years difference. I was never asked if I was shown any photographs." Defendants then moved to strike the witness's in-court identification of them. We see nothing in this testimony to warrant striking the witness's identification. The court had properly found that the in-court identification was based solely on the witness's observation of defendants on 12 June 1976. The above testimony merely bolsters that finding. The witness testified that he refused to attempt to identify the defendants from the school photographs but would rely on his observation of them. Defendants' assignments of error concerning these photographs are without merit.

Defendants next contend that certain testimony of Jacquelin Boyd should not have been admitted. There is no indication in the record that an objection was lodged to any question nor that a motion was made to strike any answer. This assignment of error presents nothing for review. On cross-examination of this witness, she testified "I went to school with Patricia. I could not swear it was her but I told Mr. Watkins that it looked like a girl that I knew, Patricia Smith. I would not definitely swear but it looked just like her that I saw in the car." This testimony is in parentheses and following the parentheses this appears "Renew Motion to Strike 'overruled' as having no probative effect. Defendants' Exception No. 3." Assuming that proper motion was made in apt time, which is certainly far from clear from the record, the assignment of error is without merit. If this were the only identification evidence, it would be too conjectural to allow the case to go to the jury. However, the evidence of identity from other witnesses was clear and unequivocal. Any error in admission of this testimony was clearly not prejudicial. This assignment of error is overruled.

By her eleventh assignment of error, feme defendant contends that the court erred in denying her motions for nonsuit timely made. Of course, in ruling on a motion to dismiss as of nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. McKinney,* 288 N.C. 113, 215 S.E. 2d 578 (1975). Whether the evidence is direct, circumstantial or both, if there is evidence from which the jury

could find that the offense charged has been committed and that defendant committed it, the motion for judgment as of nonsuit should be overruled. *State v. Lindley,* 286 N.C. 255, 210 S.E. 2d 207 (1974).

Feme defendant maintains, however, that the State's evidence was insufficient to overcome the presumption that she was acting under the dominion of her husband at the time of the alleged crime.

North Carolina has long recognized and applied the common law principle that when a wife commits certain crimes in the presence of her husband, it is presumed, in the absence of evidence to the contrary, that she did so under his coercion. In *State v. Williams,* 65 N.C. 398 (1871), the first case applying the rule in this State, our Supreme Court reversed the conviction of a wife for assault and battery because of the trial judge's failure to instruct the jury as to the presumption. Since *Williams,* the rule has been continuously recognized and applied. *State v. Cauley,* 244 N.C. 701, 94 S.E. 2d 915 (1956); *State v. Seahorn,* 166 N.C. 373, 81 S.E. 687 (1914); *State v. Nowell,* 156 N.C. 648, 72 S.E. 590 (1911); *State v. Robinson,* 15 N.C. App. 362, 190 S.E. 2d 270, *cert. den.,* 281 N.C. 762, 191 S.E. 2d 363 (1972).

Blackstone notes in Volume 4, p. 29, of his Commentaries that the presumption had existed for at least 1000 years prior to his lectures. Thus, it became incorporated into the web of the common law at a time when the rights of women were almost non-existent. The legal existence of the woman was considered suspended and incorporated into that of her husband during the time of the marriage. Husband and wife became as one. 2 Lee, North Carolina Family Law, § 107, p. 3 (1963). More specifically, the personal property of a woman became vested in her husband upon marriage. He had the right of possession and control of the wife's estate, and her estate was subject to levy under execution for the satisfaction of his debts. The wife could not validly enter a contract or convey her own property, nor could she sue or be sued, without the joinder of her husband. *See Perry v. Stancil,* 237 N.C. 442, 75 S.E. 2d 512 (1953); *Ball v. Paquin,* 140 N.C. 83, 52 S.E. 410 (1905); 2 Lee, *supra,* at pp. 3-9; Day, Rights Accruing to a Husband Upon Marriage With Respect to the Property of the Wife, 51 Mich. L. Rev. 863-869 (1953). At one point in our history, a

husband had the right to commit a battery upon his wife so long as he did not inflict permanent injury or use excessive violence because ". . . the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself. . . ." *State v. Black,* 60 N.C. 262, 263 (1864).

The presumption has come under increasing attack as society has removed from women most of the disabilities which were imposed at common law. Some states have abrogated the defense of marital coercion by statute, while others have done so by judicial decision. *See* Comment, 35 N.C.L. Rev. 104 (1956). The presumption has not been immune from criticism in North Carolina. In a concurring opinion in *State v. Seahorn, supra,* Clark, C.J., noted the change in the law since the presumption arose and concluded:

> ". . . At common law there was a presumption that when a crime was committed by the wife in the presence of her husband, she acted under compulsion; but that presumption does not comport with Twentieth Century conditions. The contention that a wife has no more intelligence or responsibility than a child is now out of date. No one believes it." 166 N.C. at 378, 81 S.E. at 689.

[3] We believe the view taken in 1911 by Chief Justice Clark is inescapably relevant in 1977. The expansion of the cause of women's rights has so pervaded our social order that it is simply unrealistic to presume that crimes committed by a wife in the presence of her husband were executed under his dominion and control. This is not to imply that a wife may never be coerced by her husband to perpetrate an illegal act. In such case, she should remain exempt from punishment, just as would anyone who can demonstrate that the crime was committed under duress. However, we believe that when it is shown that a married woman commits a crime in the presence of her husband, she should no longer be entitled to a presumption in her favor that she was compelled to so act.

[4] Nevertheless, regardless of our view that the presumption has long outlived its necessity and usefulness, we do not think it applicable in this case.

In *State v. Cauley, supra,* neither the feme defendant nor her husband testified. The evidence for the State clearly placed

the feme defendant present during a cruel beating of her 4-year-old son. The evidence was overwhelming as to the husband's active participation in the beating. The feme defendant was heard cursing and laughing and telling the child to walk and not go to sleep. She gave no explanation for her actions or remarks.

In *State v. Seahorn, supra,* the feme defendant did testify in her own behalf and denied participation in the crime charged. Her counsel requested the court to charge the jury that if the feme defendant made the sale of liquor as charged in the presence of her husband, and under circumstances that she was acting under his coercion, and with his consent and approval, she should be acquitted. The court refused to give the requested instruction, informing the jury that he refused to give it because the wife ". . . came upon the stand and made a statement, herself, as to her conduct and the circumstances and the things that happened on the premises. . . ." *Id.* at 376, 81 S.E. 688. The court then instructed the jury that if they found she acted voluntarily in making the liquor sales or was voluntarily assisting her husband, they would find her guilty. However, if upon a review of the evidence, they should find that she was ". . . acting under the constraint of her husband, and that he was exercising such power over her as to cause her to make sales of liquor, in his presence, so that it was not her own voluntary act, but she was the agent of her husband, then, under the circumstances, you should acquit the wife and convict the husband." *Id.*

In speaking to the contention of the feme defendant that the court erred in refusing to give the requested instruction, the Court said:

> "It was entirely proper to decline to give this instruction, and if any error was committed, it was in the failure of the judge to charge that the law presumed that the wife acted under the compulsion of the husband, and the burden was upon the State to rebut this presumption.
>
> This presumption is not a statutory presumption, but is a rule of evidence, established by the courts for the protection of married women at a time when they could not testify for themselves.
>
> Now the *feme* defendant can testify for herself, and in this case she did, and testified that she sold no liquor at

all. She did not claim to have acted under the constraint of her husband. It would appear that if any constraining was to be done, she was the more likely to do it than the husband. We doubt, in view of all the circumstances, and her own evidence, if she was entitled to this artificial presumption, but if so, she received the benefit of it." *Id.* at 377, 81 S.E. at 688.

In *State v. Nowell, supra,* the defendant, charged with her husband with abducting a child under 14 years of age, admitted that the child did go with her but that she went on her own volition and without any persuasion or coercion. She requested an instruction with respect to her having acted under the coercion of her husband. The court instructed on the rebuttable presumption, and feme defendant assigned error to that portion of the charge. The Supreme Court, in finding no error, said that the instruction of the court was a statement of the law of which defendant had no right to complain.

In the case *sub judice,* there was no request for instructions with respect to the presumption. Here the male defendant did not testify. However, the feme defendant did so testify and stated that neither she nor her husband had anything to do with the planning of or actual accomplishment of the robbery. Her testimony was that they knew nothing about a robbery until told by Ferguson that he and Myoka had robbed Dr. Stone and that, upon being told, feme defendant's husband was furious because he and feme defendant had accompanied Ferguson and Myoka in riding back and forth by Dr. Stone's house waiting to get some pills. She further testified that her only participation was to accompany Myoka to dispose of some silver because she was afraid of Myoka and feared that she would be assaulted or implicated in the crime by Myoka if she did not do as Myoka told her. In view of the circumstances of this case, and particularly feme defendant's own testimony, we do not believe she was entitled to the presumption, regardless of whether she requested it, nor do we agree with her contention that, as to her, the case should have been dismissed because the evidence was insufficient to rebut the presumptions.

We have reviewed defendants' remaining assignments of error and find them to be without merit.

Defendants received a fair trial free from prejudicial error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. JOHN ROGER WALTERS

No. 7716SC201

(Filed 6 July 1977)

Criminal Law § 102.12— counsel's statement of punishment to jury — refusal error

Defendant in a second degree murder prosecution is entitled to a new trial where the trial court refused to allow defense counsel to read to the jury statutes, including punishment provisions, with respect to first and second degree murder and manslaughter. G.S. 84-14.

Judge BRITT dissenting.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 16 September 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 29 June 1977.

Defendant was placed on trial for murder in the second degree.

The State offered evidence tending to show the following:

At about 1:30 a.m. on 28 February 1976, defendant called the police station and said that he had shot a man. A witness to the conversation (who had heard five or six shots) asked defendant what had happened. Defendant stated that Carson Cox had pulled a shotgun on him and defendant shot him. Defendant had the shotgun with him. When Esther Bell (defendant's girl friend) walked up, defendant referred to deceased by a vile name and said that if he "ain't dead, he ought to be." A deputy sheriff went to the scene of the shooting and saw a large pool of blood near deceased's car and a smaller puddle of blood eight feet from the car. The body had been taken to a local hospital.

The deputy testified that defendant made, in essence, the following statement: Deceased and defendant were friends. They had been riding around earlier in the evening. They had stopped and were sitting in the car. Deceased began fussing and got out of the car. Deceased came back with a shotgun and pointed it in the window. Defendant pushed the gun around and deceased walked off. Deceased returned, pointed the shotgun at defendant and told defendant that he was going to get "messed up" or words to that effect. Defendant pushed the shotgun and took his pistol and began shooting.

Deceased had been shot in the left elbow, the left forearm, the right upper quadrant of the abdomen and the left upper chest. A bullet had also entered the left lower chest and travelled down through the diaphragm into the small intestine. Death was caused by hemorrhage secondary to the gunshot wounds.

The State then rested and defendant's motion for nonsuit was denied. Defendant then offered evidence, in substance, as follows:

Defendant and deceased lived in the same neighborhood. They had been acquainted for 20 years and there had never been any trouble between them. On the evening before the shooting, deceased had adjusted one of the headlights on defendant's car. Defendant noticed that he was drinking at that time. Defendant left his home to get his girl friend, and he and the girl rode around until about 10:00 p.m. when they returned to the parking lot of a service station near the residences of the defendant and deceased. Deceased drove up and asked to be taken to a nearby pool hall. The three stayed at the pool hall until about 11:00 p.m. when they returned to the station parking lot. After talking for some time, defendant, deceased and defendant's girl friend went to a beer store and then to a bootleg liquor store. They then returned to the station and continued to talk. Deceased got out of the car and then got back in and sat down. They remained in the car talking and listening to the radio until after midnight. Both defendant and deceased had been drinking during the evening. An acquaintance of defendant walked up and, at his request, defendant took the person to another house. They then returned to the station and deceased got out of the defendant's car and got in his own. Deceased had difficulty in getting the right key in the switch, could not or did not start the car and then started walking in the direction of his home. About ten minutes later deceased returned and was carrying a shotgun. He stuck the shotgun in the car window and pointed it at the side of defendant's head. He cursed defendant and told him he would scatter his brains. The girl friend got in the floorboard, began to cry and begged deceased to go away. Deceased withdrew the gun and went to his own car and sat down. He immediately jumped back out of the car and again pointed the gun at defendant's temple. Defendant grabbed the gun with his left hand, pushed the barrel up and, with his right hand, reached in the console of his car and got his pistol, a .25 automatic, and began firing at deceased. He continued

to fire until deceased released the shotgun. Deceased staggered to the back of the car and fell. Defendant then picked up the loaded shotgun and uncocked it. He then went to the telephone and called the police.

Defendant also offered evidence tending to show that deceased had a bad reputation as being a dangerous and violent man. His evidence further tended to show that defendant had a good reputation.

The jury returned a verdict of guilty of voluntary manslaughter, and judgment imposing a prison sentence of not less than 10 nor more than 15 years was entered.

Attorney General Edmisten, by Associate Attorney Norma S. Harrell and Assistant Attorney General James Wallace, Jr., for the State.

Britt and Britt, by E. M. Britt, for defendant appellant.

VAUGHN, Judge.

We have carefully considered defendant's exceptions based on the denial of his motion for nonsuit. When all the evidence is considered in the light most favorable to the State, we conclude that it was sufficient to take the case to the jury.

At the conclusion of all the evidence, and in the absence of the jury, defendant moved that he be allowed to read to the jury the provisions of G.S. 14-17 ["Murder in the first and second degree defined; punishment"] and G.S. 14-18 ["Punishment for manslaughter"] including the punishment provisions. The court refused to allow counsel to read any of the punishment provisions of the statute to the jury. That denial is the subject of defendant's exception No. 47.

G.S. 84-14, in part, provides, "In jury trials the whole case as well of law as of fact may be argued to the jury."

In *State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553, the Supreme Court awarded a new trial in a burglary case because the trial court refused to allow counsel to advise the jury of the punishment by law provided for the crime.

In *State v. Britt,* 285 N.C. 256, 273, 204 S.E. 2d 817, the Supreme Court held:

"Counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law relevant to such case, *including the statutory provision fixing the punishment for the offense charged.* G.S. 84-14; *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236; Annot. 67 A.L.R. 2d 245. He may not, however, state the law incorrectly or read to the jury a statutory provision which has been declared unconstitutional. *See, State v. Banner,* 149 N.C. 519, 526, 63 S.E. 84. Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely." (Emphasis added.)

Justice Exum, speaking for a unanimous Court in *State v. McMorris, supra,* said:

"In a real sense the sanction prescribed for criminal behavior is part of the law of the case. Indeed, the dispute in jurisprudential circles is whether the sanction for its violation is the *only* thing which distinguishes law from custom. *See* H.L.A. Hart, The Concept of Law, Chapters 1 and 2 (1961).

It is, consequently, permissible for a criminal defendant in argument to inform the jury of the statutory punishment provided for the crime for which he is being tried. In serious felony cases, at least, such information serves the salutary purpose of impressing upon the jury the gravity of its duty. It is proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration."

G.S. 84-14, as interpreted by the Supreme Court, gives a defendant the right to inform the jury of the punishment that may be imposed upon conviction of the crime for which he is being tried. The defendant at bar was deprived of that right and, under the authority of *McMorris* and *Britt,* will be awarded a new trial.

It is not necessary to discuss the other errors assigned by the defendant because they may not occur at his next trial.

New trial.

Judge ARNOLD concurs.

Judge BRITT dissents.

Judge BRITT dissenting:

I respectfully dissent to the majority opinion awarding defendant a new trial on the ground that the trial judge committed reversible error in not allowing defendant to read the provisions of G.S. 14-17 and 14-18 to the jury. In view of the authorities cited in the majority opinion, I think the trial court erred but I do not think the error was sufficiently prejudicial to require a new trial.

It is well settled in this jurisdiction that a defendant has the burden not only to show error but also to show that the error complained of affected the result adversely to him. *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967); *State v. Bailey*, 12 N.C. App. 280, 182 S.E. 2d 881 (1971). The presumption is in favor of the regularity of the trial. *State v. Sanders*, 280 N.C. 67, 185 S.E. 2d 137 (1971); *State v. Partlow*, 272 N.C. 60, 157 S.E. 2d 688 (1967). To warrant a new trial it should be shown that the ruling complained of was material and prejudicial to defendant's rights and that a different result likely would have ensued. *State v. Paige, supra.* Mere technical error does not entitle a defendant to a new trial. *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971).

With respect to Exception No. 47 upon which the majority awards a new trial, the record discloses:

> "THE COURT: Let the record show that the defendant moves the court that he be permitted in argument to read to the jury the provisions of General Statutes 14-17 and 14-18, including the punishment provisions. The court denies defendant's motion with respect to any reading of the punishment provisions. The court allows the defendant's motion with respect to the reading of the statute—or the provisions of the statute which do not pertain to punishment for the offense.
>
> EXCEPTION NO. 47"

G.S. 14-17 defines murder in the first and second degrees and prescribes the punishment for each. In the case at hand defendant was not placed on trial for murder in the first degree and by finding him guilty of voluntary manslaughter, the jury, in effect, found him not guilty of murder in the second degree. That being true, it is clear that defendant was not prejudiced by the failure of the trial judge to permit him to read the punishment provisions of G.S. 14-17 to the jury. *State v. Casper*, 256 N.C. 99, 122 S.E. 2d 805 (1961).

G.S. 14-18 provides: "Punishment for manslaughter.—If any person shall commit the crime of manslaughter he shall be punished by imprisonment in the county jail or State prison for not less than four months nor more than twenty years: Provided, however, that in cases of involuntary manslaughter, the punishment shall be in the discretion of the court, and the defendant may be fined or imprisoned, or both."

It will be noted that G.S. 14-18 does not define manslaughter, either voluntary or involuntary. A reading of the statute to the jury would have advised them only that the punishment for voluntary manslaughter is imprisonment for not less than four months nor more than twenty years, and that the punishment for involuntary manslaughter is a fine or imprisonment, or both, in the discretion of the court.

It will be noted further that Exception 47 does not relate to defendant's argument of punishment to the jury, only the *reading* of the statute. In fact, our Supreme Court has held that even in a capital case defendant's counsel is not entitled to argue the question of punishment to the jury. *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974).

In *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969), in an opinion by Justice (now Chief Justice) Sharp, our Supreme Court held that the amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt and is therefore no concern of the jurors. In *Rhodes*, the Supreme Court went further and held that the statement in *State v. Garner*, 129 N.C. 536, 40 S.E. 6 (1901), that a jury in a non-capital case is entitled to be informed as to the punishment prescribed for the offense or offenses with which a defendant is charged, is expressly disapproved.

The majority opinion relies very heavily on *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974), and *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976). It will be noted that in *Britt* the defendant had been convicted of murder in the first degree and sentenced to death, and that there was some uncertainty about the intent of the jury in the form of its verdict. It would appear that the holding in that case must be considered in the context of the proceedings complained of and the fact that at that time the mandatory sentence for first-degree murder, absent a recommendation of mercy, was death.

In *McMorris* the defendant was found guilty of first-degree burglary and given the mandatory sentence of life imprisonment; he was also found guilty of second-degree rape and given a concurrent sentence of 16-20 years. The Supreme Court held that the trial court erred in not allowing defense counsel to inform the jury that the conviction of burglary in the first degree would necessarily result in the imposition of a life sentence. "In serious felony cases, at least, such information serves the salutary purpose of impressing upon the jury the gravity of its duty." 290 N.C. at 288, 225 S.E. 2d at 554.

I can perceive the benefit that would accrue to a defendant for the jury to be informed that its verdict of guilty would result in a *mandatory* sentence of death or life imprisonment. Surely, this information would impress upon the jury "the gravity of its duty." But I cannot perceive how the defendant in this case was prejudiced when the jury was not informed that upon a conviction of voluntary manslaughter the defendant's punishment could be imprisonment for not less than four months nor more than twenty years, and if he was convicted of involuntary manslaughter the punishment would be a fine or imprisonment, or both, in the discretion of the court.

It might be argued that had the jury known that defendant could be given a sentence of twenty years if convicted of voluntary manslaughter, they might have been reluctant to convict him of that offense. By the same token, it could be argued that had they known he could be given a sentence of only four months if convicted of that offense, they might have had no hesitancy in convicting him.

In *Rhodes* the court held that while the trial judge erred in informing the jury as to the penalty for an offense in ques-

tion, the error was not prejudicial. I feel that the converse is true in this case.

In the case *sub judice* there were no witnesses to the killing except the defendant and his girl friend. Of necessity the State had to rely on statements made by defendant. While the deceased was described as an unsavory character, defendant testified that he had known deceased for twenty years, that they were good friends and that deceased had been with him and his girl friend for several hours on that night; that he had carried deceased to several places that night to purchase beer and liquor.

It would appear that the jury's verdict "turned" on the question of excessive force. Defendant testified that when deceased stuck the shotgun barrel in the car the second time he (defendant) with his left hand pushed the barrel back out of the car and up and over the top of the car; that with his right hand he (defendant) then obtained his pistol from the console of his car, pointed it at deceased and fired five shots, all of which entered deceased's arms or body. The pistol was a semi-automatic, requiring defendant to pull the trigger each time it was fired.

The record indicates that the trial of this case consumed a large part of a two-week session of the court; that the case was hotly contested with the State being represented by an outstanding district attorney and the defendant by two very competent attorneys; and that the able trial judge exercised unusual patience and judicial restraint in presiding over the trial. Upon a careful review of the record, I am convinced that the long and tedious trial was substantially free from error except for the error discussed and I cannot believe that it was prejudicial to defendant.

Like any other defendant, Walters was "entitled to a fair trial, not a perfect one." *State v. Squire,* 292 N.C. 494, 508, 234 S.E. 2d 563 (1977); *Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953). I feel that he had a fair trial.

JAMES McDOWELL AND MARY McDOWELL v. MARVIN DAVIS, INDIVIDUALLY AND AS SHERIFF OF DURHAM COUNTY, NORTH CAROLINA; J. R. COATS, INDIVIDUALLY AND AS A DEPUTY SHERIFF OF DURHAM COUNTY, NORTH CAROLINA; J. M. CRABTREE, INDIVIDUALLY AND AS A DEPUTY SHERIFF OF DURHAM COUNTY, NORTH CAROLINA; UNITED STATES FIRE INSURANCE COMPANY

No. 7614DC938

(Filed 6 July 1977)

1. **Constitutional Law § 17; Ejectment § 5; Sheriffs and Constables § 4— ejectment of plaintiffs — action under Civil Rights Act**

The sheriff's eviction of plaintiffs from a municipal housing project pursuant to an order of ejectment did not constitute a violation of plaintiffs' Fourth Amendment rights so as to subject the sheriff to a claim for damages under 42 U.S.C. § 1983, even assuming that the sheriff had a policy and agreement with the housing authority for the unofficial cancellation of ejectment orders and the housing authority notified the sheriff to cancel execution of the ejectment order against plaintiffs, since a violation of an unofficial and informal agreement or policy between the sheriff and the holder of an ejectment judgment was at most a breach of the duty to exercise ordinary care and did not divest the sheriff of authority to execute a valid judicial order.

2. **Damages § 3.4— mental distress — necessity for physical impact or injury**

Plaintiffs showed no right to damages because of the negligence of defendants, a sheriff and his deputies, in the execution of an ejectment order where there was no evidence of any physical injury to plaintiffs' property or persons and the only evidence with respect to damages related to humiliation, embarrassment and emotional distress resulting from negligence of defendants, since there can be no recovery for emotional or mental stress in an ordinary negligence case unless it is shown that the mental stress was the proximate result of some physical impact or physical injury resulting from negligence.

APPEAL by plaintiffs from *Moore, Judge.* Judgment entered 14 May 1976 in District Court, DURHAM County. Heard in the Court of Appeals 8 June 1977.

The allegations of plaintiffs' complaint, except where quoted, are summarized as follows:

Plaintiffs, James and Mary McDowell, were tenants of Durham Housing Authority (DHA), they became delinquent in the payment of their rent, and on 16 May 1974, DHA obtained an order of ejectment which was served on them on 20 June 1974. DHA "agreed to withhold execution on the judgment pro-

vided the plaintiffs made up the rent arrearages by payment of $50 per week until the back rent was paid." On 23 June 1974, DHA "twice gave direct, personal notification to defendant Davis that the judgment of eviction against the McDowells was not to be executed on." Plaintiffs complied with their agreement with DHA, and DHA did not revoke its instructions to defendant Davis not to execute on the judgment, but nevertheless defendants J. R. Coats and J. M. Crabtree executed on the ejectment order and removed the McDowells and their belongings from their home. Defendants Coats and Crabtree with the assistance of inmates of the Durham County jail removed "plaintiffs' belongings in such a rough and grossly insensitive and culpably negligent manner that the McDowells' furniture, theretofore almost new and in good condition, was severely damaged in the amount of approximately $1,000." The eviction "made a public spectacle of plaintiffs, causing them shame, embarrassment, humiliation and mental anguish." The actions of defendants Davis, Coats, and Crabtree violated plaintiffs' rights under the Fourth and Fourteenth Amendments of the United States Constitution, established an "arbitrary, reckless and grossly negligent" breach of their duty "to exercise ordinary care in determining the need for and legality of the ejectment and in conducting that ejectment," and established a breach of defendant Davis' public official's bond that he shall "well and faithfully perform all and singular the duties incumbent upon him by reason of his election." Plaintiffs made the following prayer for relief:

> "A. Against defendants Davis, Coates, [sic] Crabtree and United States Fire Insurance Company:
>
> (1) $1,000 actual damages for the shame, humiliation and mental anguish;
>
> (2) $1,300 actual damages for the destruction and damage to plaintiffs' belongings and to their home;
>
> resulting from the wrongful ejection;
>
> B. Against defendants Davis, Coates [sic] and Crabtree; $1,500 punitive damages for the wrongful ejection.
>
> C. Against defendant Davis: $500 actual damages and $500 punitive damages for the tortious assault and vilification.

D. The costs and disbursements of this action.

E. Such other and further relief as to the court may seem just."

Defendants filed answer denying the material allegations of the complaint.

The evidence presented by plaintiffs at trial is summarized as follows:

One of the duties of defendant Davis as Sheriff of Durham County is to evict tenants under orders of execution and ejectment. The "operating policy" of the sheriff's office is to cancel an order of ejectment if the landlord, including DHA, calls the sheriff's office and requests that it be cancelled. No modification or setting aside of the execution order by the clerk of superior court is required. The sheriff's office also has a policy of not executing orders of ejectment until the landlord is contacted to see if arrangements with the tenant have been made. Orders of ejectment are normally executed on within three days after service upon the tenant.

In May 1974 DHA obtained an order of ejectment against plaintiffs. The plaintiffs made an agreement with Jacqueline Macon of DHA on 19 June 1974 that they would pay $50 per week until the rent in arrears was paid. The agreement was communicated to Gwendolyn Hartley, Director of Management at DHA, who stated she would cancel the ejectment notice. The order of ejectment was served on Mr. McDowell on 20 June 1974. Gwendolyn Hartley testified, "By referring to plaintiffs' Exhibit 9 which is the judgment in the case of *Durham Housing Authority v. McDowell* I can see that I wrote on my copy 'cancelled' with the date June 23, 1974. Based on my usual policy, that would be the date that I would cancel the eviction with the sheriff's office." Plaintiffs introduced into evidence a memorandum prepared by Mrs. Hartley on 19 July 1974 which she testified "represents the correct facts as they were in my memory on July 19, 1974 . . . . " In that memorandum she stated, "On June 23, 1974, I called the Sheriff's Department and indicated that the execution of the judgment against Mr. McDowell should be cancelled. I do not remember to whom I spoke."

J. R. Coats, Durham County Deputy Sheriff, was given the order of ejectment against the plaintiffs on 16 July 1974.

Coats knew that he was to check with DHA to determine if he was to serve the writ of execution, and that "the only one who'd give a definite answer as to whether [he] should go ahead with a DHA ejectment was Mrs. Hartley." Deputy Coats tried unsuccessfully eight times to reach Mrs. Hartley by phone. Finally on his last call he was told by someone at DHA to evict plaintiffs. Coats obtained a key from the maintenance man on the project, and he along with Deputy Crabtree and three inmates of the county jail began removing the McDowell's belongings from the house. While in the process of evicting the plaintiffs a representative of DHA arrived and stopped the eviction. The deputies and inmates left without returning the belongings to the house. Personnel of DHA returned the property to the house. Subsequently plaintiffs moved out of the project because their children were distressed and upset by the taunts of the other children in the project about having been evicted. Plaintiffs were very embarrassed about the incident.

Defendants offered evidence tending to show the following:

DHA obtained so many eviction orders against its tenants, most of which were subsequently cancelled, that a special arrangement for cancellation was set up whereby Mrs. Hartley at DHA was to call Chief Deputy William Allen personally to cancel the order. However, subsequent to the arrangement DHA cancelled numerous eviction orders, and Mrs. Hartley called Deputy Allen on just one of those occasions. On one of his calls to DHA Deputy Coats was told by someone at DHA that they would check to see if the McDowells should be evicted and would let him know what to do when he called back. Upon his next call he was "switched several times to different people" and was finally told by someone to evict the plaintiffs. None of plaintiffs' furniture and belongings was damaged during the eviction.

The following issues were presented to the jury and answered as indicated:

"1. Did Durham Housing Authority properly request the sheriff to cancel the execution against the eviction order prior to the sheriff removing such furniture?

ANSWER: Yes.

2. In removing furniture, did sheriff, through his agents, negligently damage plaintiffs' property?

ANSWER: No.

3. If you find sheriff to be negligent, was such negligence in wanton and willful disregard of his authority?

ANSWER: No.

4(a). What amount of damages are the plaintiffs entitled to recover by reason of negligence in Issue No. 2?

ANSWER: No.

(b). What amount of punitive damages are plaintiffs entitled to recover by reason of the willful and wanton negligence in Issue No. 3?

ANSWER: No."

From a judgment that they recover nothing from the defendants, plaintiffs appealed.

Legal Aid Society of Durham County by Denison Ray and Adrienne M. Fox for plaintiff appellants.

Robert D. Holleman and Felix B. Clayton for defendant appellees.

HEDRICK, Judge.

[1] One of plaintiffs' claims is based upon 42 U.S.C. § 1983 which provides,

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Plaintiffs contend that at trial they introduced sufficient evidence to support a jury verdict that defendants violated their Fourth Amendment right "to be secure in their persons, houses, papers, and affects against unreasonable searches and seizures . . . , " and that they are entitled to compensation for the humiliation and embarrassment resulting from this violation irrespective of any damage done to their belongings.

If plaintiffs are correct in their contention that they presented sufficient evidence at trial of a violation of their constitutional rights, then they need not show any property damage to recover compensation for such harm as humiliation and embarrassment resulting from the violation of their constitutional rights. *Hostrop v. Board of Junior College Dist. No. 515,* 523 F. 2d 569 (7th Cir. 1975), *cert. denied,* 425 U.S. 963, 48 L.Ed. 2d 208, 96 S.Ct. 1748 (1976); *Piphus v. Carey,* 545 F. 2d 30 (7th Cir. 1976).

"The terms of § 1983 make plain two elements that are necessary for recovery. First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.' This second element requires that the plaintiff show that the defendant acted 'under color of law.' " *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 150, 26 L.Ed. 2d 142, 150, 90 S.Ct. 1598, 1604 (1970).

In the present case the evidence is clearly sufficient to support a finding by the jury that the defendants in executing the eviction order were acting "under color of law."

A determination of whether there has been such a violation by defendants of plaintiffs' Fourth Amendment right against unreasonable search and seizure as to be actionable under § 1983 begins with *Monroe v. Pape,* 365 U.S. 167, 5 L.Ed. 2d 492, 81 S.Ct. 473 (1961). In that case the Supreme Court held that plaintiffs, a husband, wife and their children, could maintain an action under § 1983 against Chicago policemen, who allegedly broke into their home, searched it without a warrant, and arrested and detained the husband without a warrant and without arraignment. The court pointed out that § 1983 was designed to give a remedy to parties deprived of their constitutional rights by an official's misuse or abuse of his authority. The court also pointed out that § 1983 does *not* require that a plaintiff show that the defendant had "a specific intent to deprive a person of a federal right." 365 U.S. at 187. Instead, "[§ 1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Id.*

The Federal Circuit Courts have followed this Supreme Court mandate to apply § 1983 "against the background of tort liability that makes a man responsible for the natural consequences of his actions." For example in *Jenkins v. Averett*, 424 F. 2d 1228 (4th Cir. 1970), the Fourth Circuit held that a plaintiff could maintain a § 1983 action against a police officer, who was "grossly and culpably negligent" in shooting him. The District Court had denied plaintiff relief under § 1983, accepting defendant's claim that he did not intend to shoot the plaintiff as a defense. The Fourth Circuit reversed, stating that "if intent is required, it may be supplied, for federal purposes, by gross and culpable negligence, just as it was supplied in the common law cause of action, [assault]." *Id.* at 1232. In *Bryan v. Jones*, 530 F. 2d 1210 (5th Cir. 1976), the defendant-sheriff continued to keep plaintiff imprisoned in reliance upon a typographical error in a grand jury report after he should have been released. The Fifth Circuit held that plaintiff had made out a *prima facie* case under § 1983 since a *prima facie* case of false imprisonment at common law had been shown. The Court stated,

> "The elements of the prima facie case are: (1) intent to confine, (2) acts resulting in confinement, and (3) consciousness of the victim of confinement or resulting harm. Restatement, Second, Torts § 35 (1965). Thus, a prima facie case is made out against a jailer even when he believes he has legal authority to detain a prisoner." *Id.* at 1213.

The common law analogues for plaintiffs' present § 1983 suit are actions for the intentional torts of trespass to land and chattels. See 59 Minn. L. Rev. 991, 991-997 (1975). At common law a person need not have the intent to trespass in order to be liable for trespass. To be liable for trespass a person need only intentionally go upon the land in the possession of another, when not privileged or authorized to do so. *Matthews v. Forrest*, 235 N.C. 281, 69 S.E. 2d 553 (1952); Restatement (Second) of Torts § 158 (1965); Dobbs, Trespass to Land in North Carolina, 47 N.C. L. Rev. 31 (1968). To be liable for trespass to chattel, he need only intentionally dispossess the chattel of another or intermeddle with the chattel of another, when not privileged or authorized to do so. Restatement (Second) of Torts § 217. However, an officer is privileged when he evicts a person pursuant

to a valid order of the court. Restatement (Second) of Torts § 210 provides:

> "The privilege to execute an order of a court directing the actor to put a third person in possession of land of which another is in possession, or to do any other act on the land, carries with it the privilege to enter the land for the purpose of executing the order, provided that any writ issued for the execution of the order is valid or fair on its face."

In the present case plaintiffs concede that the ejectment order in the hands of the sheriff was in all respects proper. They insist, however, that because the sheriff and his deputies executed the order in violation of their agreement and policy with DHA, the defendants are liable in damages pursuant to the provisions of § 1983.

Assuming *arguendo* that the evidence is sufficient to support findings by the jury that the sheriff had a policy and agreement with DHA for the unofficial cancellation of ejectment orders, and that DHA "properly requested the sheriff to cancel the execution against the eviction order," as the jury did in fact find, we are of the opinion that such findings will not support a conclusion that defendants, or either of them, violated plaintiffs' constitutional rights within the meaning of § 1983. A violation of such an unofficial and informal agreement or policy as shown here between the sheriff and the holder of an ejectment judgment is at most a breach of defendants' duties to exercise ordinary care, and does not divest the defendants of their authority to execute a valid judicial order. Thus, we are of the opinion that the trial judge did not err in not submitting to the jury an issue of damages for defendants' alleged violation of plaintiffs' constitutional rights within the meaning of § 1983.

[2] Plaintiffs remaining assignments of error relate to the issues submitted to the jury and instructions thereon with respect to their claim for damages as a result of defendants' alleged negligence in executing the order of ejectment. There is no evidence in the record before us of any damage to plaintiffs' property or person. The only evidence with respect to damages relates to alleged humiliation, embarrassment, and emotional distress resulting from defendants' negligence.

"Mere hurt or embarrassment are not compensable. *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55 (1938)." *Alltop v. J. C. Penney Co.*, 10 N.C. App. 692, 695, 179 S.E. 2d 885, 887-88 (1971), *cert. denied*, 279 N.C. 348, 182 S.E. 2d 580 (1971). For a plaintiff to recover for emotional or mental distress in an ordinary negligence case, he must prove that the mental distress was the proximate result of some physical impact with or physical injury to himself also resulting from the defendant's negligence. *Williamson v. Bennett*, 251 N.C. 498, 112 S.E. 2d 48 (1960). *Alltop v. J. C. Penney Co., supra.* Since plaintiffs have shown no such physical impact or injury in this case, they have shown no compensable damages, and any error committed by the court with respect to issues 2, 3, 4(a) and 4(b) could not have been prejudicial.

We hold the plaintiffs had a fair trial on all their alleged claims, free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

JAMES J. FREELAND v. G. PERRY GREENE, SECRETARY OF THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA AND THE BOARD OF TRANSPORTATION

No. 7615SC849

(Filed 6 July 1977)

1. **Appeal and Error § 6.2— appeal from interlocutory order — rights adversely affected — appeal not premature**

Though the order appealed from which restrained defendants and their agents from removing plaintiff's outdoor advertising sign pending determination of the action on its merits was an interlocutory order, the defendants' appeal was not premature, since the continuance of the injunction in effect and the denial of the motion to dismiss adversely affected important rights of appellants in connection with the performance by them of duties imposed by the N. C. Outdoor Advertising Control Act, Article 11 of Chapter 136 of the General Statutes.

2. **Highways and Cartways § 2.1— removal of outdoor advertising — failure of owner to exhaust administrative remedies — injunction improper**

Plaintiff was not entitled to maintain this action to enjoin defendants from removing his outdoor advertising sign because of an

alleged violation of control-of-access, since plaintiff did not first exhaust the administrative remedies provided him by G.S. Chap. 136, Art. 11, and by the rules and regulations of the Board of Transportation adopted pursuant thereto.

APPEAL by defendants from *Browning, Judge.* Order entered 27 July 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 12 April 1977.

Plaintiff, the owner of an outdoor advertising sign located near Interstate Highway 85 in Orange County, brought this action to enjoin defendants from removing the sign. Plaintiff alleged that an agent of defendants had ordered him to remove his sign and had notified him that if he failed to do so, defendants' agents would remove it at plaintiff's expense; that defendants had no constitutional authority to take plaintiff's vested property rights in the sign except by eminent domain proceedings providing him with fair compensation; and that removal of the sign would result in immediate and irreparable harm to plaintiff by causing him loss of income to be derived from travelers on the highway who would be attracted to plaintiff's businesses and enterprises by the sign. An *ex parte* temporary restraining order was issued, after which the matter came on for hearing upon plaintiff's motion for a preliminary injunction and upon defendants' motion to dismiss made under Rule 12(b) on the grounds that the complaint failed to state a claim upon which relief can be granted and that the court lacked jurisdiction of the subject matter in that plaintiff had not exhausted his administrative remedies pursuant to Article 11 of Chapter 136 of the General Statutes. Defendants supported their motion by affidavits and exhibits, and at the hearing requested that their motion to dismiss be treated as one for summary judgment under Rule 56.

The material facts, as established by allegations in plaintiff's verified complaint, in defendants' affidavits and exhibits, and in the "Statement of Facts" contained in the record on this appeal, as to which no genuine issue appears, are as follows:

Prior to May 1976, Permit No. I-85 50044 had been issued for the sign. On 29 April 1976 Rufus Chappell, an employee of the Department of Transportation whose responsibilities included reporting any violations of the Outdoor Advertising Control Act, observed a pickup truck parked near the sign.

Tire tracks led from Highway I-85 to the truck. A man painting the sign told Chappell that plaintiff had employed him to do so. Chappell reported this to the Assistant District Engineer. A violation of control-of-access occurred when the painter left the traveled portion of Interstate 85 in his vehicle and drove to the area of the sign. Because of this violation, the permit for the sign was revoked on 4 May 1976 by a letter from the District Engineer of the Department of Transportation to "Daniel Boone Inn." This letter stated in part that the sign "is unlawful and a nuisance and your permit is now revoked," and it further stated that "[i]f the structure is not removed or made to conform to the provisions of the Act or the rules and regulations within thirty (30) days after receipt of this letter, the Board of Transportation or its agents, at the expense of the owner, will remove the nonconforming outdoor advertising." Plaintiff, through his attorney, sought to determine from defendants' agents what could be done to cause the sign to conform, but he was informed there was nothing plaintiff could do except remove the sign. By letter dated 14 May 1976 the plaintiff, through his attorney, gave notice to the District Engineer of his appeal of the revocation of the permit. Thereafter plaintiff did not submit any written appeal to the Secretary of Transportation. Instead, on 16 June 1976 plaintiff commenced this action in the Superior Court of Orange County against the Secretary of Transportation seeking to enjoin removal of his sign.

The court denied defendants' motion for summary judgment dismissing plaintiff's action and issued a preliminary injunction restraining defendants and their agents from removing the sign pending determination of this action on the merits. Defendants appealed.

Winston, Coleman & Bernholz by Douglas Hargrave for plaintiff appellee.

Attorney General Edmisten by Assistant Attorney General Archie W. Anders for defendant appellants.

PARKER, Judge.

[1] The order appealed from is interlocutory. However, appeal from such an order will not be considered premature if it adversely affects a substantial right of the appellants. G.S. 1-277; *Industries, Inc. v. Blair,* 10 N.C. App. 323, 178 S.E. 2d 781

(1971). The continuance of the injunction in effect and the denial of the motion to dismiss in this case do adversely affect important rights of appellants in connection with the performance by them of duties imposed by the North Carolina Outdoor Advertising Control Act, Article 11 of Chapter 136 of the General Statutes. We therefore consider this appeal.

[2] The question presented is whether the plaintiff may maintain this action without having first exhausted the administrative remedies provided him by G.S. Chap. 136, Art. 11, and by the rules and regulations of the Board of Transportation adopted pursuant thereto. We hold that he may not.

Article 11 of G.S. Chap. 136, the Outdoor Advertising Control Act, provides for the control and regulation of outdoor advertising signs and devices in the vicinity of the right-of-way of the interstate and primary highways in this State. G.S. 136-133 provides that

> "[n]o person shall erect or maintain any outdoor advertising . . . [except those allowed by certain subdivisions of G.S. 136-129 and G.S. 136-129.1] without first obtaining a permit from the Board of Transportation or its agents pursuant to the procedures set out by rules and regulations promulgated by the Board of Transportation or the Secretary of Transportation. The permit shall be valid until revoked for nonconformance with this Article or rules and regulations promulgated by the Board of Transportation or the Secretary of Transportation thereunder. *Any person aggrieved by the decision of the Board of Transportation or its agents in refusing to grant or in revoking a permit may appeal the decision in accordance with the rules and regulations enacted by the Board of Transportation or Secretary of Transportation pursuant to this Article to the Secretary of Transportation who shall make the final decision on the agency appeal. . . .*" [Emphasis added.]

G.S. 136-134 provides that any outdoor advertising maintained without a permit "shall be illegal and shall constitute a nuisance." The Board or its agents are directed to give 30 days notice to the owner of the illegal outdoor advertising to remove it or to make it conform to the provisions of Article 11 or the rules and regulations promulgated by the Board or the Secretary thereunder, and if the owner fails to act within

30 days after receipt of said notice, the Board or its agents "shall have the right to remove the illegal outdoor advertising at the expense of the said owner." G.S. 136-134 further provides:

> "Any person aggrieved by the decision declaring the outdoor advertising structure illegal shall be granted the right to appeal the decision in accordance with the terms of the Rules and regulations enacted by the Board of Transportation or the Secretary of Transportation pursuant to this Article to the Secretary of Transportation who shall make the final decision on the agency appeal."

Under G.S. 136-130, the Board of Transportation is authorized to promulgate rules and regulations in the form of ordinances governing:

> "(3) The specific requirements and procedures for obtaining a permit for outdoor advertising as required by G.S. 136-133 and for the administrative procedures for appealing a decision at the agency level to refuse to grant or in revoking a permit previously issued, and
>
> (4) The administrative procedures for appealing a decision at the agency level to declare any outdoor advertising illegal and a nuisance as pursuant to G.S. 136-134, as may be necessary to carry out the policy of the State declared in this Article. . . ."

At a meeting held on 15 February 1974, the Board of Transportation exercised the authority granted to it in G.S. 136-130 by adopting an ordinance containing the following:

"Section B

* * *

> 6. Revocation of Permit. Any valid permit issued for lawful outdoor advertising structure shall be revoked by the appropriate District Engineer for any one of the following reasons:
>
> * * *
>
> (9) Unlawful violation of the control of access on interstate and freeway facilities."

Section B, Subsection 9 of the ordinance is as follows:

> "9. Appeal of Decision of District Engineer to Board of Transportation. (a) Should any owner of outdoor adver-

tising structure disagree with a decision of the appropriate District Engineer pertaining to the issuance or revocation of permits for outdoor advertising, the owner of the outdoor advertising structure shall have the right to appeal to the Board of Transportation pursuant to the procedures hereinafter set out. (b) The owner of the outdoor advertising structure who decides to appeal a decision of the District Engineer shall so notify the appropriate District Engineer of his decision to appeal by registered mail, return receipt requested, within ten (10) days of the receipt of notice of the decision of the District Engineer. The District Engineer shall then forward the notice given him by the outdoor advertiser to the Secretary of Transportation. (c) Within twenty (20) days from the time of submitting his notice of appeal to the District Engineer, the owner of the outdoor advertising shall submit to the Secretary of Transportation a written appeal setting forth with particularity the facts upon which his appeal is based. (d) Within thirty (30) days from the receipt of the said written appeal or within such additional time as may be agreed to between the Secretary of Transportation and the owner of the outdoor advertising structure, the Secretary of Transportation shall make an investigation of the said appeal. The Secretary of Transportation shall then, make appropriate findings of fact and conclusions pertaining to the appeal on behalf of the Board of Transportation and the findings and conclusion be served upon the outdoor advertiser seeking the review by registered mail, return receipt requested. However, if the decision of the Secretary is that the outdoor advertising structure in question is unlawful, then the findings and conclusion be served upon the owner of the outdoor advertising by certified mail, return receipt requested."

Judicial review of final agency decision is provided for in G.S. 136-134.1, which contains the following:

"G.S. 136-134.1 *Judicial review.* Any person who is aggrieved by a final decision of the Secretary of Transportation *after exhausting all administrative remedies made available to him by rules and regulations enacted pursuant to this Article* is entitled to judicial review of such decision under this Article. . . ." [Emphasis added.]

G.S. 136-134.1 then goes on to provide that the person seeking review must file a timely petition in the Superior Court of Wake County stating explicitly what exceptions are taken to the decision of the Secretary of Transportation and what relief petitioner seeks. At any time before or during the review proceeding, the aggrieved party may apply to the reviewing court for an order staying the operation of the decision of the Secretary of Transportation pending the outcome of the review. Review is to be conducted by the court without a jury, and the court is to hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice. After hearing the matter, the court may affirm, or it may reverse or modify the decision if the decision is:

> "(1) In violation of constitutional provisions; or
>
> (2) Not made in accordance with this Article or rules or regulations promulgated by the Board of Transportation or Secretary of Transportation; or
>
> (3) Affected by other error of law."

Any party to the review proceedings may appeal to the appellate division from the final judgment of the Superior Court.

The foregoing statutes and the rules and regulations adopted by the Board of Transportation pursuant to the authority granted it by statute provide a clear, comprehensive, and adequate procedure by which any person aggrieved by a decision made by an agent of the Board of Transportation in administering the Outdoor Advertising Control Act may obtain agency review at the highest level before the Secretary of Transportation. The decision of the Secretary is in turn made subject to judicial review by G.S. 136-134.1. The express language of that statute makes clear the legislative intent that recourse to the courts is to be had by the aggrieved party only after exhausting all administrative remedies made available to him by rules and regulations enacted pursuant to Article 11 of G.S. Chap. 36. We find unpersuasive plaintiff's argument that recourse to administrative remedies should not be required in his case because he is attacking provisions of the Outdoor Advertising Control Act and certain of the regulations adopted by the Board pursuant thereto on constitutional grounds. It is true that neither the Board nor the Secretary has power to declare an act of the Legislature unconstitutional, but this would not

preclude administrative decision of this case in plaintiff's favor on other than constitutional grounds. For example, administrative review might well result in decision that plaintiff should not be held responsible for acts of the sign painter, whose relationship to the plaintiff has not been established by competent evidence and even as shown by hearsay evidence is far from clear on this record. As another example, administrative review might result in determination that, even if plaintiff should be found legally responsible for acts of the sign painter, no such violation of control-of-access occurred in this case as to require imposition of a penalty so drastic as revocation of permit. Moreover, in event administrative review in this case should result unfavorably to plaintiff, his constitutional contentions would still be fully available to him by means of the judicial review made available by G.S. 136-134.1.

Because plaintiff failed to exhaust his administrative remedies, this action should have been dismissed. Accordingly, the order appealed from is

Reversed.

Judges BRITT and MARTIN concur.

RAY SELLERS v. THE CITY OF ASHEVILLE

No. 7728SC257

(Filed 6 July 1977)

1. **Municipal Corporations § 30— extraterritorial zoning ordinance — failure to comply with enabling statutes**

In attempting to make its zoning ordinance applicable to property outside its city limits, defendant failed to comply with applicable enabling statutes in two respects: (1) it failed to give notice of a public hearing, as required by G.S. 160A-364, adequate to alert owners of property outside the city that their rights might be affected; and (2) it failed to define the boundaries of the extraterritorial area affected in the definitive manner required by G.S. 160A-360.

2. **Appeal and Error § 7— no appeal by plaintiff — no right to raise questions on appeal**

In an action by plaintiff to enjoin enforcement of defendant's zoning ordinance outside the city limits, plaintiff could not question on appeal the trial court's action in limiting the injunction to plain-

tiff's property rather than making it applicable to the properties of all other affected citizens, since plaintiff did not have standing to represent the interests of persons who were not parties to the litigation, and plaintiff did not appeal from the judgment entered.

APPEAL by defendant from *Martin (Harry), Judge.* Judgment entered 20 December 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 June 1977.

Plaintiff, the owner of a tract of land outside the city limits, brought this action against the City of Asheville seeking a judgment declaring certain sections of the Asheville City Zoning Ordinance invalid and enjoining enforcement of the ordinance outside the city limits. The case was heard on plaintiff's motion for summary judgment. The material facts, as to which there is no genuine issue, are as follows:

Since 1948 the City of Asheville has had a zoning Ordinance, being its Ordinance 322, applicable to property within its city limits. Prior to 20 February 1975 the City had never exercised zoning authority over property located outside its city limits. On that date the City Council adopted Ordinance No. 322, as amended, Section 30-1-3 of which contains the following:

> "The provisions of this Ordinance shall apply within the corporate limits of the City of Asheville, North Carolina and within the territory beyond the corporate limits for a distance of one mile in all directions in accordance with the authority granted to the City of Asheville in Article 19, Chapter 160A-360, as amended, of the General Statutes of North Carolina."

This Ordinance incorporated and made a part thereof a "Zoning Map of the City of Asheville," and the Ordinance and Map were properly recorded in the Office of the Register of Deeds of Buncombe County, N. C.

Before adopting the amended Ordinance, the Asheville City Council held a series of public hearings, the first of which was held on 19 September 1974. On 3 and 10 September 1974 the following notice was published in the Asheville Times:

"NOTICE TO PUBLIC

Notice is hereby given according to law to all parties in interest and citizens: That according to the procedures

and requirements contained in G.S. 160A-364 a public hearing will be held on the 19th day of September, 1974, at 3:00 o'clock p.m. in the City Council Chambers, Asheville, North Carolina, concerning the adoption of an ordinance amending and revising Ordinance No. 322, as amended, the Zoning Ordinance of the City of Asheville at which time and place the City Council will place on its first reading said proposed ordinanced (sic) after said public hearing.

This 3rd day of September, 1974.

William F. Wolcott, Jr.
City Clerk"

A second notice was published in The Asheville Times on 23 and 30 December 1974 that "according to the procedures and requirements contained in G.S. 160A-364 the continued public hearing will be concluded" on 9 January 1974 (sic) "concerning the adoption of an ordinance amending and revising Ordinance No. 322, as amended, the Zoning Ordinance of the City of Asheville. . . ." A third notice was published in The Asheville Times on 15 January 1975 that "[t]he continued public hearing will be concluded" on 16 January 1975 "concerning the adoption of an ordinance amending and revising Ordinance No. 322, as amended, the Zoning Ordinance of the City of Asheville at which time and place the City Council will place on its first reading said proposed ordinance after concluding said public hearing." The amended Ordinance No. 322, containing Section 30-1-3 making its provision applicable within the corporate limits "and within the territory beyond the corporate limits for a distance of one mile in all directions," was adopted at a meeting of the Asheville City Council held on 20 February 1975.

Plaintiff, the owner of a lot outside but within one mile of the city limits, placed a mobile home on his lot. He desires that this be used as a residence. Such a use is prohibited by the Asheville City Zoning Ordinance.

In moving for summary judgment, plaintiff contended that the ordinance was invalid insofar as it attempts to exercise extraterritorial zoning authority because the notices given by the City prior to adopting the ordinance failed to comply with constitutional and statutory requirements and because the ordinance itself failed to comply with such requirements as to de-

fining boundaries in terms of geographical features identifiable on the ground. The court granted the motion and entered judgment, finding no genuine issue as to any material fact, and ruling that plaintiff was entitled to judgment as a matter of law for the reasons:

> "1. That the Respondent City of Asheville failed to adequately provide notice of the public hearings conducted for the purpose of considering the proposed extensions of the zoning authority of the City of Asheville to properties located outside of the Corporate Limits of the City of Asheville, North Carolina.
>
> 2. That the boundaries for the extraterritorial zone failed to meet the required definitiveness as required by NCGS 160A-360, as amended."

The court adjudged the ordinance invalid "to the extent that it extends the zoning authority for the City of Asheville to the property" of the plaintiff, and enjoined the City from enforcing the ordinance as it applies to plaintiff's property. From this judgment, the defendant City appealed.

Bennett, Kelly & Cagle, P.A., by Robert F. Orr for plaintiff appellee.

Patla, Straus, Robinson & Moore, P.A., by Victor W. Buchanan for defendant appellant.

PARKER, Judge.

A city has power to zone only as delegated to it by enabling statutes, and "a zoning ordinance or an amendment thereto which is not adopted in accordance with the enabling statutes is invalid and ineffective." *Heaton v. City of Charlotte,* 277 N.C. 506, 513, 178 S.E. 2d 352, 356 (1971); *accord, Keiger v. Board of Adjustment,* 281 N.C. 715, 190 S.E. 2d 175 (1972). We agree with the trial court's ruling that defendant City in this case failed to comply with applicable enabling statutes insofar as it attempted to extend its zoning ordinance to property outside of its corporate limits. Accordingly, we affirm.

The North Carolina enabling statutes granting cities power to zone are now contained in Chapter 160A, Article 19, of the General Statutes. Pertinent to this appeal are the following:

> "G.S. 160A-360. *Territorial jurisdiction.*—(a) All of the powers granted by this Article may be exercised by any city within its corporate limits. In addition, any city may exercise these powers *within a defined area* extending not more than one mile beyond its limits. . . . (Emphasis added.)
>
> (b) Any council wishing to exercise extraterritorial jurisdiction under this Article shall adopt, and may amend from time to time, an ordinance specifying the areas to be included based upon existing or projected urban development and areas of critical concern to the city, as evidenced by officially adopted plans for its development. Boundaries shall be defined, to the extent feasible, in terms of geographical features identifiable on the ground. . . . The boundaries specified in the ordinance shall at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques. . . . (Emphasis added.)
>
> * * *
>
> G.S. 160A-364. *Procedure for adopting or amending ordinances under Article.*—Before adopting or amending any ordinance authorized by this Article, the city council shall hold a public hearing on it. A notice of the public hearing shall be given once a week for two successive calendar weeks in a newspaper having general circulation in the area. The notice shall be published the first time not less than 15 days nor more than 25 days before the date fixed for the hearing."

[1] In attempting to make its zoning ordinance applicable to property outside its city limits, defendant City in this case failed to comply with the foregoing statutes in two respects: first, it failed to give notice of a public hearing, as required by G.S. 160A-364, adequate to alert owners of property outside the city that their rights might be affected; and, second, it failed to define the boundaries of the extraterritorial area affected in the manner required by G.S. 160A-360.

Of the three notices which were published, the third and final one was published only once, and that on the day immediately prior to the date on which the public hearing was to be held. G.S. 160A-364 requires that the notice be published once a week for two successive weeks, the first publication to be not less than 15 nor more than 25 days before the date fixed for the hearing. None of the notices informed the public that the City intended, for the first time in its history, to make its zoning ordinance applicable to property outside its city limits. The mere reference in the first and second notices to G.S. 160A-364 would certainly not do so, for that statute would be equally applicable if the contemplated amendments to the ordinance affected only property within the city. By reading the notice, even the most diligent owner of property outside the city would have no reasonable cause to suspect that his property might be affected by the City's contemplated amendment to its ordinance. To be adequate, the notice of public hearing required by G.S. 160A-364 must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed. The notices which defendant City published in the present case failed to do this insofar as owners of property outside its limits were concerned.

In exercising the power delegated to a city by G.S. 160A-360(a) to zone property "within a defined area extending not more than one mile beyond its limits," the city council is required by G.S. 160A-360(b) to adopt an ordinance "specifying the areas to be included," based on certain criteria, and in doing so the boundaries of such areas must "be defined, to the extent feasible, in terms of geographical features identifiable on the ground." Further, the statute requires that such boundaries "shall at all times be drawn on a map, set forth in a written description, or shown by a combination of these techniques." In adopting the ordinance involved in the present case, the city council of defendant City failed to comply with these statutory requirements.

The only "written description" of the "defined area" over which defendant City attempted to exercise its extraterritorial zoning authority is the description contained in Section 30-1-3 of the ordinance. This merely refers to "the territory beyond the corporate limits for a distance of one mile in all directions." The "Zoning Map of the City of Asheville," which was made a part of the ordinance and a copy of which was filed with the

record on this appeal, shows the "mile boundary" drawn in sweeping curves, except where the city bordered upon adjacent municipalities. Both the general description in Section 30-1-3 of the ordinance and the sweeping "mile boundary" line on the map fail to comply with the mandate of the statute that "[b]oundaries *shall* be defined, to the extent feasible, in terms of geographical features identifiable on the ground." (Emphasis added.) The obvious purpose of this statutory mandate is that boundaries be defined, to the extent feasible, so that owners of property outside the city can easily and accurately ascertain whether their property is within the area over which the city exercises its extraterritorial zoning authority. The ordinance and map here in question do not make that possible, at least as to the owner of property near the one mile limit. It is not a sufficient answer that, from an engineering point of view, it would be possible for a competent surveyor to measure on the ground a distance of exactly one mile beyond the city limits and thereby ascertain with certainty whether a particular lot is, or is not, within the area over which the City exercises its extraterritorial zoning authority. It was precisely to avoid the necessity of such a costly remedy that the statute requires that the boundaries be defined, to the extent feasible, in terms of geographical features identifiable on the ground. We agree with the trial court's conclusion that the boundaries of the extraterritorial zone in this case "failed to meet the required definiteness" mandated by the statute.

[2] Plaintiff has attempted by "Cross Assignments of Error" to question the trial court's action in limiting the injunction to plaintiff's property rather than making it applicable to the properties of all other affected citizens. This question is not properly before us. Quite apart from any question as to plaintiff's standing to represent the interests of persons who are not parties to this litigation, plaintiff did not appeal from the judgment entered. Rule 10(d) of the Rules of Appellate Procedure does permit an appellee to "cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, *and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.*" (Emphasis added.) The action of the trial court in limiting the injunction to plaintiff's property did not deprive plaintiff of

"an alternative basis in law for supporting the judgment," and Rule 10(d) is not applicable in this case.

The judgment appealed from is

Affirmed.

Judges BRITT and CLARK concur.

STATE OF NORTH CAROLINA v. RICHARD MAURICE DAILEY, JR.

No. 7618SC1052

(Filed 6 July 1977)

1. **Criminal Law § 73.3— statements made in defendant's presence — knowledge by defendant — hearsay**

In a prosecution for feloniously receiving a stolen stereo, testimony that the person who sold the stereo to defendant twice stated in the presence of defendant and the witness that stereos in his possession had been stolen from an apartment complex was not inadmissible as hearsay since the testimony was not introduced to prove the matter stated therein, that is, that the stereos were stolen, but was introduced to show that defendant had knowledge of the facts declared in the statements.

2. **Criminal Law § 33.2— crimes committed by others — receipt of stolen property — guilty knowledge**

In a prosecution for feloniously receiving a stolen stereo, testimony that a State's witness and a second person from whom defendant bought the stolen stereo committed a break-in and stole cash and other items and that defendant saw the stolen property displayed in the second person's apartment on the night of the crimes was admissible as evidence of suspicious circumstances tending to show knowledge on the part of defendant that the person from whom he bought the stereo dealt in stolen goods.

3. **Criminal Law § 88.3— cross-examination — rebuttal testimony**

In this prosecution for feloniously receiving a stolen stereo wherein defendant denied on cross-examination that he told the resident manager of an apartment complex that the person who sold him the stereo had been his tenant, rebuttal testimony by the manager that defendant, whose phone number had been listed as a reference on the stereo seller's lease application, told her that the seller had been his tenant and had paid his rent on time was not admitted for the purpose of contradicting defendant's answer on a collateral matter but was competent and material to show a suspect relationship between defendant and the seller of the stereo.

4. Receiving Stolen Goods § 5— sufficiency of evidence

The evidence was sufficient for the jury in a prosecution for feloniously receiving a stolen stereo where it tended to show that defendant bought a stolen stereo from a friend; the stereo had a value of between $200 and $225; defendant and his friend were involved together in questionable activities near the time of the crime charged; and defendant's friend made statements in defendant's presence that stereos in his possession, one of which defendant received, were stolen.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 29 July 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 May 1977.

Defendant was indicted for feloniously receiving stolen goods in violation of G.S. 14-72(c). At trial the State presented evidence which tended to show that the management of the La Mancha Apartments in Greensboro, North Carolina, had ordered in the fall of 1974 a number of G. E. stereo sets to be used in a promotion aimed at attracting new tenants. Each set had a market value of between $200 and $225. They were stored, still in their original boxes, in a locked room off the manager's office, to which only the management of the apartments had authorized access.

In the early part of November, defendant Dailey, Charles Loye and a third man visited the apartments. Testimony showed that the third man wanted an apartment for his dating operations, but that Charles Loye filled out the lease application and actually rented the apartment. Loye's application listed a false residence and the defendant's phone number as a reference. When an apartment employee called the defendant to check on Loye, defendant said that Loye had been his tenant at the false residence and that Loye had paid his rent on time. Loye was leased an apartment at the La Mancha on 22 November 1974 and was given a stereo.

On 27 November 1974 there were six boxed stereos and a television in the locked storage room. They were discovered missing the morning of 28 November 1974. James Wyrick, testifying for the State, stated on the evening of the twenty-seventh, Loye broke into the storage room, and he, Loye and another man took the stereos and the television. They were placed in Loye's truck and taken to Wyrick's residence. Four stereos were unloaded at Wyrick's, Loye keeping two and the television on the truck.

On the morning of 28 November, Loye picked up two of the stereos at the Wyrick residence. Later that afternoon Wyrick and his wife went to Loye's farm. There they noted Loye's truck, a burgundy Chevrolet with two men standing at the rear, and a white station wagon. The defendant and Loye came walking out of the woods up to Loye's truck. There in the presence of Wyrick and defendant, Loye sold two stereos to the men for $100 each. The men opened the boxes, examined the sets, and then loaded them in the Chevrolet. At that point Loye remarked to the men that the stereos were "hot" and that they should be careful. After the two men left, Wyrick, Loye and defendant did some target shooting. Then Wyrick and Loye loaded a stereo into defendant's car. Loye remarked that this unit was one of those taken the previous night from La Mancha. Defendant gave Loye either a fifty or one hundred dollar bill. Defendant took the stereo to a friend who had been looking for one to give his son for Christmas. Some days later the friend paid defendant either $100 or $150 for the stereo.

The State also introduced testimony from Wyrick that on 23 November 1974, he, Loye and others broke into the apartment of one Gabriel and stole $1995 in cash and some other items. The money and items were taken to Loye's La Mancha apartment. At some time later in the evening, Wyrick saw John Essa enter the apartment. Essa testified that the defendant was in the apartment and that the money was displayed in stacks on a table in the living room and that other items including stereos and weapons were in the bedrooms.

The defendant introduced evidence that tended to show that he and his partner had hired Loye to construct three houses and remodel the basement in their office. Loye was also to purchase and furnish appliances in these jobs. Both defendant and Loye testified that defendant had mentioned to Loye that a friend was looking for a stereo and that Loye replied that he might find one wholesale. On 28 November 1974 defendant was at Loye's farm hunting. Wyrick and his wife came later. Loye had one stereo in a box in his truck. He gave the stereo to defendant, telling him to show it to the friend. If defendant's friend wanted the stereo, the price would be $100. Both defendant and Loye testified that no one besides themselves and the Wyricks were present.

From a verdict of guilty of felonious receiving and judgment imposing a two-year sentence of imprisonment, defendant appeals.

Attorney General Edmisten, by Associate Attorney Jesse C. Brake, for the State.

William A. Vaden for the defendant.

BROCK, Chief Judge.

[1] In his first argument defendant assigns as error the admission into evidence of testimony by State's witness Wyrick concerning statements made by Charles Loye in the presence of Wyrick and defendant. In essence Wyrick testified that Loye twice stated in his and defendant's presence that the stereos had been stolen from the La Mancha Apartments. Defendant contends the testimony was hearsay. We disagree.

If a statement is introduced for any purpose other than proving the truth of the matter stated, it is not hearsay and is admissible unless objectionable on other grounds. "The declarations of one person are frequently admitted to evidence a particular state of mind of another person who heard or read them; *e.g.*, to charge him with knowledge or notice of the facts declared. . . ." 1 Stansbury, N. C. Evidence (Brandis Rev. 1973), § 141, pp. 469-70. The testimony concerning Loye's statements was not introduced to prove the matter therein stated, that is, that the stereos were stolen. The testimony was introduced to show that defendant had knowledge of the facts declared in the statements. Such testimony is not objectionable as hearsay.

[2] Defendant next claims that the court erred in admitting testimony by State's witnesses Wyrick and Essa concerning the Gabriel break-in of 23 November 1974. The testimony tended to show that Loye and Wyrick committed a break-in and larceny; that the fruits of the crime were taken to Loye's La Mancha apartment; and that defendant was present in the apartment on the night the crime was committed and saw the stolen goods displayed therein.

Defendant argues that the only possible manner in which the testimony would be admissible is under one of the exceptions set out in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), to the rule against admitting evidence of prior offenses. Defendant argues that under *McClain* limiting instructions, which were

not given by the trial court, are required. We disagree in that *McClain* does not control in the present case. The State did not offer the testimony concerning the Gabriel transactions as evidence of a prior offense committed by the defendant. The testimony was introduced as evidence of suspicious circumstances tending to show knowledge on the part of the defendant that Loye dealt in stolen goods. Where knowledge is an element of the crime charged, circumstantial evidence may be offered of such acts of the accused as tend to establish the requisite state of knowledge. 1 Stansbury, N. C. Evidence (Brandis Rev. 1973), § 83, pp. 258-59.

[3] In defendant's ninth assignment of error, he contends the court erred in admitting the testimony of Yvonne Atchison, resident manager of La Mancha, offered by the State in rebuttal to statements made by the defendant. On cross-examination by the State, defendant denied that he had ever told Atchison that Loye had been his tenant. The State then recalled witness Atchison who testified concerning Loye's lease application and her telephone call to defendant during which he told her Loye had been his tenant and had paid his rent on time.

Defendant contends his answer on cross-examination was conclusive since it was in response to a collateral question. Because of the collateral nature of the question, Atchison's testimony contradicting defendant's answer was improper. We disagree. Evidence offered in contradiction to a defendant's testimony is not collateral and is admissible if tendered for some purpose other than mere contradiction. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47 (1972). Contradictory testimony is permitted where the question originally put to the witness on cross-examination tends to connect him directly with the cause or parties or where the cross-examination is as to a matter tending to show motive, temper, intent, disposition, conduct, or interest of the witness toward the parties or the cause. *State v. Long, supra.* The defendant's guilty knowledge is an essential element of the crime with which he was charged. The State's cross-examination of defendant attempted to elicit evidence of circumstances that tended to show a suspect relationship between defendant and Loye. In this light Atchison's contradictory testimony was not collateral but rather material and competent to show defendant's knowledge.

In his eleventh and seventeenth assignments of error, defendant argues that the trial court erred in denying his motions

for nonsuit at the close of the State's evidence and at the close of all evidence. When the defendant offers evidence, he waives motion for nonsuit at the close of State's evidence. *State v. Mosely,* 33 N.C. App. 337 S.E. 2d 261 (1977). In reviewing the motion for nonsuit at the close of all the evidence the court may consider any of defendant's evidence which is favorable to the State or which clarifies or explains the State's evidence. *State v. Paschall,* 14 N.C. App. 591, 188 S.E. 2d 521 (1972).

[4] In the present case defendant's motion challenges the sufficiency of the State's evidence as to whether defendant knew or must have known that the stereo he received was stolen. In considering circumstantial evidence, the court must decide whether a reasonable inference of the defendant's guilt may be drawn therefrom. "If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty." *State v. Rowland,* 263 N.C. 353, 358, 139 S.E. 2d 661, 665 (1965). The evidence in the present case is clearly sufficient as to larceny, identity of the goods, value and receiving. The State's evidence, supplemented by that of defendant, shows a close relationship between Loye and defendant and personal involvement of the defendant with Loye in questionable activities near to and at the time of the commission of the crime charged. The State's evidence further showed statements made in the presence of the defendant by Loye to the effect that the stereos, one of which defendant received, were stolen. When all of the evidence, actual and circumstantial, offered by the State is considered in the light most favorable to the State, giving it the benefit of every reasonable inference arising therefrom the evidence is sufficient to overcome motion for nonsuit and require submission to the jury.

In his two final arguments defendant contends first that the trial court erred in excluding his answer to his counsel's question of him concerning his knowledge that the stereo had been stolen. What defendant's evidence would have been was not included in the record on appeal. Where the court sustains an objection to evidence and the record fails to show what the evidence would have been, prejudice is not shown. *State v. Little,* 286 N.C. 185, 209 S.E. 2d 749 (1974). Secondly, defendant argues that the trial court erred in instructing the jury as to what circumstances were to be considered in proving guilty knowledge. We have reviewed the instructions, and in our opin-

ion they were clear and adequate to apprise the jury of the applicable principles of law.

In our opinion defendant received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. CAROLYN S. McINTYRE

No. 7729SC233

(Filed 6 July 1977)

1. **Clerks of Court § 1— disbursement of restitution funds — no jurisdiction of clerk of court**

The clerk of the superior court was without jurisdiction to enter an order directing disbursement of restitution funds which the defendant in this criminal proceeding had paid into court as the result of a plea bargain.

2. **Criminal Law § 23— plea bargain — restitution to victims as valid condition**

Payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for acceptance of a plea bargain.

3. **Criminal Law § 23— plea bargain — restitution ordered — aggrieved party must be named**

Where restitution is ordered as a condition for acceptance of a plea bargain, the restitution must be to a specific aggrieved party, and this party must be named in the judgment.

4. **Criminal Law § 13— restitution funds — controversy over ownership — independent civil action required**

Where restitution was ordered as a condition for acceptance of a plea bargain, and the judgment ordered payment of restitution into the court but failed to specify to whom or in what amounts the funds should ultimately be disbursed, a civil action among the various claimants to the funds was the proper method by which distribution of the restitution funds should be adjudicated.

ON *writ of certiorari* to review proceedings before *Griffin, Judge.* Order entered 21 October 1976 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 30 June 1977.

This case involves the disposition of $60,000.00 paid into court by defendant as partial restitution of funds embezzled by

her. In March 1976 defendant, Carolyn McIntyre, was charged in separate bills of indictment with nine counts of embezzlement and with one count of obtaining money by false pretenses. All charges arose out of her employment as legal secretary of John R. Hudson, Jr., an attorney. In total, defendant was charged with having embezzled and having converted to her own use in excess of $100,000.00 from her employer's trust account or from various estate accounts controlled by him. It was alleged in the indictments that some of the funds embezzled belonged to estates and trusts for which Mr. Hudson acted as executor, administrator, trustee, or attorney, and some funds belonged to Mr. Hudson.

As result of plea bargaining between defendant's attorney and the district attorney, the defendant pled guilty on 6 July 1976 to one count of embezzlement, being the count in Case 76-CR-534, in which she was charged with embezzling checks and monies totalling $950.00 belonging to the Estate of Rufus Ray Burgin which had been entrusted to her by her employer. Conditions of the plea bargain, as set forth in the transcript of plea signed by defendant on 6 July 1976, included that she be given a sentence of 3-5 years, that $40,000.00 be paid into court to be added to $20,000.00 previously paid, "with said total sum to be disbursed with the court's approval (with the recommendation that the court get the District Atty's . . . (sic) among those estates where monies were missing arising out of the defendant's employment with attorney John R. Hudson," and that all other charges arising out of her employment with attorney John R. Hudson be dismissed.

On defendant's plea of guilty in Case No. 76-CR-534, Superior Court Judge Kenneth A. Griffin, the judge presiding at the July Session of Superior Court in Transylvania County entered judgment on 6 July 1976 sentencing defendant to prison for a term of not less than three nor more than five years. The judgment directed defendant to pay into the office of the Clerk of Superior Court the sum of $40,000.00 "as restitution," this sum to be added to the $20,000.00 already paid into the Clerk's office. The judgment further directed that "the said Clerk of Transylvania County shall disperse (sic) the funds subject to the Superior Court's approval with the recommendation that the presiding judge seek the District Attorney's advice as to the method and the recipients of dispersement(s) (sic)." In compliance with the plea and the judgment, the additional

$40,000.00 was paid into the court and the remaining nine cases against defendant were dismissed.

On 20 and 21 October 1976, Judge Griffin held a "hearing" in the Superior Court in Transylvania County. The judge announced that this hearing was called "in the discretion of the Court for the purpose of determination of the disbursement of $60,000.00 plus accumulated interest arising out of a plea bargain with reference to the defendant, Carolyn S. McIntyre," and that the hearing was called "as a matter of courtesy to those who may have an interest in these funds." No sworn witnesses testified at this hearing, but various persons and their attorneys were permitted to make statements as to how the funds should be disbursed. At the conclusion of the hearing, the following order was entered:

"ORDER FOR DISBURSEMENT

In accordance with the judgment of the Honorable Kenneth A. Griffin, Presiding Judge, dated July 6, 1976, and upon his direct recommendation, the Clerk of Superior Court for Transylvania County, North Carolina, proposes and shall upon the approval of the Superior Court, at the expiration of the ten days noted for appeal, is to disburse the funds now on deposit and paid as part restitution by Carolyn S. McIntyre, defendant, to the following persons and in the sum set next to their names in their individual or fiduciary capacities as therein may appear in the Clerk's office of Transylvania County:

Payable to:	*In the sum of:*
Furman Reece	$ 8,324.92
U. G. Reeves	27,945.36
Ruby A. Smith	12,438.98
Robert F. Tharp	1,264.47
Robert F. Tharp, Jr.	3,158.15
Synthia A. Benjamin	3,357.80
Mary Elizabeth A. Bridges	1,367.32
Jones & Gravely	417.46
Bruce Patterson	48.40
Dent Harden	66.55
Rufus Ray Burgin	701.81
Mable Sharp	1,409.67
	$ 60,500.89

The above scheduled list of disbursement, has after investigation of myself, the District Attorney, to wit: M. Leonard Lowe, and the Honorable Kenneth A. Griffin, has been determined to be a fair equitable disbursement of the sums paid by the said defendant into the Clerk of Superior Court's office in Transylvania County by reasons of the criminal activities of Carolyn S. McIntyre.

This 21st day of October, 1976.

s/ MARIAN M. McMAHON
Clerk of Superior Court

The undersigned, after careful examination of the above and prior examination of the facts of these matters and prior to tender hereof, hereby gives its approval and consent to the above mentioned disbursement in the sums set out by the payees named at the said stated time.

This the 21st day of October, 1976.

s/ KENNETH A. GRIFFIN
Judge Presiding"

Some of the persons named as distributees in the foregoing order had not been named as owners of funds embezzled in any indictment returned against the defendant, Carolyn S. McIntyre, while other persons who had been so named, including her employer, John R. Hudson, Jr., were omitted from the list of distributees. To entry of the foregoing "Order for Disbursement," attorney John R. Hudson, Jr., excepted. To obtain review of the order, Hudson filed a petition for writ of certiorari with the Court of Appeals. This court granted the writ.

Attorney General Edmisten by Associate Attorney Patricia B. Hodulik for the State.

Bennett, Kelly & Cagle, P.A., by E. Glenn Kelly for petitioner, John R. Hudson, Jr.

PARKER, Judge.

[1] The initial question presented is whether the Clerk of Superior Court had jurisdiction to enter the order directing disbursement of the restitution funds which the defendant in this criminal proceeding had paid into court as result of a plea bargain. We hold that the Clerk did not have such jurisdiction.

Art. IV. § 12(3), of the Constitution of North Carolina contains the following:

> "The Clerks of the Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State."

G.S. 1-209 lists certain judgments which the Clerks of Superior Court are authorized to enter, but an order of the type here in question is not among those listed. Other statutes confer judicial power upon the Clerk as ex officio judge of probate and in respect of special proceedings and the administration of guardianships in trusts. We have found no statute which confers upon the Clerks of Superior Court any jurisdiction or power to order the manner in which restitution funds paid into court by a defendant in a criminal proceeding shall be disbursed. Absent such a statute, the Clerk of Superior Court had no jurisdiction to enter such an order in this case.

In fairness to the Clerk of Superior Court of Transylvania County, it should be noted that the record before us reveals that the "Order for Disbursement" dated 21 October 1976 which she signed in this case was dictated by Judge Griffin to the court reporter and was signed by the Clerk at Judge Griffin's request. In addition, Judge Griffin gave the Clerk's order his written "approval and consent." Judge Griffin, however, had no power to grant to the Clerk any jurisdiction or power which the General Assembly had not granted.

[2, 3] If the "Order for Disbursement" which was entered in this case be considered, under the peculiar circumstances of this case, as having actually been entered by the judge rather than by the Clerk, we still find no jurisdiction in the court for the entry of such an order in this criminal proceeding. It is true that, subject to the constitutional prohibition contained in Art. I, § 28, of our State Constitution against imprisonment for debt, except in cases of fraud, payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for suspension of sentence. *See State v. Caudle*, 276 N.C. 550, 173 S.E. 2d 778 (1970); *State v. Green*, 29 N.C. App. 574, 225 S.E. 2d 170 (1976). We hold that such a condition may also be a valid condition for acceptance of a plea bargain. Our Supreme Court has noted, however, in connection with payment of restitution as a condition for suspension of sentence, that

"[w]here restitution is ordered it must be to a specific aggrieved party and this party must be named in the judgment." *Shore v. Edmisten, Atty. General,* 290 N.C. 628, 638, 227 S.E. 2d 553, 561 (1976). This command would seem equally appropriate when restitution is ordered as result of a plea bargain. Failure to heed it when the judgment imposing sentence was entered in this case has resulted in the anomaly displayed in the present proceedings.

[4] In the present criminal case, final judgment sentencing the defendant was entered. That judgment ordered payment of restitution into the court but failed to specify to whom or in what amounts the funds should ultimately be disbursed. It is apparent that the funds are insufficient to make whole all of the victims of the defendant's criminal activities and that some equitable pro rations among the victims will be required. It is also apparent that there is some dispute among the several claimants as to the validity of some of the claims. Moreover, the amounts which the several claimants lost as result of defendant's criminal activities have never yet been judicially determined by a court having jurisdiction in proceedings in which all claimants were accorded due process notice and opportunity to be heard. The ultimate responsibility of John R. Hudson, Jr., to other claimants for any loss of funds entrusted to his care has not been determined. Under these circumstances, a civil action among the various claimants is the proper method by which distribution of the restitution fund can be adjudicated. *See State v. Earley,* 24 N.C. App. 387, 210 S.E. 2d 541 (1975).

For lack of jurisdiction, the order entered in the criminal action on 21 October 1976 which directed distribution of the restitution funds must be vacated and the present proceeding dismissed.

Order vacated.

Proceeding dismissed.

Judges MARTIN and ARNOLD concur.

BIG BEAR OF NORTH CAROLINA, INC., BELK-BECK CO., COLONIAL STORES, INC., K & W CAFETERIA, INC., ROSE'S STORES, INC., WINN-DIXIE FOOD STORES, INC., WAGNER TIRE SERVICE, INC. AND S. S. KRESGE CO. v. THE CITY OF HIGH POINT, NORTH CAROLINA

No. 7618SC921

(Filed 6 July 1977)

Money Received § 2; Municipal Corporations § 37— fee for garbage collection — unconstitutional ordinance — recovery of fees paid

Payments by plaintiffs to a municipality for garbage collection pursuant to an unconstitutional ordinance and regulation which required plaintiffs to provide dumpster boxes and to pay to have the dumpsters serviced under threat of discontinuance of service were involuntary, and plaintiffs are entitled to recover the fees so paid.

APPEAL by plaintiffs from *Rousseau, Judge.* Judgment entered 25 October 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 7 June 1977.

Pursuant to G.S. 1A-1, Rule 23(a), the plaintiffs brought this class action against the City of High Point (the City) to recover money paid to the City for collecting garbage. The facts are stipulated and show the following: Prior to 21 January 1971, the City collected the plaintiffs' trash and garbage. Plaintiffs provided their own large rectangular metal receptacles ("dumpster boxes"), but the City did not charge the plaintiffs anything for this service. Effective 21 January 1971 the City enacted a new ordinance which said:

"Sec. 10-6. Same—Establishments to provide an approved covered box.

"(a) The director of public works is authorized to determine the type, size, number and location of containers for the collection of garbage, trash, waste or other refuse, and the failure to comply with the director of public works' instructions as to same shall result in discontinuance of garbage, waste or trash collection service.

"(b) All persons, firms or corporations, except single family residences, apartments and public schools, desiring or required by the director of public works to have dumpster boxes shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced, said fee shall be billed monthly,

and failure to pay the bill within ten (10) days shall result in a discontinuance of service."

Pursuant to his authority under Sec. 10-6(a) the City's director of public works promulgated a regulation which required that all persons, firms and corporations which generate more solid waste than can be adequately handled by three thirty-gallon garbage containers serviced twice a week *(i.e.,* which generate more than 180 gallons of solid waste a week) and which are located on the City's dumpster service routes *must* provide themselves with dumpster boxes.

Plaintiffs generate more than 180 gallons of solid waste each week and are on the City's dumpster service routes. Therefore, since 21 January 1971 the plaintiffs have been required to provide dumpster boxes and pay to have them serviced. Failure either to provide dumpster boxes or to pay for the collection service would result in loss of all garbage removal by the City. The record does not show whether private companies collect garbage in the City of High Point.

When the City enacted the ordinance, the plaintiffs protested, saying that it was unconstitutional because, among other reasons, it delegated unrestricted authority to the director of public works to determine who would have to use dumpster boxes and, therefore, have to pay for garbage and trash collection. From the time the ordinance was enacted until 7 August 1971, the plaintiffs refused to pay the service charge. On that date the City discontinued service. On August 9 the plaintiffs, under protest, paid all past due fees, and the City resumed collection. Plaintiffs have continued to pay, and the City has continued to service the dumpsters. To date the plaintiffs have paid more than $55,000 in fees to the City.

On 19 January 1972 the plaintiffs filed suit against the City seeking to have Sec. 10-6 of the Code of Ordinances declared unconstitutional. Judgment was entered 24 November 1975 on the stipulated facts set forth above. All of Sec. 10-6(a) plus the clause in Sec. 10-6(b) which reads " . . . or required by the director of public works . . . , " were declared unconstitutional. The City elected not to appeal this decision. The issue of damages was severed and deferred for a future trial.

On 25 October 1975, the court entered judgment on the question of damages. The judgment provides, in pertinent part:

"FINDINGS OF FACT

"1. Prior to January 21, 1971, the Plaintiffs voluntarily purchased and provided 'dumpster boxes', which the City of High Point serviced free of charge.

"2. [The constitutionally valid part of Section 10-6(b)] reads as follows:

> (b) All persons, firms or corporations, except single family residences, apartments and public schools, desiring to have dumpster boxes shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced, said fee shall be billed monthly and failure to pay the bill within ten (10) days shall result in a discontinuance of service.

"3. The fees paid by the Plaintiffs are reasonable.

"4. Plaintiffs desired the dumpster service by the City of High Point.

"CONCLUSIONS OF LAW

"1. [Section 10-6(b) is constitutionally valid.]

"2. Payments by Plaintiffs to Defendant of dumpster box service charges under the amended ordinance (Chapter 10, Article I, Section 10-6(b)) were valid.

"3. Plaintiffs have failed to establish that they were *required* under the invalid provision of the ordinance to have dumpster boxes.

"4. Plaintiffs have not shown that they ever requested the City not to service their boxes which they could have done under Chapter 10, Article I, Section 10-2 of the Code of Ordinances of the City of High Point.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

"1. That this action be dismissed."

From this judgment the plaintiffs appeal.

Morgan, Byerly, Post, Herring & Keziah, by W. B. Byerly, Jr., for plaintiff appellants.

Knox Walker for defendant appellee.

ARNOLD, Judge.

Plaintiffs assign error to the findings of fact and conclusions of law by the trial court. They argue that payments for collection of trash and garbage were under such compulsion or coercion as to make the payments involuntary. The City's position is that since plaintiffs had voluntarily purchased the dumpster boxes prior to enactment of the ordinance the only involuntary act by plaintiffs was the payment of the fees, and that the portion of the ordinance requiring payment of fees for dumpster services was not found to be invalid.

As a general rule one, who, because he is coerced, pays money which he does not owe, may recover it. *Bradsher v. Morton,* 249 N.C. 236, 106 S.E. 2d 217 (1958); 5 Strong's N. C. Index 2d, Money Received § 1 (1968). However, money paid voluntarily and with full knowledge of the facts cannot be recovered even where there is no debt. *Thompson v. Shoemaker,* 7 N.C. App. 687, 173 S.E. 2d 627 (1970).

Plaintiffs cite no North Carolina cases which permit recovery from a municipality of unowed money paid to it under threat of discontinuance of a service, such as trash collection. However, there is authority from other jurisdictions which supports the recovery of such money. *Bettini v. City of Las Cruces,* 82 N.M. 633, 485 P. 2d 967 (1971); *City of Chicago v. Northwestern Mut. Life Ins. Co.,* 218 Ill. 40, 75 N.E. 803 (1905); *St. Louis Brewing Ass'n v. City of St. Louis,* 140 Mo. 419, 37 S.W. 525 (1896); Cf. *Farrell v. Ward,* 53 A. 2d 46 (D.C. 1947). There is also some support for this principle in North Carolina cases which permit unlawful taxes to be recovered if they were paid involuntarily and under protest. G.S. 105-267; *Middleton v. R. R.,* 224 N.C. 309, 30 S.E. 2d 42 (1944); *Blackwell v. Gastonia,* 181 N.C. 378, 107 S.E. 218 (1921). We see no material difference between taxes levied to fund general governmental operations and fees charged to provide compensation for a particular important municipal service, such as trash and garbage collection.

Evidence does not support Finding of Fact No. 4 that plaintiffs "desired the dumpster service by the City of High

Point." The term "desired" was obviously used by the court in the context of Sec. 10-6(b) of the City Ordinance that those " . . . desiring to have dumpster boxes shall pay a fee . . . " for collection. However, an examination of the original ordinance reveals that "desiring" is a participle which modifies a group of persons, firms or corporations who "shall pay a fee of four dollars ($4.00) each time the dumpster box is serviced." Such persons, firms or corporations could desire a dumpster box as a trash receptacle and still not desire the City's "dumpster box service." More importantly, plaintiffs were among those who were *required* by the invalid ordinance and regulation to have dumpster boxes. It is irrelevant that prior to 21 January 1971 the plaintiffs voluntarily used the boxes (Finding of Fact No. 1) because prior to that time the City charged no fee to service the dumpster boxes.

Since the evidence fails to support Finding of Fact No. 4 there is no support for the trial court's Conclusion of Law No. 3 that "[P]laintiffs have failed to establish that they were required under the invalid provisions of the ordinance to have dumpster boxes." Plaintiffs in fact were required by Sec. 10-6(a) and the regulation thereunder to have dumpster boxes, and, according to the record, after 21 January 1971 plaintiffs did not desire the City's dumpster service for which they had to pay a fee. The facts are that plaintiffs desired the service as it was furnished, without a fee, prior to enactment of the ordinance.

The court's Conclusion No. 4 that plaintiffs failed to show that they requested the City not to service the boxes, as plaintiffs could have done under another section of the ordinance, misses the point. While the record is silent here, it can be presumed that plaintiffs could have hauled away their own trash, or contracted with someone else to haul it away. However, if it was coercion for the City to force plaintiffs to pay the City fees under color of an unconstitutional ordinance, then it also would be coercion for the City, by discontinuing service, or threatening to discontinue service, to force plaintiffs to pay the extra cost to a private contractor, or increase their own cost, when but for the unconstitutional ordinance the City would have performed the service at no extra cost to plaintiffs.

For reasons already stated, Conclusion No. 2 that payments made by plaintiffs to the City were valid cannot be

supported. These payments were involuntary and can be recovered by plaintiffs. Judgment is reversed, and the case is remanded to Superior Court of Guilford County for entry of judgment in favor of plaintiffs.

Reversed and remanded.

Judges BRITT and VAUGHN concur.

VINCENT E. MASON, AND WIFE, CAROLYN K. MASON v. ROBERT L. ANDERSEN, AND WIFE, MARY S. ANDERSEN; LAKE FOREST ASSOCIATION, INC.

No. 7615SC952

(Filed 6 July 1977)

Deeds § 22— conveyance subject to restrictions — no easement conveyed — no breach of covenant of seisin

Language in a deed from defendants to plaintiffs that "This conveyance is made and accepted subject to restrictive and protective covenants recorded in Book 174, Page 256, Orange County Registry" did not purport to convey the easement for use of a lake created by paragraph 13 of that document, since the deed was delivered subject to *restrictions*, not *easements*, and the privilege of using the lake was in no sense a restriction on the land in question and could not have been conveyed by a deed using the word "restrictions."

APPEAL by plaintiffs from *McLelland, Judge*. Judgment entered 16 June 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 June 1977.

The facts in this case are undisputed. On 13 September 1971 the Andersens, defendants, sold a lot of land to the Masons, plaintiffs. The lot was described as Lot 5, Block A, Section 11, Lake Forest Estates. It was conveyed by a warranty deed with full warranty of seisin and warranty against encumbrances, and in the space following the granting clause and the description of the land conveyed, and before the habendum clause, the following appeared:

"This deed is delivered and accepted subject to those restrictions which are recorded in Book 174, at Page 256, Orange County Registry."

In Book 174 of the Orange County Registry, beginning at page 256, appears an untitled document which says, in pertinent part:

"KNOW ALL MEN BY THESE PRESENTS:

"That whereas, Mortgage-Insurance Corporation, a North Carolina Corporation with its principal office and place of business in the City of Burlington, Alamance County, North Carolina, is the owner of the following described real property:

> A certain tract . . . in Chapel Hill Township . . . being all of that property shown on plat entitled 'Lake Forest Estates, Section III' . . . recorded in the office of the Register of Deeds for Orange County, North Carolina, in Plat Book 8, at page 70.

"And whereas, the owner has heretofore caused a plan of said land to be made, dividing the same into lots and streets and intends to convey said lands subject to restrictions and conditions affecting the use and occupancy of same;

"NOW, THEREFORE, the said Mortgage-Insurance Corporation, owner of the above described property, does hereby establish the following restrictions and conditions upon said land:

[There follow nine numbered paragraphs establishing many of the restrictive covenants common to residential housing subdivisions: *e.g.*, lots shall not be used except for residential purposes; no residence shall be built on less than one lot; no swine shall be kept on the premises, etc. Then come]

"10. It is expressly understood and agreed between the owners of Lake Forest Estates, Section Three (3) and all subsequent purchasers of lots therein that all conveyances of lots of Lake Forest Estate, Section Three (3) are made subject to the foregoing covenants, conditions and restrictions . . . and shall be covenants running with the land and binding upon all parties buying lots in Lake Forest Estates, Section three (3) . . . .

"11. . . . the owners of property in Lake Forest Estates, Section Three (3), and their heirs, successors or assigns, may enforce the above restrictive covenants . . . .

"12. Invalidation of any one of these covenants by judgment or court order shall in no wise affect any of the other provisions . . . .

"13. The grantor herein reserves unto itself, its successors and assigns, the fee in Lake Forest and all water rights incident thereto, and the grantee specifically acknowledges that grantor is and shall remain the absolute owner thereof. The grantee herein, however, as an appurtenance to the lot herein conveyed, shall have and is hereby given the privilege of fishing, swimming and boating in Lake Forest [subject to certain limitations and conditions concerning assumption of risk and the range of permissible activities.]"

The Masons, at the time they purchased the lot in question from the Andersens, believed that they were purchasing the privilege of using Lake Forest in accordance with paragraph 13 set forth above. In fact, the Masons do not have the privilege of using Lake Forest. Only those landowners whose lots lie in Lake Forest Estates, Section 3, and whose title derives from Mortgage-Insurance Corporation have the privilege of using Lake Forest. The Masons' land lies in Section 11, not Section 3, of Lake Forest Estates, and their chain of title does not devolve from Mortgage-Insurance Corporation. Therefore, the Masons have been denied all access to Lake Forest.

On 26 November 1975, the Masons brought this action alleging that the Andersens breached their covenant of seisin in that they purported to convey as appurtenant to their land, an easement which they did not own, to wit: an easement purportedly entitling the Masons to the privilege of using Lake Forest. The Masons further alleged that they were damaged by this breach because their land was less valuable than it would have been with this easement. Both parties moved for summary judgment, and it was granted in favor of the Andersens. The Masons appealed. (The plaintiffs do not appeal from summary judgment entered in favor of Lake Forest Association, Inc., the corporation which presently holds title to Lake Forest in trust for its members.)

Charles G. Beemer for plaintiff appellants.

Midgette, Page & Higgins, by Keith D. Lembo, for defendant appellees.

ARNOLD, Judge.

The question presented by this appeal is whether the language in the Masons' deed, "This deed is delivered and accepted subject to those restrictions which are recorded in Book 174, at page 256, Orange County Registry," purports to convey an easement to plaintiffs. Plaintiffs argue that an easement is conveyed and that defendants have broken their covenant of seisin because they failed to convey the full estate described in the deed. We disagree with plaintiffs and affirm summary judgment for defendants.

G.S. 1A-1, Rule 56(c) provides:

> " . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law . . . . "

The indisputable facts raise a question of law in the case at bar, i.e., whether the deed conveys an easement. Since there are no disputes as to material facts summary judgment is the proper procedure to reach final judgment.

A deed is to be construed by the court, and the meaning of its terms is a question of law, not of fact. *Brown v. Hodges*, 232 N.C. 537, 61 S.E. 2d 603 (1950), *reh. den.* 233 N.C. 617, 65 S.E. 2d 144 (1951). When the language used has a clear legal meaning there is not even room for construction; the only question is that of determining the applicable law. *Strickland v. Jackson*, 259 N.C. 81, 130 S.E. 2d 22 (1963). In the present case the language used in the deed does not purport to convey from the Andersens to the Masons an easement entitling the landowner to use Lake Forest. The deed states only that it is " . . . delivered and accepted subject to those *restrictions* which are recorded in Book 174, at Page 256, Orange County Registry [emphasis added]." A "restriction" as the word is used here is not any kind of "easement." "An easement is a right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E. 2d 449 (1972). The land benefited is known as dominant land; that burdened is servient. Thus, while an easement might be a restriction on the servient land, it is in no sense a

restriction on the dominent land. In the present case, the land sold by the Andersens to the Masons was " . . . *subject to* those restrictions . . . [emphasis added]." In other words, by the terms used in the deed it was the servient land. Yet, manifestly, if the Masons had received as part of their estate in the land the privilege of using Lake Forest, their land would have been benefited not burdened; it would have been dominant, not servient. Thus, as a matter of law, the privilege to use Lake Forest was in no sense a "restriction" on the Andersen-Mason land and could not have been conveyed by a deed using the word "restrictions."

The instrument appearing in Book 174, at page 256, of the Orange County Registry, and incorporated by reference in the Masons' deed, does not use the word "restrictions" to describe the privilege, or easement, created therein to use Lake Forest. It refers " . . . to the following restrictions and conditions upon said lands," and thereafter nine paragraphs set forth limitations which could only be meaningfully described as restrictions. Next are two paragraphs which refer respectively to " . . . the foregoing covenants, conditions or restrictions . . . " and " . . . the above restrictive covenants. . . . " Next follows a single paragraph which refers to " . . . these covenants . . . , " and finally paragraph thirteen conveys the easement in Lake Forest. That paragraph speaks of "the privilege" which is " . . . an appurtenance to the lot conveyed. . . . "

By incorporating the document in Book 174, page 256, of the Orange County Registry there was an obvious attempt to impose the same restrictive covenants on the plaintiffs' property as existed on adjoining property. The restrictions referred to in plaintiffs' deed are those referred to in the first nine paragraphs of the incorporated document. However, the privilege created in paragraph thirteen is an entirely different animal, not imposed, and not conveyed in plaintiffs' deed.

Moreover, the words "This deed is delivered and accepted subject to those restrictions . . . , " are not words of transfer or conveyance. Therefore, the Masons' deed purports to give them nothing more than the fee simple described in its granting and habendum clauses. Since that fee was, in fact, conveyed, the covenant of seisin was not broken.

The Masons' deed purports to convey a fee simple in the described land, subject to certain restrictive covenants. It does

not purport to convey the privilege, or easement, entitling them to use Lake Forest. Summary judgment is

Affirmed.

Judges BRITT and VAUGHN concur.

HENRY G. GRABOWSKI AND WIFE, VIRGINIA M. GRABOWSKI v. PAUL A. DRESSER, JR., AND WIFE, JUDITH S. DRESSER AND LAKE FOREST ASSOCIATION, INC.

No. 7615SC953

(Filed 6 July 1977)

APPEAL by plaintiffs from *McLelland, Judge.* Judgment entered 16 June 1976 in Superior Court, ORANGE County. Heard in the Court of Appeals 9 June 1977.

Oral argument in this case was consolidated with that in *Mason v. Andersen,* No. 7615SC952, (opinion filed 6 July 1977) and the two cases were heard at the same time. The questions presented for review in both cases are almost identical and the facts are substantially the same.

By warranty deed dated 1 August 1974, recorded 16 August 1974, defendants Dresser conveyed to plaintiffs a parcel of land described by courses and distances and further identified as Lot No. 9, Section XI, of Lake Forest Estates as shown on a map recorded in Orange County Registry in Plat Book 19, at Page 44. The deed is on a printed form and contains full warranty of seisin and warranty against encumbrances. Immediately below the description of the property and above the habendum clause, the deed contains the following provision: "This conveyance is made and accepted subject to restrictive and protective covenants recorded in Book 174, Page 256, Orange County Registry."

The document recorded in Orange County Registry in Book 174, Page 256, and containing the restrictive covenants referred to above, is set forth in pertinent part in the opinion in the companion case of *Mason v. Andersen, supra,* and will not be re-

stated in full here. Paragraph 13 of the document reads as follows:

> "13. The grantor herein reserves unto itself, its successors and assigns, the fee in Lake Forest and all water rights incident thereto, and the grantee specifically acknowledges that grantor is and shall remain the absolute owner thereof. The grantee herein, however, as an appurtenance to the lot herein conveyed, shall have and is hereby given the privilege of fishing, swimming and boating in Lake Forest, [subject to certain limitations and conditions concerning assumption of risk and the range of permissible activities] . . . . "

Plaintiffs allege that at the time they purchased the property from defendants Dresser, they believed that they were getting the privilege of using Lake Forest in accordance with paragraph 13 set forth above. In fact, plaintiffs do not have the privilege of using Lake Forest as only those landowners whose lots lie in Lake Forest Estates, Section 3, and whose title derives from Mortgage-Insurance Corporation, have the privilege of using Lake Forest. Plaintiffs' lot is located in Section XI, not Section 3, of Lake Forest Estates and their title does not devolve from Mortgage-Insurance Corporation. Plaintiffs have been denied all access to Lake Forest.

On 2 January 1976 plaintiffs brought this action, alleging in their first cause of action that defendants Dresser breached their covenant of seisin in that they purported to convey, as appurtenant to their land, an easement granting to plaintiffs the privilege of using Lake Forest. In their second cause of action, plaintiffs allege that defendants Dresser orally misrepresented that said property was in Lake Forest Estates and that the owners would be members of Lake Forest Association and therefore have access to the lake. In both causes of action plaintiffs allege that they have been damaged by a loss in value of their investment and by a loss in recreational benefits and enjoyment.

Defendants Dresser made several Rule 12 motions and plaintiffs moved for summary judgment. The trial judge granted summary judgment for defendants Dresser as to plaintiffs' first cause of action and denied summary judgment as to their second cause of action. (Plaintiffs have not appealed from summary judgment entered in favor of Lake Forest As-

sociation, Inc.) From the order of summary judgment entered in favor of defendants Dresser as to their first cause of action, plaintiffs have appealed.

Charles G. Beemer for plaintiff appellant.

Midgette, Page & Higgins, by Keith D. Lembo, for defendant appellees.

BRITT, Judge.

The question presented on appeal is whether the language in plaintiffs' deed that, "This conveyance is made and accepted subject to restrictive and protective covenants recorded in Book 174, Page 256, Orange County Registry" purports to convey the easement created by paragraph 13 of that document. For the reasons stated in the companion case of *Mason v. Andersen, supra,* we hold that the deed did not purport to convey such easement and that summary judgment was properly entered in favor of defendants Dresser.

The question of the propriety of the denial of summary judgment as to plaintiffs' second cause of action relating to alleged oral misrepresentations by defendants Dresser is not presented, therefore, we do not pass upon that question.

The order appealed from is

Affirmed.

Judges VAUGHN and ARNOLD concur.

ANTHONY GAINES, EMPLOYEE v. L. D. SWAIN & SON, INC., EMPLOYER; RELIANCE INSURANCE COMPANY, CARRIER

No. 7614IC922

(Filed 6 July 1977)

Master and Servant § 94— workmen's compensation — insufficient finding of facts by Industrial Commission

In an action to recover compensation for an alleged injury by accident arising out of and in the course of plaintiff's employment, findings of fact were insufficient to support the order of the Industrial Commission that plaintiff's hearing loss did not result from use

of a jackhammer on a construction job, and hence was not an injury by accident arising out of and in the course of employment, where such findings consisted only of a recitation of an expert witness's testimony.

APPEAL by plaintiff from opinion of the North Carolina Industrial Commission filed 28 June 1976. Heard in the Court of Appeals 7 June 1977.

Plaintiff seeks compensation from his employer, L. D. Swain & Son, Inc., and Reliance Insurance Company, the employer's compensation carrier, for an alleged injury by accident arising out of and in the course of his employment.

The parties stipulated that at the time of the alleged injury by accident the parties were subject to the provisions of the Workmen's Compensation Act and that the employer-employee relationship existed between plaintiff and defendant employer at such time.

Plaintiff's testimony tends to show: On 8 May 1974 he was working for defendant employer in the operation of an air drill. He and Mr. L. D. Swain were handling the air drill together as they bored holes in a wall at tabletop height. The room they were working in was approximately thirty feet by fifty feet. Plaintiff asked his employer for earplugs but was given none; he operated the air drill practically all day. He suffered a sudden hearing loss after operating the air drill and went to the doctor the next morning. He had not had any hearing trouble prior to 8 May 1974.

A clinical audiologist, who was stipulated to be an expert in measuring hearing loss, testified that based on the report of the tests given plaintiff on 11 and 25 June 1974, in his opinion plaintiff had a bilateral severe hearing loss which was recent. The report stated that plaintiff's hearing loss was evidence of a "phenomenon associated with cochlear damage and frequently with noise trauma." Plaintiff's father testified that plaintiff had no hearing problem prior to 8 May 1974.

Defendants presented the testimony of L. D. Swain who stated that he operated the air drill with plaintiff on the date in question; that they would operate the drill for about a minute or minute and one-half and then move to the next hole; that they operated the drill for "approximately twenty minutes all totaled"; that plaintiff did not ask him for earplugs nor had

he asked for any plugs or protectors the only other time that they had used an air drill or air hammer; and that previously he had asked plaintiff to get his hearing checked because his hearing problem was noticeable.

Two other employees testified that plaintiff had hearing trouble prior to the incident in question. Neither of them heard plaintiff ask for earplugs on that date.

The deposition of Doctor Frank Wardar was also introduced into evidence. Dr. Wardar is an ortalarygolist (ear, nose and throat specialist) with extensive medical experience and training. He testified that he examined plaintiff on 9 May 1974 at McPherson Hospital but the test results were not reliable; that this was not unusual in recent hearing losses of a severe nature; that plaintiff's hearing was further tested on 23 May 1974 and 6 June 1974 with these tests indicating a hearing loss in both ears at the three frequencies tested; that plaintiff was tested by the audiologist on 11 June 1974 and Dr. Wardar felt that all three tests showed consistent responses and were almost identical; that plaintiff was instructed to avoid further exposure to noise levels exceeding ninety decibels; that plaintiff was tested again on 19 April 1975 and the test showed a further hearing loss during the intervening period.

In response to a hypothetical question, Dr. Wardar testified that in his opinion plaintiff's hearing loss could not have been caused by the operation of the jackhammer on 8 May 1974. Based on a review of medical literature, his own experience and discussions with his colleagues at Duke, Dr. Wardar testified that industrial noise levels of the type in question do not cause sudden bilateral hearing loss but cause gradual losses of hearing, normally beginning at high frequencies only and leveling off 30 to 60 days after the person has been exposed to the excessive noise. Plaintiff's sudden bilateral loss of hearing in all frequencies and continued loss of hearing followed removal of the excessive noise indicated to Dr. Wardar that plaintiff's hearing loss was caused by a metabolic process, either viral or based on other etiologies. Dr. Warder stated that hearing losses in younger persons such as plaintiff were usually due to viral illnesses and although plaintiff exhibited no signs or symptoms of viral illness, this was often the case.

Deputy Commissioner Denson purported to find facts in accordance with Dr. Wardar's opinion and concluded that plain-

tiff sustained neither an injury by accident nor an occupational disease within the meaning of the Workmen's Compensation Act. Plaintiff appealed to the Full Commission which ordered the case reset to permit both parties to present further evidence as to the causal relationship between plaintiff's alleged injury by accident and his hearing loss.

Plaintiff submitted the additional testimony of Margaret G. Wiseman, who was qualified as an expert audiologist trained in the therapy of individuals having impaired hearing. She testified that she saw plaintiff on 25 June 1974 and he complained that he had a sudden hearing loss after using a jackhammer on a construction job. The tests administered by her indicated that plaintiff had a bilateral moderately severe sensorineural hearing loss and that his poor discrimination scores were frequently associated with cochlear damage and with noise trauma.

The Full Commission received this further testimony along with the previous testimony of record and thereafter affirmed and adopted as its own the opinion and award of Deputy Commissioner Denson. From this determination, plaintiff appealed.

Pearson, Malone, Johnson, DeJarmon and Spaulding, by W. G. Pearson II and T. Mdodana Ringer, Jr., for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon, by O. William Faison, Jr., and Lewis A. Cheek, for defendant appellee.

BRITT, Judge.

Plaintiff contends that the Industrial Commission erred in finding and concluding that he did not sustain an injury by accident nor an occupational disease within the meaning of the Workmen's Compensation Act. We do not reach the question stated at this time.

On appeal from an order of the Industrial Commission the jurisdiction of the courts is limited to the questions of law whether there was competent evidence before the commission to support its findings of fact and whether such findings justify the legal conclusions and decision of the commission. *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950), *Snead v. Mills, Inc.*, 8 N.C. App. 447, 174 S.E. 2d 699 (1970). It is also settled that the findings of the Industrial Commission are

conclusive on appeal when supported by competent evidence even though there is evidence that would have supported findings to the contrary. G.S. 97-86, *Hales v. Construction Co.*, 5 N.C. App. 564, 169 S.E. 2d 24 (1969).

While the commission is not required to make findings as to each fact presented by the evidence, it is required to make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends. *Smith v. Construction Co.*, 27 N.C. App. 286, 218 S.E. 2d 717 (1975). If the findings of fact of the commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded to the commission for proper findings of fact. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948). As stated in *Thomason v. Cab Co.*, 235 N.C. 602, 605-6, 70 S.E. 2d 706, 709 (1952):

> "The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. . . . It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend."

In the case *sub judice*, we think the commission failed to make sufficient findings of fact to support its order. The crucial "findings" made by the commission are mere recitals of the evidence and are not sufficiently positive and specific to enable this court to judge the propriety of the order. *Thomason v. Cab Co., supra.*

In findings of fact numbered 6 and 7, the commission found:

> "6. Dr. Wardar is of the opinion that the operation of the drill on May 8, 1974, under the circumstances could not have caused a sudden bilateral onset of hearing loss preceding the McPherson tests on May 9, 1974. Further, based on the test results and the relation of sudden onset

of bilateral hearing loss on May 8, 1974 by plaintiff Dr. Wardar is of the opinion that plaintiff's hearing loss is more likely not based on exposure to loud noise, specifically the use of the air drill. In cases where industrial loud noise is the cause for hearing loss, typically the hearing loss extends over a long period of time with the loss being gradual in onset and once the patient is removed from the high noise level, the patient's hearing tends to stabilize. Plaintiff was removed from his employment environment since he has not worked from May 9, 1974, but his hearing continued to decline.

"7. Dr. Wardar thinks it more likely that plaintiff's hearing loss was due to a viral illness although there was no evidence of such viral illness upon medical examination; suffice to say that the doctor's opinion is that plaintiff's hearing loss is not due to the exposure to noise in the employment on May 8, 1974."

These are not appropriate *findings of fact.* Obviously, the expert testimony was crucial to a proper determination, particularly as to any causal relationship between plaintiff's alleged injury by accident and his employment. However, the *recitation* of Dr. Wardar's *opinion* is not sufficient in this case.

Finding of fact number 7 states that Dr. Wardar thinks it is more likely that plaintiff's hearing was due to a viral illness. We fail to perceive how this can constitute a positive finding to support the commission's determination. Although medical testimony is oftentimes less than precise, the commission must do more than recite the expert's opinion.

The crucial finding necessary to determine the rights of these parties is whether plaintiff's loss of hearing was caused by the operation of the jackhammer. The necessary conclusion based on this finding would be whether this was an injury by accident arising out of and in the course of employment. The only determinative "finding of fact" in this instance is "suffice to say that the doctor's opinion is that plaintiff's hearing loss is not due to the exposure to noise in the employment on May 8, 1974." We hold that this finding is insufficient to support the commission's conclusion of law.

Furthermore, we note that in finding of fact number 3, the commission found that "[t]he record is devoid of evidence as

to exactly how long the air drill was being used." Mr. Swain testified that "we ran the drill for approximately twenty minutes all totaled." The finding was not based on evidence.

For failure of the commission to make sufficient findings of fact to support its conclusions of law, the opinion appealed from is vacated and this cause is remanded to the Industrial Commission for proper findings of fact, conclusions of law and determination of the rights of the parties. *Allred v. Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E. 2d 879 (1977).

Vacated and remanded.

Judges VAUGHN and ARNOLD concur.

DORIS SEYMOUR FRYE AND WILLIAM L. FRYE v. MALCUM DUGLAS WILES AND ALTERMAN TRANSPORTATION LINES, INC.

No. 768SC937

(Filed 6 July 1977)

1. **Rules of Civil Procedure § 55— setting aside entry of default**

All that needs to be shown to set aside an entry of default is good cause, and the determination of whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge. G.S. 1A-1, Rule 55(d).

2. **Negligence § 44— consistency of verdict**

A jury verdict was not inconsistent in finding that defendant driver's negligence was not the proximate cause of feme plaintiff's personal injuries and that it was the proximate cause of damage to the male plaintiff's vehicle which the feme plaintiff was driving; nor was the verdict inconsistent in failing to answer an issue as to contributory negligence of the feme plaintiff and finding that contributory negligence by the feme plaintiff was imputed to the male plaintiff.

APPEAL by plaintiffs from *Webb, Judge.* Judgment entered 11 June 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 8 June 1977.

This appeal involves an action brought by Doris and William Frye, husband and wife, against Alterman Transportation Lines, Inc. and its employee, Malcum Wiles. The complaint was

filed in September 1973 and in it the plaintiffs alleged that Doris Frye suffered personal damages and William Frye sustained property damages to his automobile as a result of defendant Wiles's negligence in a collision between the truck he was driving for defendant Alterman and the vehicle driven by Mrs. Frye.

By an order entered on 8 March 1975, plaintiffs obtained an entry of default against defendants. On 2 April 1975, defendants filed a motion and affidavit to set aside the entry of default. After a hearing on the motion, the entry of default was set aside pursuant to G.S. 1A-1, Rule 55(d) and an order was entered to that effect on 5 May 1975.

The case was finally tried in June 1976. Plaintiffs offered evidence at the trial which tended to show the following: On 20 December 1972, Doris Frye was driving west on U. S. Highway 70 near Goldsboro in a car owned by her husband, William Frye. Defendant Wiles was also driving west on Highway 70, which is a dual-lane road. Mrs. Frye and Wiles were both in the left westbound lane and Wiles was in the front vehicle. Mrs. Frye blew her horn, pulled into the right lane, and began passing Wiles. Just as she reached Wiles's front bumper, he moved over into the right lane and his front bumper struck Mrs. Frye's left rear bumper. Wiles did not give a turn signal before moving into the right lane. Plaintiffs' car was thrown into the median and Mrs. Frye suffered personal injuries.

Defendants offered evidence tending to show that Wiles never heard Mrs. Frye blow her horn before the collision occurred and, moreover, he never heard her car at all. He gave a right turn signal before pulling into the right lane and he did not see plaintiffs' vehicle until the moment of impact. After the collision, plaintiffs' car was not thrown into the median but merely went onto the right shoulder, returned to the right lane, and slowly came to a halt.

The jury found that Mrs. Frye was not injured by Wiles's negligence; that Mr. Frye's property was damaged by Wiles's negligence; that Mrs. Frye's contributory negligence was imputed to Mr. Frye; and that Mr. Frye was not entitled to any recovery.

Plaintiffs appealed.

E. C. Thompson III for the plaintiffs.

Freeman & Edwards, by George K. Freeman, Jr., for the defendants.

MARTIN, Judge.

Plaintiffs have grouped their three assignments of error into two arguments in their brief. In the first argument they contend that the trial court committed reversible error by allowing defendants' motion to set aside entry of default against defendants. We disagree.

[1] In setting aside an entry of default, as opposed to a default judgment, a showing of excusable neglect is not necessary. *Acoustical Co. v. Cisne and Associates*, 25 N.C. App. 114, 212 S.E. 2d 402 (1975). Under G.S. 1A-1, Rule 55(d), all that needs to be shown to set aside an entry of default is good cause. *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55 (1972). The determination as to whether good cause exists to vacate an entry of default is addressed to the sound discretion of the trial judge. *Crotts v. Pawn Shop, supra.* The judge's exercise of that discretion will not be disturbed on appeal unless a clear abuse of discretion is shown. *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). In the case at bar, the court determined that there was good cause to set aside the entry of default and the plaintiffs have failed to show any abuse of discretion in the making of this determination.

[2] By their second argument, plaintiffs contend that the trial court committed reversible error by denying their motion to set aside the verdict as against the weight of the evidence. In making this argument, the plaintiffs direct our attention to what they consider to be inconsistencies in the verdict. We disagree.

The issues presented to the jury and the answers given by the jury are set forth in the record as follows:

> "1. Was the plaintiff, Doris Seymour Frye, injured and damaged by the negligence of the defendant, Malcum Duglas Wiles, as alleged in the complaint?
>
> ANSWER: No.
>
> 2. Was the property of the plaintiff, William L. Frye, damaged by the negligence of the defendant, Malcum Duglas Wiles, as alleged in the complaint?

ANSWER: Yes.

3. Did the plaintiff, Doris Seymour Frye, by her own negligence contribute to her injuries as alleged in the answer?

ANSWER: _____

4. If so, was the contributory negligence of the plaintiff, Doris Seymour Frye, imputed to the plaintiff, William L. Frye?

ANSWER: Yes.

5. What amount of damages, if any, is the plaintiff, Doris Seymour Frye, entitled to recover of the defendants?

ANSWER: _____

6. What amount of damages, if any, is the plaintiff, William L. Frye, entitled to recover of the defendants?

ANSWER: None."

The jury thus found that defendant Wiles's negligence caused the damage to plaintiff William Frye's vehicle but did not cause the injuries to Mrs. Frye. The plaintiffs point to this as the first inconsistency in the jury's verdict. We, however, have no problems with this part of the verdict. Even if it is conceded that defendant Wiles was negligent, Mrs. Frye still could not recover against him unless it was also shown that his negligence proximately caused the injuries of which she complained. The trial judge properly instructed the jury concerning this proximate cause requirement. By construing the verdict with reference to the pleadings, the evidence, and the charge, it is clear that the jury verdict was consistent. *Nicholson v. Dean*, 267 N.C. 375, 148 S.E. 2d 247 (1966). The evidence in this case was not complicated. It just failed to convince the jury that defendant Wiles's negligence was the proximate cause of Mrs. Frye's injuries.

The plaintiffs point to yet another alleged inconsistency in the jury verdict. The jury did not answer the third issue as to Mrs. Frye's contributory negligence but nevertheless answered the fourth issue "If so, was the contributory negligence of the plaintiff Doris Seymour Frye, imputed to the plaintiff William L. Frye" in the affirmative. Although it is clear that

the fourth issue was poorly drawn and could have included separate issues of contributory negligence, we must nevertheless conclude that there was no inconsistency in the verdict given by the jury. The jurors did not answer the third issue because the trial judge specifically instructed them that if they found that Mrs. Frye was not injured by Mr. Wiles's negligence then they should not consider the issue as to whether she was contributorily negligent for her own injuries. However, having found that Mr. Frye's property *was* damaged by Mr. Wiles's negligence, the jury had to answer the issue as to whether Mrs. Frye's negligence was imputed to her husband. The only way the jury could do this was to answer the fourth issue. By construing this part of the verdict with reference to the pleadings, the evidence, and the charge, we therefore hold that there was no inconsistency. *Nicholson v. Dean, supra.*

That part of plaintiffs' second argument dealing with the alleged inconsistencies in the verdict is therefore overruled.

We have reviewed the remaining contention in plaintiffs' second argument and find it to be without merit.

No error.

Chief Judge BROCK and Judge HEDRICK concur.

IN THE MATTER OF THE ESTATE OF ANNIE MAE G. ETHERIDGE, DECEASED

No. 761SC881

(Filed 6 July 1977)

1. Appeal and Error § 7; Wills § 61— judgment as to husband's intestate share — husband's executor as aggrieved party

Where decedent's husband dissented from her will prior to his own death, and the husband's executor was substituted for the husband in an action to determine the validity of a provision of the wife's will and to obtain partition, the husband's executor was an aggrieved party who could appeal from a judgment determining that devises which lapsed as a result of the dissent should be first used to satisfy the husband's intestate share, since the husband's estate was a beneficiary of the wife's estate and was thus aggrieved by the judgment.

2. Wills § 61— dissent to will — consideration of will in allocating intestate share

Where a husband dissented from his wife's will, the court properly considered provisions of the wife's will in allocating the husband's intestate share and properly ruled that specific devises which lapsed as a result of the dissent should be the first properties used to satisfy the husband's intestate share.

APPEAL by petitioner from *Small, Judge.* Judgment and order entered 9 August 1976. Heard in the Court of Appeals 10 May 1977.

On 18 January 1975, Annie Mae G. Etheridge died testate leaving surviving her husband, Doc Etheridge, Sr., and three children, Ray, Fred and Doc Etheridge, Jr. In her will, which was probated on 30 January 1975, she devises her homeplace and farm, known as the Shaw Farm, to her husband for life, subject to the right of her son Ray Etheridge to occupy the house jointly with her husband. Upon Doc Etheridge, Sr.'s death, the will provides that the dwelling house and curtilage, the pasture, and the contents of the house are to pass to Ray in fee. The lot where a grain dryer and barn are located passes to Doc Etheridge, Jr. for life and then to his sons Joe and Owen Etheridge in fee. The rest of the farm passes to Ray and Fred Etheridge in fee. The will disposes of Mrs. Etheridge's other real and personal property among her three sons, her husband, and her grandchildren.

One of the items in the will, Item X, provides that if Doc Etheridge, Sr. dissents from the will then all property devised or bequeathed to Doc Etheridge, Jr., Joe or Owen shall go to Ray and Fred instead. On 4 February 1975, Doc Etheridge, Sr. filed a notice of dissent from the will. He then petitioned the court for a determination as to whether he was entitled to dissent and for a partition of the real property owned by Mrs. Etheridge if it was determined that he did have a right to dissent. Doc Etheridge, Jr., his wife, and his sons Joe and Owen counterclaimed for a declaratory judgment as to the validity of Item X of the will. On 15 November 1975, Doc Etheridge, Sr. died and on 24 November 1975 his executor, Doc Etheridge, Jr., was substituted as petitioner.

Appellee respondents (Fred and his wife Mary Etheridge and Ray Etheridge individually and in his capacitiy as executor of Annie Mae G. Etheridge's estate) moved for summary judg-

ment. The trial court then entered summary judgment holding that Item X of the will was valid and that Doc Etheridge, Jr., Joe, and Owen were not entitled to anything under the will. In addition, the court held that commissioners should be appointed to partition Mrs. Etheridge's property and to allocate Doc Etheridge, Sr.'s intestate share. The court also held that the tracts devised to Doc Etheridge, Jr., Joe, and Owen should be the first tracts set aside for the purpose of determining which tracts should be used to comprise the intestate share. The present appeal relates to this ruling. Doc Etheridge, Jr., as executor of the estate of Doc Etheridge, Sr., the substituted petitioner filed notice of appeal.

Twiford, Seawell, Trimpi & Thompson, by Russell E. Twiford and John G. Trimpi, for the petitioner appellant.

White, Hall, Mullen & Brumsey, by Gerald F. White, for the respondent appellees.

MARTIN, Judge.

Petitioner does not contest the trial court's ruling that Item X of the will was valid. He does, however, contend that the court erred in concluding that the intestate share of Doc Etheridge, Sr. should first be satisfied from the lands devised to Doc Etheridge, Jr. and his sons, Joe and Owen.

[1] At the threshold of our considerations in this case, we are confronted with the question of whether a real party in interest was substituted in this action when Doc Etheridge, Sr. died. Every action must be prosecuted in the names of the real party in interest. G.S. 1-57.

If, as in the case at bar, there is a death of a party to an action, then G.S. 1A-1, Rule 25(a) provides for a substitution of parties. It requires the substitution of either a personal representative *or* a successor in interest. In deciding whether to substitute a personal representative, or a successor in interest, or both, it is of course necessary to be certain that the substituted party is a real party in interest. G.S. 1-57. In the instant case, the original petitioner, Doc Etheridge, Sr., died on 15 November 1975. The executor of his estate, Doc Etheridge, Jr., was then substituted as the petitioner while no effort was made to substitute his successors in interest, the beneficiaries under his will.

We caused a certified copy of the will of Doc Etheridge, Sr. to be sent up and made a part of the record in the case at bar. In the will, all the real property of the testator is devised to Doc Horace Etheridge, Jr.

Upon filing his dissent to the will, Doc Etheridge, Sr. became vested, as of the date of testatrix's death, with title to that part of her real property allowed him by statute as surviving spouse. We do not agree with appellees that the appeal should be dismissed on the ground that appellant is not aggrieved. Appellees cite the case of *Bank v. Melvin,* 259 N.C. 255, 130 S.E. 2d 387 (1963) as support for their position. In that case, the executor of Adam Melvin's estate brought forth an appeal concerning the court's distribution of *his* estate following his wife's dissent from his will. Our Supreme Court held that the executor was not aggrieved by the superior court's judgment and could not appeal. In the case at bar, however, Doc Etheridge, Sr.'s wife predeceased him and his estate was a beneficiary from her estate. As such, his estate was aggrieved by the judgment, and it was entitled to appeal through its executor, Doc Etheridge, Jr.

[2] G.S. 30-3(a) provides that a dissenting spouse takes the same share of the deceased spouse's property as if the deceased had died intestate. Under G.S. 29-14(2) the intestate share in the instant case includes "a one third undivided interest in the real property." Appellants argue that the provisions of the will should not be given any consideration. They contend that the dissenting spouse takes his interest in the decedent's property in spite of the will, not under the will, and there is no reason why the language of the will should be controlling. We disagree.

Under *Trust Co. v. Waddell,* 234 N.C. 454, 67 S.E. 2d 651 (1951), when a surviving spouse dissents from a will, the intestate share should be allocated so as to cause the least possible disruption of the decedent's plan for the distribution of his estate. In partitioning testatrix's property, her will should be given consideration, and insofar as possible the beneficiaries of the will should receive the property testatrix intended for them to receive. Item XI of the will plainly indicates that testatrix's primary intent in disposing of her estate was to give the Shaw Farm to Fred and Ray. She also intended to give Doc Etheridge, Sr. a life estate in the farm, but Items X and XI establish that the gift to Fred and Ray was of more importance to her than the gift to her husband.

G.S. 29-14 does not purport to give the dissenting spouse the right to select the particular property he or she will receive in opposition to the dominant intent expressed in the will. The dominant intent expressed in the will is still controlling so long as it can be carried out and leave the dissenting spouse with the prescribed fractional interest in value in the estate.

Following the settled principle that the will shall be so construed that the dissent shall effect the devisees to the least possible degree and the general scope or plan of distribution be carried out and effectuated so far as possible, we hold that the specific devises, which lapsed as a result of the dissent, should be the first properties used to satisfy the intestate share belonging to the estate of Doc Horace Etheridge, Sr. The trial court so provided and his judgment is affirmed.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. HOWARD McLAURIN

No. 7716SC138

(Filed 6 July 1977)

Homicide §§ 24.2, 28— absence of malice — self-defense — burden of proof on defendant — instruction prejudicial

In a prosecution for second degree murder where defendant contended that he acted in self-defense, the trial court's instructions placing the burden on defendant (1) to show circumstances that would reduce the offense from second-degree murder to manslaughter and (2) to justify the killing on ground of self-defense were erroneous in view of *Mullaney v. Wilbur*, 421 U.S. 684, and were prejudicial to defendant.

ON *writ of certiorari* to review judgment entered 21 March 1975 by *McKinnon, Judge*, in Superior Court, SCOTLAND County. Heard in the Court of Appeals 7 June 1977.

In a bill of indictment proper in form defendant was charged with the murder of Paul E. McIntosh. He was placed on

trial for second-degree murder and pled not guilty. Evidence presented by the State tended to show:

Defendant and McIntosh were in business together, operating a clothing store in Laurinburg and one in Fayetteville. On the night of 30 March 1974 defendant was in the Laurinburg store and McIntosh came in. They got into an argument and cursed and scuffled with each other. Defendant produced a pistol and shot McIntosh, who was unarmed, inflicting head injuries resulting in his death.

Defendant's evidence tended to show: Previous to the night in question McIntosh had given defendant a pistol for protection in case of robbery. He and McIntosh had had disagreements about finances. On that night McIntosh came to the store and attacked defendant without provocation. Defendant had his back to the wall and could escape only by going past McIntosh. He shot McIntosh out of fear "because I thought he was going to kill me." Defendant surrendered immediately to police and told them that he was defending himself at the time of the shooting.

The jury returned a verdict of guilty of voluntary manslaughter, and from judgment imposing a prison sentence of not less than five nor more than ten years, defendant gave notice of appeal.

On 6 May 1975 this court allowed defendant's petition for a writ of certiorari to perfect a late appeal. On 7 December 1976 we amended the writ to extend the time for filing the record on appeal and briefs.

Attorney General Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

Arthur L. Lane, by Paul B. Eaglin, for defendant appellant.

BRITT, Judge.

Defendant contends he is entitled to a new trial for the reason that certain instructions given by the trial court to the jury violated the rule established by the United States Supreme Court in *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 508 (1975), and followed by the North Carolina Supreme Court in *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975). We hold that the contention has merit.

In the case at hand defendant admitted shooting and killing McIntosh but insisted that he did it in self-defense. In his instructions to the jury with respect to the difference between second-degree murder and manslaughter, the trial judge charged that if the jury was satisfied beyond a reasonable doubt that defendant intentionally shot the deceased and thereby proximately caused his death, the burden would rest upon defendant to satisfy the jury of circumstances of adequate provocation which would reduce the killing to manslaughter, "unless the evidence arises out of the State's evidence, evidence of such provocation."

On the question of self-defense, the jury charge included the following:

> " . . . The defendant contends that he acted in self defense and if you find beyond a reasonable doubt that the defendant intentionally killed the deceased—or intentionally shot him and thereby proximately caused his death, then for you to find that such killing was in self defense and therefore excusable and not unlawful and (sic) *the defendant must satisfy you,* not beyond a reasonable doubt or by the greater weight of the evidence, but simply must satisfy you of three things: first, that he, himself, was not the aggressor. (Emphasis added.)
>
> * * *
>
> "Secondly, you must be satisfied that the circumstances as they appeared to the defendant at the time were such as to create in the mind of a person of ordinary firmness a reasonable belief that the shooting of the deceased was necessary in order to save himself from death or great bodily harm, and circumstances did create such a belief in the defendant's mind.
>
> * * *
>
> "Thirdly, *the defendant must satisfy you* or you must be satisfied from all the evidence that he did not use excessive force in defending himself; that is, more force than under the circumstances reasonably appeared to be necessary to save himself from death or great bodily harm. . . . " (Emphasis added.)

Clearly, the instructions placing the burden on defendant (1) to show circumstances that would reduce the offense from

second-degree murder to manslaughter and (2) to justify the killing on ground of self-defense were erroneous in view of *Mullaney* and *Hankerson.* We hasten to add, however, that the trial of the instant case took place in March of 1975, previous to the *Mullaney* and *Hankerson* decisions, and the able trial judge gave the substance of instructions that had been approved by the Supreme Court of this State for more than one hundred years.

In *Hankerson* our Supreme Court declared no longer valid instructions similar to those challenged in the instant case. We quote from the Hankerson opinion (page 643): "We hold that by reason of the decision in *Mullaney* the Due Process Clause of the Fourteenth Amendment prohibits the use of our long-standing rules in homicide cases that a defendant in order to rebut the presumption of malice must prove to the satisfaction of the jury that he killed in the heat of a sudden passion and to rebut the presumption of unlawfulness, that he killed in self-defense. . . . "

We now reach the question whether the erroneous instructions were prejudicial to defendant. The burden is on a defendant not only to show error but also to show that the error was prejudicial to him. 4 Strong, N. C. Index 3d, § 167.

Since the jury, in effect, found defendant not guilty of second-degree murder but found him guilty of manslaughter, we perceive no prejudice in the challenged instructions placing the burden on him to show circumstances that would reduce the charges against him from second-degree murder to manslaughter. However, defendant's plea of self-defense applied to manslaughter as well as to second-degree murder, therefore, we perceive that the erroneous instructions placing on him the burden of showing self-defense were prejudicial.

In *State v. Hankerson, supra,* without further guidance from the U. S. Supreme Court our State Supreme Court declined to give the Mullaney decision retroactive effect. Thereafter the U. S. Supreme Court allowed certiorari in *Hankerson* and in an opinion filed 17 June 1977 held that our State Supreme Court erred in declining to hold the Mullaney rule retroactive. Of course, we are bound by that opinion. Consequently, we hold that defendant in the case at hand is entitled to a new trial and it is so ordered.

New trial.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. GARY MINSHEW

No. 778SC39

(Filed 6 July 1977)

1. **Criminal Law § 91.1— withdrawal of State's consolidation motion — motion to continue — denial proper**

Where the State withdrew its motion to consolidate for trial defendant's case with that of another person, and defense counsel alleged that he learned of such withdrawal on the day of the trial, the trial court did not err in denying defendant's motion for a continuance in the absence of any showing that the withdrawal of the motion to consolidate in any way prejudiced defendant's case and denied him his right to effective counsel.

2. **Criminal Law §§ 145; 157.1— record on appeal — unnecessary material — costs taxed against counsel**

Counsel is taxed with the cost of printing unnecessary material in the record on appeal. App. Rule 9(b)(5).

APPEAL by defendant from *Tillery, Judge.* Judgments entered 17 August 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 1 June 1977.

Defendant pled not guilty to two counts of sale and delivery of marijuana, two counts of possession of marijuana with intent to sell, and one count of conspiracy to possess, sell, and deliver marijuana.

On 28 June 1976, the district attorney moved that defendant and Steve Wilkins be tried jointly. When defendant's case was called for trial on 16 August 1976, defense counsel moved for a continuance on the ground that he had just learned that morning that defendant and Wilkins would not be tried jointly. Motion was denied.

Briefly, the evidence for the State tended to show that on two occasions on 2 and 3 June 1976, an undercover agent gave money to Steve Wilkins for the purpose of purchasing marijuana. On each occasion, Wilkins left after receiving the money, and defendant appeared shortly thereafter with the marijuana.

Defendant told the agent that this arrangement was used as a safety device to confuse the other party to the transaction and that in return for helping Wilkins sell the marijuana he was getting his free.

The evidence for the defendant tended to show that on 2 June 1976, after Wilkins left the agent's car, defendant got in because he thought the agent was someone he knew. He then found two bags of what appeared to be marijuana between the front seat and the door. On 3 June the agent stopped him, and he again got in the car and saw what appeared to be marijuana. He and the agent then smoked some of the material.

The jury found defendant guilty as charged. Defendant appeals from judgments imposing imprisonment.

Attorney General Edmisten by Associate Attorney Elisha H. Bunting, Jr. for the State.

C. Branson Vickory for defendant appellant.

CLARK, Judge.

[1] Defendant first assigns error to the denial of his motion for continuance. Defendant contends that the denial deprived him of his right under the Sixth Amendment to the Federal Constitution and Article I, Sections 19 and 23 of the State Constitution to effective counsel for the following reasons: (1) the best interests of the defendant would have been served by one line of defense in a joint trial and a completely different line of defense in a separate trial; and (2) there could have been witnesses available who would have testified at a trial of defendant alone, but not at a trial of both defendant and Wilkins, in particular Wilkins himself.

Ordinarily the grant or denial of a motion for continuance is within the discretion of the trial court. However, when such a motion involves a right guaranteed by the Federal and State Constitutions, the question is one of law and not of discretion, and the ruling of the trial court on such a motion is reviewable. *State v. Harris,* 290 N.C. 681, 228 S.E. 2d 437 (1976). Implicit in the constitutional right at issue herein is that an accused and his counsel shall have a reasonable time to investigate, prepare, and present the defense. Whether there has been a denial of due process depends upon the circumstances of each case. *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975).

The circumstances in the present case reveal no denial of defendant's right to effective counsel. Nowhere has defendant shown how the "line of defense" offered at the trial which occurred differed from that which would have been offered at a joint trial. It is a *non sequitur* to say that defendant was prejudiced by a solitary trial since Wilkins had a defense of entrapment at a joint trial which was not available to defendant. Defendant has failed to explain how the defenses available to Wilkins affected in any way the "line of defense" available to defendant.

Defendant has similarly failed to show that the denial affected the use of witnesses in his defense. The record reveals that the following was all that occurred relative to the motion:

> "At the commencement of the trial of GARY LEE MINSHEW the following motion was made out of the hearing of the jury:
>
> MR. VICKORY: I make a motion for continuance on the grounds that the state has made a motion to try the defendant, MINSHEW with STEVE WILKINS, his codefendant. I learned this morning, the 16th day of August, 1976 that the State was not going to try WILKINS with MINSHEW and I need more time to prepare the case for MINSHEW to be tried by himself.
>
> COURT: Denied."

Where the absence of witnesses is the basis for a motion to continue, and where neither the names of the witnesses nor the substance of their testimony has been divulged, there is no error in the denial of the motion. *State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112 (1975); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972).

Since the State made a motion to consolidate the trials of defendant and Wilkins, defendant may have expected a joint trial. However, any number of circumstances could have operated to defeat such expectation, e.g., the death of the codefendant, a guilty plea by the codefendant, or denial of the motion due to oppositon from the codefendant. It is the duty of the defendant to be prepared for trial. We must conclude, in the absence of any showing that the withdrawal of the motion to consolidate in any way prejudiced defendant's case and denied him his right to effective counsel, that there was no error in the

denial of the motion to continue. We find no merit to this assignment of error.

Defendant's remaining assignments of error are considered abandoned under Rule of Appellate Procedure 28(b) (3). Contrary to the statement in defendant's brief, assignments of error do not "speak for themselves." The standards set forth in Rule 28(b) (3) must be followed if the purported error is to be considered.

[2] We note that the entire charge of the trial judge was included in the record on appeal, even though no error was assigned to the charge. This is in violation of Rule of Appellate Procedure 9(b) (3) (vi). We also note that the list of assignments of error at the conclusion of the record includes those portions of the record to which the assignments are directed. This is not necessary under Rule 10(c). Counsel will be taxed with the unnecessary printing costs. Rule 9(b) (5).

No error.

Judges MORRIS and PARKER concur.

LILLIAN B. LAMBETH v. JANET L. FOWLER, SUCCESSOR EXECUTRIX OF C. R. LAMBETH, JANET L. FOWLER, INDIVIDUALLY, AND HUSBAND, DONALD S. FOWLER, GERALD LAMBETH, AND WIFE, JUANITA B. LAMBETH

No. 7622SC923

(Filed 6 July 1977)

1. **Wills § 64— wife as beneficiary — no election required**

The trial court properly concluded that plaintiff, testator's spouse, was not required to make an election where testator referred to all land as "my property," and his will contained no term requiring an election.

2. **Wills § 34— farm machinery — life estate given to wife**

Where the testator's will provided that all of his personal property should go to his wife for the term of her natural life or widowhood with remainder at her death to their "two children, share and share alike, except the farm machinery which shall be the sole property of Gerald Lambeth in fee," the plaintiff wife was entitled to a life estate in the farm machinery.

Lambeth v. Fowler

APPEAL by plaintiff and defendants Gerald Lambeth and Juanita B. Lambeth from *Barbee, Judge.* Judgment entered 9 June 1976 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 8 June 1977.

This is an action for a declaratory judgment for the purpose of construing the will of C. R. Lambeth, who died on 12 July 1975. He was survived by his wife, who is the plaintiff, and by two children, who, with their spouses, are the defendants. His will was offered for probate on 11 August 1975, and plaintiff qualified as executrix. The following provisions of the will are relevant to this appeal:

> "ITEM TWO: I will and devise all of my real property unto my beloved wife, LILLIAN B. LAMBETH, for the term of her natural life or widowhood, with vested remainder thereafter unto our two children in the following manner:
>
> To JANET L. FOWLER and her bodily heirs —
>
> * * * [Six pieces of property are described.]
>
> To GERALD LAMBETH and his bodily heirs:
>
> * * * [Six pieces of property are described.]
>
> ITEM THREE: I give and bequeath unto my beloved wife, Lillian B. Lambeth all of my personal property for the term of her natural life or widowhood to use as she sees fit, with the remainder at her death or widowhood unto our two children, share and share alike, *except the farm machinery which shall be the sole property of Gerald Lambeth in fee.*" (Emphasis added.)

On 12 January 1976 plaintiff resigned as executrix and filed a notice of election, wherein she elected to take a fee simple interest in the three pieces of property described in Item Two which she and the testator had owned by the entirety.

After hearing, the court found that the testator had "erroneously believed that he was the sole fee simple owner of all the tracts of land specifically described in item two of his will" and that he had not manifested a clear intention to put the plaintiff to an election. The court also concluded that even if plaintiff had been put to an election, she had not so elected by qualifying and acting as executrix from 11 August 1975 to 12 January 1976.

Plaintiff was declared to be the owner of a fee simple interest in the three tracts described in Item Two which she and testator had owned by the entirety (two of which would have gone to defendant Gerald Lambeth and one to defendant Janet Fowler). Plaintiff was also declared to be the owner of a determinable life estate in the other nine tracts described in Item Two.

With respect to Item Three, the court declared that the exception of the farm machinery applied to the life estate of plaintiff as well as to the remainder of defendant Janet Fowler and declared that defendant Gerald Lambeth was "the fee simple owner of all farm machinery owned by C. R. Lambeth at his death."

Plaintiff and defendants Lambeth appeal. Subsequent to the filing of briefs, counsel for defendants Lambeth was allowed to withdraw from the appeal.

Walser, Brinkley, Walser & McGirt by Walter B. Brinkley for plaintiff appellant-appellee.

Wilson & Biesecker by Joe E. Biesecker for defendant appellants-appellees.

CLARK, Judge.

The first issue upon appeal is whether plaintiff was required by the will to make an election.

[1] An election is required only if the will discloses that it was the testator's manifest purpose to put the beneficiary to an election. *Bank v. Barbee,* 260 N.C. 106, 131 S.E. 2d 666 (1963). "The doctrine of equitable election is in derogation of the property right of the true owner. Hence, the intention to put the beneficiary to an election must appear plainly from the terms of the will (citations omitted)." *Burch v. Sutton,* 266 N.C. 333, 335, 145 S.E. 2d 849, 851 (1966). The doctrine does not apply if the testator was under the mistaken belief that he owned the property of the beneficiary, which the testator devised or bequeathed to another. *Breece v. Breece,* 270 N.C. 605, 155 S.E. 2d 65 (1967). Nothing else appearing, factors which belie any intent to put a beneficiary to an election include a description of the property by the testator as "my property" and an absence of an express term requiring election. See *Burch v. Sutton, supra; Bank v. Barbee, supra; Honeycutt v. Bank,* 242 N.C.

734, 89 S.E. 2d 598 (1955). As counsel for plaintiff has pointed out in his well-written brief, in the present case testator referred to all twelve tracts of land as "my property" and his will contains no term requiring an election. In these circumstances we find no error in the judge's conclusion that plaintiff was not required to make an election.

Because of our disposition of this issue, we need not reach the issue of whether plaintiff made an election by qualifying and acting as executrix.

[2] The remaining issue is whether the exception of the farm machinery in Item Three applies to plaintiff's life estate or only to the remainder. The cardinal principle in the construction of a will is to give effect, within the limits of the law, to the intent of the testator as it appears from the language used in the entire instrument. *Olive v. Biggs*, 276 N.C. 445, 173 S.E. 2d 301 (1970). In Item Two testator devised to his wife a life estate in all the real property he thought he owned. This manifests an understandable concern for the security and well-being of his surviving spouse. It is reasonable to infer that this same concern encompassed all of testator's personal property and did not exclude the farm machinery. Moreover, the trial court's interpretation runs contrary to the grammatical sense of the sentence, since it would transpose an exception placed at the end of the clause creating the remainder back to the earlier clause creating the life estate. The court may transpose phrases or clauses when the context manifestly so requires in order to ascertain and effect the intent of the testator. *Entwistle v. Covington*, 250 N.C. 315, 108 S.E. 2d 603 (1959). However, this will not be done where the context does not require. *Jernigan v. Lee*, 279 N.C. 341, 182 S.E. 2d 351 (1971). The rule that a will must be construed from its four corners or contextually does not require courts to give a strained construction contrary to the grammatical sense of the words. *Ward v. Black*, 229 N.C. 221, 49 S.E. 2d 413 (1948). To deprive this plaintiff of a life estate in the farm machinery would be contrary to the grammatical sense of the sentence as well as to the intention and primary concern of the testator. We conclude that plaintiff is entitled to a life estate in the farm machinery, and the judgment is so modified.

As modified the judgment is

Affirmed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. DONALD DAILEY

No. 763SC1007

(Filed 6 July 1977)

Searches and Seizures § 3— search warrant — sufficiency of underlying affidavit

Facts stated in an affidavit supported the magistrate's finding of probable cause that marijuana was in defendant's apartment where those facts tended to show that officers had a named house and a named individual under surveillance; at the time the affidavit was made, the individual was under military charges for two separate offenses of selling controlled substances; the individual who was under surveillance went into the house which was under surveillance, came out with a paper bag, and entered defendant's apartment with the bag; the individual returned to the house and came out with a suitcase; the individual was stopped and searched; the suitcase was full of marijuana; and the house was searched and revealed a large quantity of marijuana.

APPEAL by defendant from *Martin (Harry), Judge.* Judgment entered 22 July 1976 in Superior Court, CRAVEN County. Heard in the Court of Appeals 5 May 1977.

On 7 February 1976 officers of the Havelock Police Department, acting pursuant to a search warrant obtained that day, searched defendant's apartment and seized a large quantity of marijuana. As a result, defendant was indicted for felonious possession of more than one ounce of marijuana. Prior to arraignment, defendant moved to suppress the evidence obtained as result of the search. The motion was denied. Defendant then pled guilty and, from judgment imposing a prison sentence, appealed.

Attorney General Edmisten by Assistant Attorney General Claude W. Harris for the State.

Beaman, Kellum, Mills & Kafer P.A. by Norman B. Kellum, Jr., for defendant appellant.

PARKER, Judge.

The sole question presented is whether the court erred in denying defendant's motion to suppress the evidence obtained by the search of his premises made pursuant to a search warrant. Appellate review of this question is authorized by G.S. 15A-979(b).

Defendant contends that the affidavit on which the warrant was issued is insufficient to support the magistrate's finding of probable cause. We do not agree.

The affidavit was made by Sergeant C. R. King of the Havelock Police Department and was sworn to on 7 February 1976. The affidavit named the property sought, marijuana, and described with particularity the premises to be searched, Apartment number 1, 607 East Main Street, Havelock, N. C., rented in the name of Donald Dailey. To establish probable cause for issuance of the warrant, Sergeant King swore to the following facts:

> "After receiving information from several confidential sources known to be reliable survelliance (sic) was established by both this department and the Criminal Investigation Department of the Provost Marshall's Office of USMC, Cherry Point, North Carolina. The residence located at 44 Poplar Drive in the Slocum Housing area. Additionally survilleance (sic) had been conducted on the personal movements of one Orville Roland McCorn, black male, who is presently under military charges for two separate offenses of selling controlled substances. On this date, 2-7-76, subject McCorn was seen to enter the residence at 44 Poplar Drive and leave with a large brown bag. Subject McCorn delivered this bag to Apartment 1, 607 East Main Street, Havelock, North Carolina. Subject McCorn then proceeded back to 44 Poplar Drive and again left with a large suitcase. Subject was stopped and apprehended by CID agents on a military charge stemming from a previous sell of marijuana. Since subject vehicle was stopped in government housing military authorization was obtained for a search which resulted in confiscation of approximately 5 pounds of marijuana. Military authorization was then obtained for a search by CID agents of the quarters at 44 Poplar Drive. Results of this search was the confiscation of a large quanity of marijuana. CID agents who were survelling (sic) the

movement of McCorn attest to the fact that the large bag brought from 44 Poplar Drive was the same bag which was taken into Apartment 1, 607 East Main Street, Havelock, North Carolina."

Probable cause, as that expression is used in the Fourth Amendment and in our statutes, G.S. 15A-244 and 245, "means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell,* 282 N.C. 125, 128-29, 191 S.E. 2d 752, 755 (1972). Probable cause does not deal in certainties but deals rather in probabilities "which are factual and practical considerations of everyday life upon which reasonable and prudent men may act." *State v. Spillars,* 280 N.C. 341, 350, 185 S.E. 2d 881, 887 (1972). Moreover, a valid search warrant may be issued on the basis of an affidavit setting forth information which may not be competent as evidence in a criminal trial. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971). Thus, "[t]he affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable." *State v. Campbell, supra* at 129. In this connection, the police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. *United States v. Ventresca,* 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965); *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Vestal, supra; State v. Banks,* 250 N.C. 728, 110 S.E. 2d 322 (1959).

Testing the affidavit in the present case by these well established principles, and interpreting it in a "commonsense and realistic fashion" as we are enjoined to do in *United States v. Ventresca, supra,* we find it sets forth the following facts: Officers of the Havelock Police Department and of the Criminal Investigation Department of the Provost Marshall's Office of the United States Marine Corps at Cherry Point placed a residence at 44 Poplar Drive under surveillance. They also placed under surveillance a man named McCorn, who, at the time the

affidavit was made, was under military charges for two separate offenses of selling controlled substances. On 7 February 1976, the same date the affidavit was sworn to and the warrant was issued, McCorn was seen to enter the residence at 44 Poplar Drive and leave with a large brown bag, which he delivered to defendant's apartment. McCorn then returned to 44 Poplar Drive and again left with a large suitcase. He was then stopped and arrested by the military officers on charges resulting from the previous sales of marijuana. Search by the military officers of McCorn's vehicle and of the residence at 44 Poplar Drive resulted in the finding of a large quantity of marijuana both in the vehicle and at the residence.

In our opinion reasonable men, knowing these facts, would find it highly probable that the large brown bag, which McCorn was seen to carry from 44 Poplar Drive into defendant's apartment, contained marijuana. These facts supplied reasonable cause to believe that a search of defendant's apartment, made on the same day the bag was delivered into it, would reveal the presence in the apartment of marijuana. Accordingly, we hold that the facts stated in the affidavit support the magistrate's finding of probable cause. *See State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972) ; *see also State v. Oldfield,* 29 N.C. App. 131, 223 S.E. 2d 573 (1976).

Defendant's motion to suppress the evidence was properly denied. The judgment appealed from is

Affirmed.

Judges BRITT and MARTIN concur.

FIRST UNION NATIONAL BANK OF NORTH CAROLINA, A NATIONAL BANK v. TECTAMAR, INC., A NORTH CAROLINA CORPORATION; GEORGE E. BECKER, JOY D. BECKER, EWALD L. MERTENS, BERTHA H. MERTENS, CLYDE T. GASPERSON, FAYE W. GASPERSON, HAROLD L. COGDILL, FRANK MACHESKY AND JACKIE MACHESKY

No. 7628SC898

(Filed 6 July 1977)

1. **Uniform Commercial Code § 78— sale of collateral — inadequate price**

Testimony that the price paid by the purchaser of collateral was inadequate was insufficient to raise a genuine issue of fact as to whether a foreclosure sale of the collateral was commercially unreasonable. G.S. 25-9-507(2).

2. **Uniform Commercial Code § 78— sale of collateral — application of proceeds — senior liens**

A creditor violated G.S. 25-9-504(1) and (2) by paying off senior liens out of the proceeds of the sale of collateral, and evidence of such violation raised a genuine issue of fact as to the amount the creditor is entitled to recover on a deficiency judgment from guarantors of the note secured by the collateral.

APPEAL by defendants, Tectamar, Inc., George E. Becker, Joy D. Becker, Clyde T. Gasperson, Faye W. Gasperson, and Harold L. Cogdill, from *Martin (Harry), Judge.* Judgment entered 3 June 1976 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 11 May 1977.

Plaintiff brought this action to collect on a note from defendant Tectamar; to enforce a security agreement securing the note; and to enforce the individual defendants' agreement to guarantee payment of the note. On 29 January 1976 the parties agreed to a consent order providing that Tectamar had executed a note and security agreement to plaintiff; that Tectamar had defaulted and was indebted to plaintiff for $45,795.75; that plaintiff was entitled to repossess and sell the collateral; and that plaintiff was entitled to recover $45,795.75, with interest, from Tectamar. In their answer the individual defendants admitted that they had guaranteed Tectamar's note.

Plaintiff moved for summary judgment against the individual defendants, and in support of its motion it submitted an affidavit of its assistant vice president, David Kissmann. Kissmann stated that on 20 February 1976 he conducted a private sale of the collateral. Before the sale he published a notice of sale in

a newspaper and contacted numerous persons and firms who he thought might be interested in buying the collateral. Peco, Inc. bought the collateral (which consisted of machinery of various types) in bulk for $29,500. Of this sum, $1,418 was used for expenses plaintiff had incurred insuring and storing the collateral. $5,571.95 was paid to the Northwestern Bank in full satisfaction of a lien on part of the collateral, which was prior to plaintiff's lien. $2,200 was paid to the Bank of Asheville in settlement of its claim to a prior lien on part of the collateral, pursuant to a settlement agreement. The remaining $20,310.05 was credited on Tectamar's indebtedness to plaintiff, reducing the indebtedness to $27,333.18. Kissmann stated that copies of the notice of sale, and of plaintiff's agreements with the Northwestern Bank and the Bank of Asheville, were attached to his affidavit.

At the hearing on plaintiff's motion, defense counsel stated that the notice of sale and settlement agreements were not attached to his copy of Kissmann's affidavit and the court noted that these items were also not attached to the original affidavit in the court files. Defense counsel objected to consideration of Kissmann's affidavit and to the consideration of plaintiff's motion for summary judgment but the objection was overruled. Plaintiff's attorney then submitted copies of the notice of sale and settlement agreements. The notice of sale was accompanied by an affidavit of A. Gaston Dalton, who stated that it had appeared in the Asheville Citizen-Times on 11 and 18 February 1976.

In opposition to plaintiff's motion for summary judgment defendants offered the oral testimony of defendant George Becker, who stated that he was formerly the president of Tectamar. He cooperated with plaintiff in searching for buyers for the collateral until he found that further cooperation would jeopardize his position with his present employer. In his opinion "the absolute minimum that could be obtained for said assets [the collateral] on a quick sale was $45,000.00; and, said assets had been appraised in May of 1975 at $88,000 plus." He also stated that collateral should have been sold individually rather than in bulk. He had received firm offers for particular items of the collateral. Some of the people who made these offers called plaintiff and later told George Becker "that they were handled rudely by" plaintiff.

In rebuttal, plaintiff offered the testimony of David Kissmann, who stated that Becker had told him several times that the collateral was worth $25,000 to $30,000. Plaintiff accepted bids for the collateral on both a lump-sum and a piecemeal basis, and the total of all the piecemeal bids was substantially less than Peco's bid of $29,500. On cross-examination Kissmann stated that the notice of sale was in the newspaper "for a period of approximately 17 days." Plaintiff paid off the Northwestern Bank's lien on the collateral because Kissmann believed that the UCC required this. It settled the Bank of Asheville's claim, rather than paying the lien in full, because there was some doubt as to the validity of that bank's financing statement.

From judgment granting summary judgment for plaintiff, defendants appealed.

McGuire, Wood, Erwin & Crow, by Charles R. Worley, for the plaintiff.

Long, McClure & Dodd, by Jeff P. Hunt, for the defendants.

MARTIN, Judge.

[1] Defendants contend that testimony of the price paid by Peco for the collateral was inadequate and raises a genuine issue of fact as to whether the foreclosure sale was commercially unreasonable. We disagree. Defendant offered no testimony that the sale was commercially unreasonable in any other way. G.S. 25-9-507(2) provides:

> "The fact that a better price could have been obtained by a sale . . . in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner."

[2] Defendants' contention that the plaintiff conducted the foreclosure sale improperly has merit. Plaintiff's own testimony and affidavits show that it has violated G.S. 25-9-504(1) and (2) by paying off senior liens out of the proceeds of the sale. This was not a reasonable expense of sale. Plaintiff's violation of G.S. 25-9-504(1) and (2) in failing to apply the proceeds of the sale to the satisfaction of Tectamar's indebtedness, upon which defendants were guarantors, raises a genuine issue of fact as to the amount plaintiff is entitled to recover on a defi-

ciency judgment. See *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976); see *Hodges v. Norton*, 29 N.C. App. 193, 223 S.E. 2d 848 (1976).

We hold that summary judgment was improperly entered.

Reversed.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. PAUL EDWARD BELL

No. 764SC1017

(Filed 6 July 1977)

1. Narcotics § 3— demonstration of cutting and mixing heroin — relevancy of evidence

In a prosecution for possession of heroin and for manufacture of heroin, the trial court did not err in allowing a narcotics agent's testimony and demonstration regarding the process of cutting, bagging and mixing heroin where there was evidence linking defendant to cutting, bagging and mixing equipment found in the motel room in which defendant was arrested; moreover, the agent's demonstration and testimony was important to help the jury better understand the manufacturing charge against defendant, and it was helpful in illustrating to the jury how the items found in the motel room could have been used to package heroin.

2. Narcotics § 3— value of heroin — evidence not prejudicial

Defendant was not prejudiced by the testimony of a narcotics agent concerning the value of a bindle of heroin the size of one he folded in court while testifying, since G.S. 90-95 makes it unlawful to possess any amount of heroin regardless of value.

3. Narcotics § 4— possession and manufacture of heroin — sufficiency of evidence

In a prosecution for possession of heroin and for manufacture of heroin, evidence was sufficient to be submitted to the jury where it tended to show that defendant was present in a motel room at the time officers arrived to conduct a search; defendant's fingerprints were found on tinfoil packets containing heroin; his name was on a prescription bottle which was found in a carrying case containing tinfoil, plastic bags, measuring spoons, a sifter, and a razor blade box cutter, all of which are used in the cutting and packaging of heroin; and defendant was the one who paid for the motel room.

State v. Bell

APPEAL by defendant from *Rouse, Judge.* Judgment entered 16 July 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 5 May 1977.

The defendant was indicted for possession with intent to manufacture, sell, and deliver heroin, a Schedule I controlled substance, and for manufacture of heroin. He entered a plea of not guilty to both charges.

The State offered evidence which tended to show the following: On the night of 30 April 1976 at 9:50 p.m., Officer Paul Buchanan, a narcotics agent with the City of Jacksonville, went to room number 214 of a local motel along with another officer for the purpose of executing a search warrant. Upon their arrival at the motel room, the officers found the defendant and a woman by the name of Angela Millander occupying the room. A search was then made pursuant to the warrant and three plastic bags containing tinfoil packets of white powder were found under the carpet in two different places. Also found in the motel room was a black carrying case containing tinfoil, a box of plastic bags, a box cutter with a razor blade, a sifter, three measuring spoons, and a small medicine bottle with the defendant's name on the prescription label. Further evidence by the State tended to show that the sifter, spoons, and tinfoil are used in cutting and packaging heroin for sale. The defendant was later fingerprinted and an SBI agent testified that his prints matched those prints lifted earlier from the tinfoil packets. An analysis revealed that the powder taken from the tinfoil packets was heroin and quinine. The State's evidence also tended to show that the defendant had paid for the motel room numbered 214.

The defendant did not testify. He did, however, present evidence tending to show that the motel room was registered in the name of Wanda Williams. He and Angela Millander had only been in the motel room for a short while when the police arrived and searched.

The jury returned a guilty verdict on both charges and the defendant was sentenced to concurrent terms of nine to ten years each. Defendant appealed.

Attorney General Edmisten, by Associate Attorney William H. Boone, for the State.

Louis Jordan, for the defendant.

MARTIN, Judge.

[1] The defendant brings forth twenty-nine assignments of error which he presents as nine arguments for our consideration. Both of defendant's first two arguments pertain to the admission of narcotics agent Buchanan's testimony and demonstration regarding the process of cutting, bagging, and mixing heroin. Defendant contends that the trial court erred in admitting this evidence since there was no evidence adduced at trial to show that the defendant cut, bagged, or mixed the heroin in question. We disagree.

During his search of the motel room in which the defendant was arrested, Buchanan found plastic bags containing tinfoil packets of white powder. He also found a black bag which contained tinfoil, a box of plastic bags, a box cutter with a razor blade, a sifter, three spoons, and a prescription bottle. Contrary to the defendant's contention, there was evidence linking the defendant to the items found in the motel room. For example, the prescription bottle found among the other items in the black bag had the defendant's name on it and the defendant's latent fingerprints were removed from the tinfoil packets which were later found to contain heroin.

There is an additional reason why the court did not err in admitting Buchanan's testimony. The defendant was tried, among other things, for the manufacture of heroin. G.S. 90-87 (15) defines the term "manufacture" to include the packaging or repackaging of a controlled substance or the labeling or relabeling of its container. Buchanan's demonstration and testimony concerning the process of cutting, bagging, and mixing heroin was important to help the jury better understand the charges against the defendant and it was helpful in illustrating to the jury how the items contained in the black carrying case could have been used to package heroin. See *State v. Covington*, 22 N.C. App. 250, 206 S.E. 2d 361 (1974). Defendant's first and second arguments are therefore overruled.

[2] By defendant's third argument, he contends the trial court erred in its admission of testimony by Agent Buchanan as to the value of a bindle of heroin the size of one he folded in court while testifying. The defendant contends that this evidence is inadmissible since there had been no other evidence of value of the heroin taken from the motel room. We disagree.

The defendant was not prejudiced by this testimony since G.S. 90-95 makes it unlawful to possess any amount of heroin *regardless of value.* See *State v. Thomas,* 20 N.C. App. 255, 201 S.E. 2d 201 (1973). This argument is overruled.

In his next argument, defendant contends that the court erred in its denial of his motion for judgment as of nonsuit as to each charge. We disagree.

[3] The defendant argues that the motion for judgment as of nonsuit should have been granted because the State failed to establish a sufficient nexus between the defendant and the manufacture of the heroin. He specifically points to the fact that no fingerprints were found on the items supposedly used to manufacture the heroin and there was no evidence as to when the heroin was manufactured or who manufactured it. In making this argument, the defendant points to *State v. Baxter,* 21 N.C. App. 81, 203 S.E. 2d 93 (1974), reversed on other grounds in *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974). *Baxter* is distinguishable, however, because there the defendant was not at home at the time of the search and had not been at home in over a week. In the instant case, the State's evidence tends to show that the defendant was present in the room at the time the officers arrived to conduct the search; that his fingerprints were found on the tinfoil packets containing heroin; that his name was on a prescription bottle which was found in a carrying case containing tinfoil, plastic bags, measuring spoons, a sifter, and a razor blade box cutter, all of which are used in the cutting and packaging of heroin; and that he was the one who paid for the motel room. Viewing this and all other evidence in the light most favorable to the State, as we are required to do, we hold that the trial court properly denied defendant's motion for nonsuit as to each charge. *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974).

We have reviewed defendant's remaining arguments and find them to be without merit.

Defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. GORDON ROWE

No. 778SC24

(Filed 6 July 1977)

1. **Constitutional Law § 66; Criminal Law § 98.3— unruly defendant — removal from courtroom — no prejudice**

Defendant was not prejudiced by his removal from the courtroom and continuation of the trial in his absence where defendant violently threw counsel's table upside down, shouted obscenities at the judge and continued shouting after he was physically restrained by officers and dragged to a corner of the courtroom so that the trial judge had no opportunity to warn defendant before removing him that he would be removed if he persisted in his disruptive conduct.

2. **Criminal Law § 7— sale of heroin to undercover agent — no entrapment as matter of law**

In a prosecution for felonious possession and sale of heroin, the evidence did not reveal entrapment as a matter of law, since an undercover agent's asking of defendant to sell drugs to her or telling him she was interested in buying some drugs did not constitute an inducement to defendant to commit a crime he did not otherwise contemplate committing.

APPEAL by defendant from *Tillery, Judge.* Judgments entered 20 August 1976 in Superior Court, WAYNE County. Heard in the Court of Appeals 31 May 1977.

Defendant was tried upon four bills of indictment: (1) Felonious sale or delivery of heroin on 6 May 1976 in case No. 76CR6085; (2) Felonious possession of heroin on 6 May 1976 with intent to sell or deliver in case No. 76CR6085A; (3) Felonious possession of heroin on 8 May 1976 with intent to sell or deliver in case No. 76CR6257; and (4) Felonious sale or delivery of heroin on 8 May 1976 in case No. 76CR6257A.

Defendant was found not guilty of the two charges of felonious possession of heroin with intent to sell or deliver (Nos. 76CR6085A and 76CR6257). The jury found defendant guilty of the two charges of felonious delivery of heroin (Nos. 76CR6085 and 76CR6257A). Judgments of imprisonment for consecutive terms of six years were entered.

Attorney General Edmisten, by Associate Attorney James L. Stuart, for the State.

Smith, Everett & Womble, by James D. Womble, Jr., for the defendant.

BROCK, Chief Judge.

At the conclusion of a voir dire hearing on defendant's motion to suppress evidence of defendant's inculpatory statement to an officer, the trial judge made findings of fact, concluded that the evidence was admissible, and denied the motion to suppress. As the trial judge was making his final ruling on the motion to suppress the defendant stood up, grabbed defense counsel's table and threw it completely upside down on the floor. At the same time defendant was shouting at the judge, "you sons-of-bitches ain't changed in 200 years." He shouted at the judge, "you ain't shit." The defendant was forcibly restrained by officers and was carried to a corner of the courtroom where he continued to shout. He was thereafter handcuffed by the officers and carried from the courtroom.

The trial judge then entered findings of fact concerning defendant's conduct and concluded that the trial could not be conducted in a proper atmosphere with defendant in the courtroom in his present state of mind and ordered that the trial should proceed with defendant absent until such time as the court has determined that it is both proper and safe that defendant be allowed to return to the courtroom. The trial judge directed defense counsel to apprise the defendant in jail of the events taken place in the trial.

During defendant's absence the State's three final witnesses testified. One testified to the statement made by defendant. This was the statement which was the subject of the voir dire hearing during which defendant disrupted the proceedings. The testimony was: "He stated that he did not sell any heroin to Miss Melvin [the undercover agent]; that he only set the buys up." The second witness testified that he arrested defendant pursuant to a warrant and that defendant said: "Mr. Surratt [the arresting officer], man, I ain't sold no heroin to nobody." The third witness was the chemist who analyzed the white powder and determined that it was nine percent heroin. Thereafter the State rested its case.

Upon inquiry of the defendant by the courtroom deputy, the defendant gave assurances to the judge that he would conduct himself in a proper manner in the courtroom. Thereafter the judge directed that defendant be returned to the courtroom for the remainder of the trial.

[1] Defendant argues that the trial judge denied defendant's constitutional right to confront the witnesses against him during the time that the trial proceeded after he was expelled from the courtroom and until he was allowed to return to the courtroom. We are not impressed with this argument.

The trial judge in this case chose one of the constitutionally permissible methods of dealing with a disruptive defendant as outlined in *Illinois v. Allen*, 397 U.S. 337, 25 L.Ed. 2d 353, 90 S.Ct. 1057 (1970), *e.g.*, "take him out of the courtroom until he promises to conduct himself properly." Even so, defendant argues that there was a fatal defect in the procedure followed in this case in that the trial judge did not warn him before removing him that he would be removed if he persisted in his disruptive conduct. Ordinarily the trial judge should give a defendant an opportunity to correct his conduct before removal from the courtroom. Obviously, however, that can only be done if the defendant gives the trial judge a reasonable opportunity. In this case the defendant was continuously disruptive from the time he first became disruptive. He violently threw counsel's table upside down, shouted obscenities at the judge, and continued shouting after he was physically restrained by officers and dragged to a corner of the courtroom. There was nothing left for the judge to do except direct that defendant be taken to jail where he could have an opportunity to calm himself. The trial judge is not required to lower himself to the status of such a disruptive, violent, and boisterous defendant, and our judges are not required to engage in a shouting contest in order to warn a defendant that he will be removed from the courtroom if he does not desist. By his conduct defendant deliberately waived and forfeited his right to confront the witnesses against him during the interval until he could calm down. In a very short time, after defendant's assurances that he would conduct himself properly, the trial judge permitted defendant to return to the courtroom for the remainder of the trial. We find no abuse of discretion and no prejudicial error in the removal of defendant from the courtroom or in continuing the trial during his absence under the circumstances disclosed by this record.

[2] The trial judge submitted to the jury defendant's contention of entrapment. Defendant argues that the trial judge should have found entrapment as a matter of law and should have dismissed the charges against him. We disagree.

The evidence in this case presents no more than the ordinary undercover operation. The undercover agent worked herself into the drug traffic society and purchased drugs from the defendant. She merely set a trap to catch defendant in the execution of a crime of his own conception. Merely asking defendant to sell drugs to her or telling him she was interested in buying some drugs did not constitute an inducement to defendant to commit a crime he did not otherwise contemplate committing. See *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975); *State v. Burnette*, 242 N.C. 164, 87 S.E. 2d 191 (1955); *State v. Keen*, 25 N.C. App. 567, 214 S.E. 2d 242 (1975); *State v. Hendrix*, 19 N.C. App. 99, 197 S.E. 2d 892 (1973).

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. EDWARD EARL WASHINGTON AND BENJAMIN F. WIGGINS

No. 778SC25

(Filed 6 July 1977)

1. **Narcotics § 4— driver and passenger of vehicle — possession of drugs — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for possession of heroin where it tended to show that one defendant was the owner and operator of a vehicle in which controlled substances and narcotic paraphernalia were found, and the other defendant, who was a passenger in the car, was in such close proximity to a bottle cap containing heroin residue, needles and syringes that the items could have easily been seen by him.

2. **Narcotics § 4.5— passenger in vehicle — proximity to drugs — instruction on possession erroneous**

In a prosecution for possession of heroin, the trial court's instruction with respect to an automobile passenger that "if you find beyond a reasonable doubt that heroin was found in close proximity, physical proximity to the defendant . . . , you may infer that the defendant had . . . both the power and the intent to control its disposition or use" was overbroad and erroneous, since, to infer power and intent to control a substance to a mere passenger in a vehicle, the jury must rely on circumstances in addition to defendant's mere "close physical proximity to the drugs."

State v. Washington

APPEAL by defendants from *Tillery, Judge.* Judgments entered 14 October 1976 in Superior Court, LENOIR County. Heard in the Court of Appeals 31 May 1977.

Defendants were tried for possession of heroin.

The State's evidence tended to show the following: On 5 July 1976, during the early morning hours, Kinston law enforcement officers positioned themselves at the intersection of Highways 258 North and 70 West, and waited for the appearance of a 1965 Buick convertible, having the license number NPR-128. The officers had been informed that the occupants of the vehicle would have heroin in their possession when they reentered the City of Kinston. They first observed the vehicle around 12:40 a.m. The officers began following the vehicle into the City of Kinston. The officers stopped the vehicle after following it for approximately a mile.

The driver and owner of the vehicle was defendant Washington. He was placed under arrest for possession of heroin. Defendant Wiggins was seated in the front passenger seat of the car. Both defendants were advised of the Miranda rights.

The search officer observed on the passenger side of the vehicle between the seat and the door, some needles, syringes, and one bottle cap cooker wrapped in tinfoil. The charred bottle cap contained a crystal-like residue which was later determined to be heroin. In the console, located between the bucket seats, the officer found a Kool cigarette pack in which there was a packet of heroin and lactose. On the backseat, the officer found a black tape case which held another set of needles and syringes wrapped in yellow tissue paper and a plastic bag containing 14.3 grams of marijuana. A package of cigarette rolling papers in a plastic box was also found in the car.

Both defendants testified. Their evidence tends to show the following:

On the evening of 4 July 1976, defendants closed the Fast Fare, where they were employed, about 10:30 p.m. because they had run out of change. They took Washington's car and drove it to a nearby service station where they obtained a small amount of change from the attendant and where they had to wait a few minutes because the water pump was not functioning properly. After the car had cooled off, they put water into

the radiator and then proceeded towards La Grange. A mile or two down the road, the engine ran hot again and they had to pull over and wait for it to cool off. After it had cooled, they put more water in the radiator and drove away from Kinston until they made a U-turn at the Amoco Station and started back to Kinston. They were stopped by the police as they drove back to Kinston.

Neither of the defendants denied that the incriminating items were found in the vehicle, but Washington testified that the items must have been planted on his vehicle by some of the "junkies" with whom he was having trouble for stealing. He had trouble with this group on the day before his arrest. Both defendants denied any knowledge of the presence of the controlled substances before they were arrested.

From verdicts of guilty and judgments sentencing defendants to terms of imprisonment, defendants appealed.

Attorney General Edmisten, by Special Deputy Attorney General Robert P. Gruber, for the State.

Leland M. Heath, Jr., for defendant Washington and Gerrans and Spence, P.A., by William D. Spence, for defendant Wiggins.

VAUGHN, Judge.

One of the questions presented is whether the evidence was sufficient to withstand defendants' motions for nonsuit. As to both defendants we hold that there was sufficient evidence to require the submission of the case to the jury.

Upon a motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State and every reasonable inference arising therefrom must be given to the State. Any evidence of the defendant which is favorable to the State is considered, but his evidence that is in conflict with that of the State is not considered upon such motion. *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866. When all of the evidence is so considered, the State must have set forth substantial evidence to support a finding both that the offense charged has been committed and that the defendants committed it. *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786.

[1] With respect to Washington, evidence that he was the owner and operator of the vehicle in which the controlled substances and the narcotic paraphernalia were found is sufficient to require submission of his case to the jury. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706. As to defendant Wiggins, there was evidence that placed the bottle cap containing heroin residue, needles and syringes in such a position that they could have easily been seen by him. This and all of the other circumstances of the case would permit the jury to conclude that defendant had both the power and intent to control the contraband.

[2] Defendant Washington's exception in the judge's charge is without merit.

Defendant Wiggins assigns as error the following instruction:

> "With respect to the defendant Wiggins I charge you that if you find beyond a reasonable doubt that heroin was found in close proximity, physical proximity to the defendant Wiggins, you may infer that the defendant had either by himself or together with others both the power and the intent to control its disposition or use.
>
> DEFENDANT WIGGINS' EXCEPTION NO. 15
>
> However, as to each defendant you are not compelled to make this inference. (You may consider this evidence together with all the other evidence in the case in determining whether the State has proved beyond a reasonable doubt that either defendant had either by himself or together with others both the power and the intent to control the disposition and use of that substance.)"

In *State v. Weems,* 31 N.C. App. 569, 230 S.E. 2d 193, Judge Parker speaking for this Court stated:

> "Necessarily, power and intent to control the contraband material can exist only when one is aware of its presence. Therefore, evidence which places an accused within close juxtaposition to a narcotic drug under circumstances giving rise to a reasonable inference that he knew of its presence may be sufficient to justify the jury in concluding that it was in his possession. 'However, mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to con-

vict for possession.' Annot., 91 A.L.R. 2d 810, 811 (1963). Consistent with this view, a number of courts have recognized the principle that 'the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs . . . . ' Annot., 57 A.L.R. 3d 1319, 1326 (1974)."

Although we have held that the evidence of Wiggins' possession was sufficient to take the case to the jury, we conclude that Wiggins' exception to the charge has merit. We are aware of the suggested instruction, "if you find beyond a reasonable doubt that . . . was found in close physical proximity to the defendant, you may infer that the defendant had . . . the power and intent to control its use" comes directly from N.C.P.I. — Crim. 104.41. We conclude, however, that it is overbroad and erroneous. To infer power and intent to control a substance to a mere passenger in a vehicle, the jury must rely on circumstances in addition to defendant's mere "close physical proximity to the drugs." *State v. Weems, supra.*

In defendant Washington's trial, we find no error.

Defendant Wiggins is awarded a new trial.

Judges BRITT and ARNOLD concur.

STATE OF NORTH CAROLINA v. WALTER PRESTON PERRY, JR.

No. 775SC108

(Filed 6 July 1977)

Criminal Law § 86.8— embezzlement from employer — employer's bias — exclusion of evidence error

In a prosecution of defendant for embezzlement from his employer where defendant testified that he lawfully received payments on behalf of his employer and then gave the money to his employer, but the employer testified that defendant did not give him the money, the trial court erred in excluding defendant's evidence which tended to show bias on the part of the employer.

APPEAL by defendant from *Lanier, Judge.* Judgment entered 15 September 1976 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 June 1977.

State v. Perry

Defendant, Walter Preston Perry, Jr., was charged in indictments, proper in form, with three counts of embezzlement from Fiatville, USA, Inc., doing business as American Imports. Upon defendant's plea of not guilty the State offered evidence tending to show the following:

Dave Garris, the owner of American Imports, employed defendant in 1975 as an automobile salesman. In the course of his employment he occasionally received money for American Imports. When defendant did receive money, he was supposed either to take the money to the office and get a receipt, or to write out a receipt, give the money to Garris, and have Garris initial the receipt. In November 1975 Patricia Horton bought a car from American Imports under a financing arrangement that left $135 payable to American Imports. Horton dealt with the defendant in purchasing the car. In late 1975 with defendant acting as salesman, Frank Malpass purchased an automobile from American Imports for a purchase price of $200 of which he paid $100 down. On two occasions in early 1976 defendant went to Patricia Horton's house and was given payments of $10 and $25, respectively, on the balance due American Imports, for which he gave her receipts on his personal calling cards. During the early months of 1976 Frank Malpass made three payments directly to defendant including a payment of $30. American Imports never received the $30 payment made by Malpass, and the $35 in payments made by Patricia Horton.

Defendant offered evidence tending to show the following:

He never received any payment from Patricia Horton at her house, but he did receive payments from her at American Imports on a couple occasions. While he worked at American Imports he did not at any time obtain money from anyone on behalf of American Imports that he did not give to Mr. Garris or to one of the bookkeepers. When defendant gave the money he received in payment for the Malpass automobile to Mr. Garris, Garris did not always enter it into his receipt book. On occasion he would just put it in his pocket.

Defendant was found guilty as charged, and from a judgment imposing a prison sentence of four to five years, he appealed.

Attorney General Edmisten by Associate Attorney Catharine Biggs Arrowood for the State.

James J. Wall for defendant appellant.

HEDRICK, Judge.

Defendant contends the court erred in denying his motion for judgment as of nonsuit. When considered in the light most favorable to the State, the evidence is sufficient to support findings by the jury that defendant, pursuant to his employment with American Imports, lawfully received payments from Patricia Horton of $10 and $25 and from Frank Malpass of $30, which he fraudulently converted and misapplied to his own use. The assignment of error upon which this contention is based is not sustained.

On cross examination of the State's witness Garris the court sustained the State's objections to questions concerning a business transaction between defendant's father, Warren Perry, Sr., and Garris, and a lawsuit commenced against Garris by Mr. Perry. The court likewise refused to allow defendant and his father to testify with respect to these matters on direct examination. The excluded evidence tends to show that in May 1976 Garris and Mr. Perry entered into an agreement whereby Mr. Perry was to sell Garris a 1973 Checker Marathon automobile for $1,100 and a .357 magnum pistol. Mr. Perry delivered the automobile to Garris, and Garris paid the $1,100 but never delivered the gun. Mr. Perry subsequently filed suit against Garris for breach of contract in the latter part of May, 1976. The court also excluded evidence of defendant's Witness George Gifford, a former employee of American Imports, that Garris fired him in the latter part of May, 1976 for talking to defendant about the alleged embezzlements, and that Garris told him that he would be prosecuted for aiding and abetting if he testified for defendant. Defendant contends the court erred in excluding this testimony because it prevented him from showing bias on the part of the State's witness Garris.

"Cross examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross examining party." *State v. Hart*, 239 N.C. 709, 711, 80 S.E. 2d 901, 903 (1954). A defendant may also show bias on the part of a State's witness by the testimony of his own wit-

nesses. *State v. Wilson,* 269 N.C. 297, 152 S.E. 2d 223 (1967). Bias may be shown by introducing statements made by the impeached witness. *Id.*

In the present case defendant testified that he gave the payments in question to Garris. Garris testified that he did not. Therefore, Garris's testimony was crucial to the State's case against defendant. The excluded testimony certainly tended to establish bias on part of the witness since it revealed that the witness was involved in a lawsuit with defendant's father, and that he had fired defendant's witness for talking to defendant about the alleged embezzlement and threatened to prosecute him if he testified for defendant at trial. The court's exclusion of this testimony was prejudicial to defendant, and he is entitled to a new trial.

Defendant has brought forward and argued numerous other assignments of error which we need not discuss since they are not likely to occur upon a new trial.

For the reasons stated the defendant is entitled to a

New trial.

Chief Judge BROCK and Judge MARTIN concur.

EXECUTIVE LEASING ASSOCIATES, INC. v. FRANK LAMBERT

No. 7610DC916

(Filed 6 July 1977)

Principal and Surety § 1— execution of suretyship agreement — sufficiency of consideration

The trial court erred in granting a directed verdict for defendant on the ground that a suretyship agreement executed by defendant was not supported by a valuable consideration where the evidence tended to show that defendant was the owner of a grading company which leased a tractor and defendant signed a suretyship agreement guaranteeing payment of the rent; the grading company, having no further use for the equipment, wanted to be released of further liability under the lease; defendant suggested that the equipment be leased to a named third party and defendant executed a suretyship agreement for that lease; and the release of the grading company, of which defendant was owner and guarantor, from further obligation resulted in a bene-

fit to defendant which amounted to adequate consideration for the suretyship agreement.

APPEAL by plaintiff from *Murray, Judge.* Judgment entered 4 June 1976 in District Court, WAKE County. Heard in the Court of Appeals 7 June 1977.

Plaintiff brought this action against Frank Lambert and David Parrish, alleging in its complaint that it had leased a Long tractor to Parrish; that Lambert had guaranteed payment of all sums owed to plaintiff under the lease; that Parrish had defaulted in his rental payments; and that defendants were liable to plaintiff for $11,648, plus interest and attorney's fees. Parrish filed no answer, and default judgment was entered against him. In his answer, Lambert denied that he was liable for any amount under the guaranty agreement.

Plaintiff offered evidence tending to show that in January 1973 it leased the Long tractor to B & L Grading Construction Company, and Lambert, who was the owner, signed a suretyship agreement guaranteeing payment of the rent. In June 1973 Lambert told plaintiff's president that he had no more use for the tractor and wanted the equipment re-leased to Parrish. On 3 August 1973 plaintiff and Parrish signed a lease agreement providing that Parrish would lease the tractor for 29 months at a rental of $465.92 per month. On 8 August 1973 Lambert signed a suretyship agreement guaranteeing payment of the rent due under Parrish's lease. Parrish defaulted on his rental payments, and Lambert refused to make the payments pursuant to the suretyship agreement. At the time plaintiff declared the lease to be in default, the amount due was $11,648. Plaintiff sold the tractor for $2,600 and credited this amount (after deducting sale expenses) on defendants' debt, leaving a balance of $9,513.92.

At the conclusion of plaintiff's evidence the court granted a directed verdict for defendant Lambert.

Hatch, Little, Bunn, Jones, Few & Berry, by John N. McClain, Jr., for the plaintiff.

C. K. Brown, Jr., for the defendant.

MARTIN, Judge.

Plaintiff contends the court erred in granting defendant's motion for directed verdict. In granting the motion, the court stated:

> "... [L]ooking at the whole transaction, it is my opinion that there is inadequate consideration either on the theory that there is no consideration or no new or different consideration, and it is upon the ground that I grant the motion."

The validity of the judgment from which the plaintiff appealed is therefore dependent upon whether the suretyship agreement is supported by a valuable consideration. Plaintiff contends there was sufficient consideration. We agree.

In *Stonestreet v. Oil Co.*, 226 N.C. 261, 262, 37 S.E. 2d 676, 677 (1946), Chief Justice Stacy speaking for the Court stated:

> "It may be stated as a general rule that 'consideration' in the sense the term that is used in legal parlance, as affecting the enforceability of simple contracts, consists of some benefit or advantage to the promisor, or of some loss or detriment to the promisee. (Citations omitted.) It has been held that 'there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not.' (Citations omitted.) On the other hand, a mere promise, without more, lacks a consideration and is unenforceable." (Citation omitted.)

On 18 January 1973 the defendant, Frank Lambert as general partner, executed and delivered to plaintiff a lease agreement on behalf of B & L Grading Company for a tractor. Lambert, individually, executed a suretyship agreement which guaranteed payments. Thereafter Mr. Lambert told plaintiff he had no more use for the tractor and suggested that it be leased to David Parrish. Plaintiff would not accept a lease from Parrish unless defendant would execute a suretyship agreement for that lease. Plaintiff testified:

> "... I personally accepted the lease for Executive Leasing Associates, Inc. upon the completion of a suretyship agree-

ment for that lease, and I mailed it to Mr. Lambert, I believe, on the fifth or sixth of August, and he signed it on the eighth."

B & L Grading Company, having no further use for the equipment, wanted to be relieved of further liability under the lease. In the event of a default in payments, defendant would have been primarily responsible as a partner in B & L Grading Company, and would have had a contingent liability under the suretyship agreement. The lease of the equipment to Parrish transferred such obligation for further payments for the equipment to Parrish, thus relieving the Grading Company of further obligation. This resulted in a benefit to the Grading Company, of which the defendant was liable as partner and guarantor, and it amounted to adequate consideration for the execution of defendant's suretyship for the Parrish lease.

On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The evidence in the case at bar does not support a finding of insufficient consideration to support a directed verdict for the defendant. The trial court was therefore incorrect in granting defendant's motion for a directed verdict.

New trial.

Chief Judge BROCK and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. BOYD LEWIS WILLIAMS

No. 7721SC43

(Filed 6 July 1977)

1. Criminal Law § 75.2— confession — conduct of investigating officer — voluntariness as question of law

Whether conduct of investigating officers amounts to a threat or promise which will render a subsequent confession involuntary and incompetent is a question of law reviewable on appeal.

2. Criminal Law § 75.2— statement by investigating officer to defendant — subsequent confession involuntary

Defendant's confession was not freely and voluntarily given and was thus incompetent as a matter of law where defendant confessed only after the investigating officer told defendant that he would tell the court, the judge and the jury that defendant was cooperative, and the effect of such statement was that defendant could gather hope of benefit by confessing.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 27 October 1976 in Superior Court, FORSYTH County. Heard in the Court of Appeals 1 June 1977.

Defendant was charged by indictments in proper form with breaking and entering, safecracking and larceny. He entered a plea of not guilty to each offense and was convicted by a jury of all charges. Judgment was imposed sentencing defendant to terms of 12 to 16 years on the safecracking charge and 10 years on the larceny and breaking and entering charges.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Acie L. Ward, for the State.

Rabil and Maxwell, by Jonathan V. Maxwell, for defendant appellant.

MORRIS, Judge.

This appeal stems from the second trial of this defendant on these charges. The first trial resulted in a mistrial when the jury was unable to reach a verdict. At the previous trial, a voir dire was conducted to determine the admissibility of a confession allegedly made by defendant to R. A. Spillman, a detective with the Winston-Salem Police Department. Spillman testified that he was the investigating officer of the break-in, with which defendant was subsequently charged, of the Salvation Army Church. Spillman's first contact with defendant took place on 10 June 1976, the day after the break-in, at which time defendant told Spillman that he had observed four black males the previous day seated on the steps of the church. Defendant further informed Spillman that he did not know the four males but that one face looked familiar and that he would call Spillman if he discovered who the men were. On 26 July, Spillman spoke again with defendant, who had been placed under arrest

and was in custody on the present charges. Spillman advised defendant of his rights, and further told him " . . . that he appeared to be cooperative and when and if this went to court, that all I could say on his behalf was that he was cooperative at the time." Defendant then made an oral confession of all charges to Spillman. The confession was transcribed and read to defendant, who signed it.

On cross-examination, Spillman further testified that, before defendant made the alleged confession, Spillman told him that

> " . . . all I could say on his behalf as far as to a judge or jury was that he was cooperative, which he was at that time. . . . I told him that that would be what I—only what I could testify to and that I would. . . . I advised him that I could tell the Court, the Judge and the jury, that in his behalf at the time of this interview that he was cooperative."

Following the voir dire, the trial court made findings of fact and concluded that defendant was fully advised of his constitutional rights; that after being so advised, defendant made a confession to the investigating detective; that the confession was made voluntarily, understandingly, knowingly and intelligently; that defendant made the confession without promise, inducement, threats, coercion or hope of reward " . . . with the exception that [the investigating officer] did state to the defendant that all he could tell the Court was that he was cooperative, the Court concluding that this statement on the part of the detective was not the motivating factor in the giving of the statement or confession by the defendant. . . . " The trial court then overruled defendant's motion to suppress the confession and permitted Spillman to read it before the jury.

At the second trial, the State again attempted to introduce the alleged confession into evidence. Counsel stipulated that the voir dire testimony heard at the previous trial be included in the transcript of the second trial. Based on the prior voir dire, Spillman was again permitted to relate the contents of defendant's statement to the jury.

In his first assignment of error, defendant contends that the trial court erred in admitting his alleged statement into evidence, on the grounds that the statement was not voluntary as a matter of law. We are constrained to agree.

[1] As a general rule, the trial court's findings of fact which are supported by competent evidence are conclusive on appeal. *State v. Curry,* 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. McIlwain,* 18 N.C. App. 230, 196 S.E. 2d 614, *cert. den.,* 283 N.C. 668, 197 S.E. 2d 877 (1973). However, the appellate courts are not so bound by the conclusions of law drawn from the facts. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511 (1968); *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569 (1966). Therefore, whether the conduct of the investigating officers constituted such threats or promises as to render a subsequent confession involuntary is a question of law and is reviewable on appeal. *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968).

We find *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68 (1967), to be particularly analogous to the case *sub judice.* In *Fuqua,* the investigating officer told the defendant "[t]hat if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative." Branch, J., speaking for the Court, stated:

> "... This statement by a person in authority was a promise which gave defendant a hope for lighter punishment. It was made by the officer before the defendant made his confession, and the officer's statement was one from which defendant could gather some hope of benefit by confessing. The total circumstances surrounding the defendant's confession impels the conclusion that there was aroused in him an 'emotion of hope' so as to render the confession involuntary." *Id.* at 228, 152 S.E. 2d at 72.

[2] In the present case, we are unable to distinguish the remarks made from those made in *Fuqua* and therefore must conclude that Officer Spillman's statements likewise were such that defendant "could gather hope of benefit by confessing." Consequently, we hold that defendant's confession was not freely and voluntarily given, and it is thus incompetent as a matter of law. The trial court erred in admitting it, and defendant is entitled to a new trial.

In view of our decision, we do not reach defendant's other assignment of error.

New trial.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. BILLY RAY CLARK

No. 7717SC111

(Filed 6 July 1977)

Constitutional Law § 49— waiver of assigned counsel — attempted withdrawal on trial date

Where defendant had counsel appointed for him but at the preliminary hearing voluntarily and understandingly waived counsel, he was not thereafter entitled to withdraw his waiver of counsel at any time and have counsel appointed to represent him; therefore, defendant was not prejudiced where he requested appointment of counsel at trial, and the court refused his request but did direct defendant's original attorney to assist defendant in his defense.

APPEAL by defendant from *Long, Judge.* Judgment entered 19 October 1976 in Superior Court, CASWELL County. Heard in the Court of Appeals 7 June 1977.

Defendant was tried upon a bill of indictment charging an assault with a deadly weapon with intent to kill inflicting serious injury. The jury found him guilty of the lesser included offense of an assault with a deadly weapon inflicting serious injury.

The State's evidence tended to show the following: On 15 August 1976 defendant and the victim, James Tillman, both of whom were serving prison sentences, were in line in the prison unit dining hall at about 4:00 p.m. Defendant broke out of line, ran up behind Tillman and stabbed him in the back with a "shiny object." Tillman cried out and ran toward the door. Defendant attempted to pursue Tillman but was restrained by other prisoners. Defendant passed a shiny object to another prisoner and it was passed along among a group of prisoners who were standing near defendant. A spoon handle with the cup end cut off and one end sharpened was later found beneath a dining table in the area where the attack on Tillman had occurred. The spoon handle had specks of dried blood on it. Tillman received two deep wounds.

The defendant's evidence tended to show that he was present but that he did not commit the assault.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

Philip W. Allen for the defendant.

BROCK, Chief Judge.

The alleged offense was committed on 15 August 1976. On 16 August 1976 criminal summons charging the offense was issued to defendant and served upon him on 26 August 1976. On 30 August 1976 defendant filed an affidavit of indigency and requested appointment of counsel. On 30 August 1976 attorney Philip W. Allen was appointed to represent defendant. When defendant appeared for his preliminary hearing on 17 September 1976 defendant requested the district court judge to permit attorney Philip W. Allen to withdraw as counsel. It was so ordered. Defendant then executed a waiver of assigned counsel and elected to represent himself. Probable cause was found on 17 September 1976 and defendant was bound over for trial in the superior court.

Nothing further transpired until defendant appeared for trial in the superior court on Monday, 18 October 1976. At that time defendant executed another affidavit of indigency and requested appointment of counsel. The trial judge declined to appoint counsel but directed Philip W. Allen, attorney, "to assist the defendant in his defense." The trial judge instructed attorney Allen as follows: "You are appointed to advise in the case or assist the defendant in any way he desires." Thereafter attorney Allen cross-examined each of the State's witnesses and examined each of the defense witnesses.

Defendant now argues that he was entitled to withdraw his waiver of counsel at any time and have counsel appointed to represent him. He reasons that the failure of the trial judge to appoint counsel on 18 October 1976 as he requested deprived him of his constitutional right to be represented by counsel.

It is clear that an accused can waive his right to be represented by counsel if he voluntarily and understandingly does so. There is no question of the voluntariness of defendant's waiver executed at the preliminary hearing on 17 September 1976. The waiver of the right to have assigned counsel executed

by defendant on 17 September 1976 was good and sufficient until the trial was finally terminated, "unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him." *State v. Smith*, 27 N.C. App. 379, 219 S.E. 2d 277 (1975); *State v. Watson*, 21 N.C. App. 374, 204 S.E. 2d 537 (1974).

The tactics employed by the defendant in this case are markedly similar to those employed in *State v. Watts*, 32 N.C. App. 753, 233 S.E. 2d 669 (1977), and in *State v. Smith, supra.*

> "In this case the defendant delayed until the day his case was scheduled for trial before moving to withdraw the waiver and have counsel assigned. If this tactic is employed successfully, defendants will be permitted to control the course of litigation and sidetrack the trial. At this stage of the proceeding, the burden is on the defendant not only to move for withdrawal of the waiver, but also to show good cause for the delay. Upon his failure to do so, the signed waiver of counsel remains valid and effective during trial." *State v. Smith, supra*, at 381, 219 S.E. 2d at 279.

Judge Long did all, if not more, than was necessary to meet the requirements of due process and fairness when he assigned attorney Allen "to advise in the case or assist the defendant in any way be desires." This assignment of error is overruled.

We have examined defendant's assignment of error to the trial judge's instructions to the jury. In our opinion the instructions were fair and submitted the issues to the jury under applicable principles of law. This assignment of error is overruled.

No error.

Judges HEDRICK and MARTIN concur.

J. C. WHITE, GUARDIAN FOR LUCILLE R. WHITE, INCOMPETENT v. JOHNNY L. LAWRENCE AND WIFE, ERMA D. LAWRENCE

No. 762SC915

(Filed 6 July 1977)

Criminal Law §§ 155.1, 161.3— failure to comply with appellate rules of procedure — appeal dismissed

Defendants' appeal is dismissed for failure to comply with App. R. 12(a) requiring that the record on appeal be filed within 10 days after certification and App. R. 28(b)(3) requiring that, following each question presented in the brief, reference to the assignments of error and exceptions pertinent to the questions should be made.

APPEAL by defendants from *Webb, Judge.* Judgment entered 15 June 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 7 June 1977.

This is an action to set aside a deed from Lucille White to defendants for a house and lot. The deed was dated 11 April 1975 and acknowledged by Lucille White on 28 April 1975. The complaint alleged that Lucille White was not mentally competent to execute a deed.

Plaintiff offered evidence tending to show the following: Lucille White was suffering from arteriosclerosis. She suffered a stroke in November 1971 and from that time her memory and coherence deteriorated. She was frequently hospitalized during 1974 and 1975. She was in the hospital from 4 April 1975 until she was discharged on 11 April 1975, the date of the deed in question. The deed in question was not prepared by the attorney who regularly handled her legal affairs. Lucille White was declared mentally incompetent on 23 May 1975 and plaintiff, her son, was appointed guardian for her.

In May 1974 plaintiff employed defendant Erma Lawrence to care for Lucille White. He paid Erma Lawrence $100.00 per week and furnished a house rent free for defendants to live in on Lucille White's property. This is the house included in the deed in question. Defendant Johnny Lawrence arranged for a survey of the lot, to include the house, in April 1975 to obtain a description for the deed in question. Plaintiff knew nothing of the preparation or execution of the deed in question until it was filed for recording in the Register of Deeds office. The Register of Deeds called plaintiff to advise him of it.

Plaintiff offered numerous witnesses, including Lucille White's doctor, minister, attorney (who did not prepare the deed in question), neighbors, daughter, son-in-law, and son, all of whom testified that on 28 April 1975 Lucille White did not have the mental ability to understand the nature of the act of executing a deed or its scope and effect.

The two defendants testified to their close association with Lucille White and that in their opinion she had sufficient mental capacity on 28 April 1975 to understand the nature and consequences of making a deed and to know the land and to whom she was giving it. Defendants' evidence tended to show that on numerous occasions Lucille White had stated that she wanted to give defendant Erma Lawrence some land so that she would have a place to live.

The jury found that Lucille White was mentally incompetent on 28 April 1975 to execute the paper writing dated 11 April 1975 purporting to convey property to the defendants. Defendants gave notice of appeal.

Griffin & Martin, by Clarence W. Griffin, for plaintiff.

Moore & Moore, by Regina A. Moore, for defendants.

BROCK, Chief Judge.

The record on appeal in this case was certified by the Clerk of Superior Court, Martin County, on 1 October 1976. Appellate Rule 12(a) requires: "Within 10 days after certification of the record on appeal by the clerk of superior court . . . the appellant shall file the record on appeal with the clerk of the court to which appeal is taken." The record on appeal in this case was filed with the Clerk of this Court on 1 November 1976, 31 days after certification. Perhaps it is well to state again what we said in *State v. Gillespie,* 31 N.C. App. 520, 230 S.E. 2d 154 (1976); in *Ledwell v. County of Randolph,* 31 N.C. App. 522, 229 S.E. 2d 836 (1976); and in *In re Allen,* 31 N.C. App. 597, 230 S.E. 2d 423 (1976): "The time schedules set out in the rules are designed to keep the process of perfecting an appeal to the appellate division flowing in an orderly manner. Counsel is not permitted to decide upon his own enterprise how long he will wait to take his next step in the appellate process. There are generous provisions for extensions of time by the trial court if counsel can show good cause for extension."

In their brief defendants have failed to refer us to the assignments of error and exceptions pertinent to the questions argued. Appellate Rule 28(b)(3) provides: "Immediately following each question [presented in the brief] shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear."

The North Carolina Rules of Appellate Procedure are mandatory. "These rules govern procedure in all appeals from the courts of the trial division to the courts of the appellate division; . . . " App. R. 1(a).

Appeal dismissed.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. HARRY LAWRENCE BAUM

No. 771SC195

(Filed 6 July 1977)

Automobiles § 114— involuntary manslaughter — lesser offense of death by vehicle — failure to instruct — error

In a prosecution for involuntary manslaughter where the State's evidence tended to show that defendant was intoxicated at the time his vehicle hit the deceased pedestrian, the trial court erred in failing to submit as a possible verdict that of the statutory crime of death by vehicle. G.S. 20-141.4.

APPEAL by defendant from *Small, Judge.* Judgments entered 15 October 1976 in Superior Court, DARE County. Heard in the Court of Appeals 29 June 1977.

Defendant was convicted of operating a motor vehicle upon a highway while the alcoholic content of his blood was 0.10 percent or more. He was also convicted of involuntary manslaughter.

Attorney General Edmisten, by Associate Attorney Richard L. Griffin, for the State.

E. Cordell Avery and James, Hite, Cavendish and Blount, by Marvin Blount, Jr., for defendant appellant.

VAUGHN, Judge.

Although defendant appealed both of his convictions on oral argument, he conceded that his assignments of error are only directed at the conviction for manslaughter.

Evidence for the State tended to show the following: At about 9:00 p.m. on 21 August 1976, the deceased and a companion were walking in a northerly direction along the right side of U. S. Highway No. 158 near Nags Head. It was dark and deceased was dressed in black pants. Traffic was heavy. Deceased was killed when struck from behind by a vehicle being operated by defendant who was also proceeding in a northerly direction. The point of impact was at the right headlight of defendant's vehicle. Defendant was intoxicated.

Defendant offered evidence tending to show that he was not under the influence of any intoxicant at the time of the accident. He was driving down the highway at about twenty-five or thirty miles per hour. His headlights were dimmed. He was following another vehicle at a distance of about three car lengths and heard a loud bump. He had not seen deceased and did not realize that he had struck anyone until later.

In his tenth assignment of error defendant contends that the court erred in failing to submit as a possible verdict that of guilty of the statutory crime of death by vehicle. The pertinent statute is as follows:

> "Whoever shall *unintentionally cause the death* of another person while engaged in the *violation* of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic shall be guilty of death by vehicle when such violation is the proximate cause of said death." G.S. 20-141.4. (Emphasis added.)

The offense is a misdemeanor.

In *State v. Freeman*, 31 N.C. App. 93, 228 S.E. 2d 516, *cert. den.*, 291 N.C. 449, 230 S.E. 2d 766, this Court held that G.S. 20-141.4 created a lesser degree of homicide than involuntary manslaughter. The evidence in the case at bar would have permitted the jury to find defendant guilty of the conduct proscribed by G.S. 20-141.4. The failure to allow the jury to consider the lesser degree of homicide constituted prejudicial error

that was not cured by a verdict of guilty of the more serious crime. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

Since there must be a new trial, we will not discuss the other assignments of error.

In No. 76CR2694, we find no error.

In No. 76CR2792, there must be a new trial.

Judges BRITT and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 13 JUNE 1977

STATE v. EARLEY No. 7729SC141	Rutherford (76CR1092)	No Error

FILED 15 JUNE 1977

AMEREL CO. v. DIAMOND MACHINE No. 7611SC805	Johnston (74CVS2161)	No Error
BORG-WARNER v. MARTINEZ No. 764DC918	Onslow (76CVD96)	Vacated and Remanded
LANE v. BOARD OF ALCOHOLIC CONTROL No. 7610SC948	Wake (75CVS5323)	Affirmed
STATE v. ACKLIN No. 773SC11	Pitt (76CR8162)	No Error
STATE v. BARKLEY No. 7714SC18	Durham (76CR7526)	No Error
STATE v. BOYKIN No. 777SC27	Wilson (76CR4642)	No Error
STATE v. HIGHT No. 7725SC65	Catawba (76CR5527) (76CR5533)	No Error
STATE v. HILL No. 7715SC55	Orange (76CRD5292)	No Error
STATE v. HORNER No. 7715SC67	Alamance (76CRS875) (76CRS876)	Reversed
STATE v. HYDE No. 7719SC104	Cabarrus (75CR11504)	Dismissed
STATE v. McKINNEY No. 7629SC1059	Rutherford (74CR7479)	No Error
STATE v. MANAGO No. 7719SC12	Rowan (76CR11217)	No Error
STATE v. MEDLIN No. 7710SC69	Wake (76CR24287)	No Error
STATE v. MULL No. 7725SC63	Burke (76CR4029) (76CR4031)	No Error
STATE v. NICHOLSON No. 7727SC131	Gaston (76CR5914)	No Error

STATE v. PEACOCK No. 771SC21	Dare (76CR865)	Affirmed
STATE v. SHAW No. 7727SC32	Cleveland (75CR14054)	No Error
STATE v. SHUFORD No. 7725SC78	Catawba (76CR6349)	No Error
STATE v. TEASLEY No. 7719SC59	Rowan (76CR6397)	Dismissed
STATE v. YANCEY No. 779SC26	Granville (76CR306)	No Error
TODD v. CREECH No. 7612DC913	Bladen (71CVD687)	Reversed and Remanded

FILED 20 JUNE 1977

STATE v. SCHLIEGER No. 764SC739 (Supplemental Opinion, Original filed 16 March 1977)	Onslow (75CR19314) (75CR19315) (75CR19316) (76CR400)	No Error

FILED 6 JULY 1977

FERGUSON v. ST. JAMES No. 7621DC909	Forsyth (74CVD6960)	Reversed and Remanded
HALL v. PIEDMONT No. 7623SC899 and CRAWLEY v. PIEDMONT No. 7623SC900	Yadkin (73CVS123) (73CVS124)	Reversed and Remanded
IN RE MELVIN No. 7712DC92	Cumberland (75J1027)	Dismissed
STATE v. ADAMS No. 7726SC30	Mecklenburg (76CR26908) (76CR26911)	No Error
STATE v. BANKS No. 7726SC127	Mecklenburg (76CR39013) (76CR38406)	No Error
STATE v. BROWN No. 7721SC72	Forsyth (76CR30256)	No Error
STATE v. CABLE No. 7627SC821	Gaston (75CR5338)	Affirmed
STATE v. CANADY No. 7716SC129	Robeson (76CR7588) (76CR7590)	No Error

STATE v. CONRAD No. 7722SC136	Davidson (76CR5585)	No Error
STATE v. DUNLAP No. 7626SC1050	Mecklenburg (76CR1463)	No Error
STATE v. ELLIS No. 773SC126	Pitt (76CR7860)	No Error
STATE v. HARTLEY No. 778SC146	Wayne (76CR7682)	No Error
STATE v. McMAHON No. 7718SC197	Guilford (76CRS32187)	No Error
STATE v. McMANUS No. 7726SC238	Mecklenburg (76CR44861)	No Error
STATE v. MOSES No. 7710SC164	Wake (76CR47297) (76CR47296B)	No Error
STATE v. ROBINSON No. 776SC209	Halifax (76CR4749)	No Error
STATE v. SLOAN No. 768SC936	Wayne (75CR12465)	No Error
STATE v. STROUD No. 7717SC38	Rockingham (74CR10446)	Vacated and Remanded
STATE v. TOLBERS No. 774SC150	Onslow (76CR14001)	No Error
STATE v. VINSON No. 778SC66	Wayne (75CR6718D) (75CR6718C)	No Error
STATE v. WALLACE No. 7726SC154	Mecklenburg (73CR5402, 5404) (74CR62356, 57) (74CR68127-30) (74CR70762, 63) (74CR73254) (74CR74298, 99) (74CR0460) (74CR14657)	Dismissed
STATE v. WHITE No. 7722SC79	Iredell (76CR110)	No Error
WILSON v. WILSON No. 7621DC873	Forsyth (71CVD0148)	Affirmed

ANUZEL MEDLIN DeBERRY v. AMERICAN MOTORISTS INSURANCE COMPANY

No. 7616DC902

(Filed 20 July 1977)

1. **Insurance § 68.6— automobile liability policy — medical payments — "struck by automobile"**

Recovery under the medical payments provision of an automobile liability policy providing coverage for accidental injury caused by being "struck by an automobile" does not require physical contact between the automobile and the body of the insured; therefore, an insured was entitled to recover under such provision for medical expenses incurred for an injury received when an automobile struck a rope barrier that had been tied across a city street during a Christmas parade, causing it to break and to strike and injure the insured, although the automobile did not come into physical contact with the insured's body and the rope was not in physical contact with the insured's body at the time it was struck by the automobile.

2. **Insurance § 68.7— automobile liability policy — coverage of two automobiles — medical payments**

The limit of an insurance company's liability under the medical payments provision of an automobile liability policy covering two cars for injury to the insured when she was "struck by an automobile" was the amount on each insured car ($500.00), not the total amount on both insured cars ($1,000.00).

3. **Attorneys at Law § 7.5— action against insurer — no unwarranted refusal to pay claim — disallowance of attorney's fees**

The trial court properly found that there was no unwarranted refusal by defendant insurer to pay plaintiff insured's claim under the medical payments provision of an automobile policy covering accidental injury by being "struck by an automobile" where the automobile in question did not come into physical contact with insured's body, and the law was unclear as to whether defendant was liable to plaintiff under the policy; therefore, the trial court properly refused to award attorney's fees to plaintiff under the provisions of G.S. 6-21.1 when it determined that defendant insurer was liable to plaintiff.

APPEAL by plaintiff and defendant from *Britt, Judge.* Judgment entered 17 June 1976 in District Court, SCOTLAND County. Heard in the Court of Appeals 12 May 1977.

In this action to recover $759.50 under the medical payments provision of an automobile liability insurance policy issued by defendant to plaintiff, the following facts were stipulated:

On 2 December 1974 plaintiff was a spectator at a Christmas parade. She was standing within two feet of a rope barrier that had been tied across a city street to control the crowd. While she was standing there a third party negligently drove his automobile (not one of those covered in the policy) against the rope, causing it to break and to strike and injure plaintiff. The automobile did not come into physical contact with plaintiff's body, nor was the rope in physical contact with plaintiff's body when it was struck by the automobile.

Plaintiff filed claim with defendant for her medical expenses in the sum of $759.50, but defendant refused to pay.

The following provisions of the policy are relevant:

"Coverages — Limits of Liability

Car	C-Medical Payments each person
#1	$500.00
#2	$500.00

Coverages — Premiums

Car	Medical Payments
#1	$5.00
#2	$4.00

* * *

Part II — Expenses for Medical Services

Coverage C — Medical Payments

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgigal, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional, nursing and funeral services: DIVISION 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', caused by accident,

* * *

(c) through being struck by an automobile or by a trailer of any type;

* * *

Limit of Liability

The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

* * *

4. Two or More Automobiles

Parts I, II and III

When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto."

The action was heard on the stipulated facts without jury. The judge concluded that plaintiff had been "struck by an automobile" within the terms of the policy, awarded plaintiff $759.50, but denied a request for attorney's fees pursuant to G.S. 6-21.1. Defendant appeals from the award to plaintiff of $759.50. Plaintiff appeals from the denial of attorney's fees.

Mason, Williamson, Etheridge & Moser, P.A. by Daniel B. Dean for plaintiff appellant-appellee.

Leath, Bynum, Kitchin & Neal by Henry L. Kitchin for defendant appellant-appellee.

CLARK, Judge.

The appeal presents three questions: (1) whether plaintiff was "struck by an automobile" as that term is used in the insurance policy; (2) if so, whether defendant's liability for medical expenses is limited to the amount on each insured car ($500.00) or to the total amount on all insured cars ($1,000.00); and (3) whether plaintiff is entitled to attorney's fees under G.S. 6-21.1.

(1) The term "struck by an automobile."

[1] The term "struck by an automobile" is not defined in the policy. In the absence of a definition, nontechnical words are to be given a meaning consistent with the sense in which they are

used in ordinary speech, unless the context clearly requires otherwise. *Peirson v. Insurance Co.*, 249 N.C. 580, 107 S.E. 2d 137 (1959). If there is no uncertainty or ambiguity in the language of a policy, there is no occasion for judicial construction. *Squires v. Insurance Co.*, 250 N.C. 580, 108 S.E. 2d 908 (1959). However, any ambiguity or uncertainty as to the meaning of terms in a policy should be resolved against the insurer since it selected the language used. *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967).

Plaintiff contends that the term does not require physical contact between the automobile and the body of the insured, and relies on *Trust Co. v. Insurance Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970), wherein the pertinent provisions in the policy were identical to those in the present case. In *Trust Co.* the insured was driving a vehicle covered by his policy and was killed when this vehicle collided with another vehicle. There was no physical contact between the body of the insured and the automobile which collided with his vehicle. The insurer paid $5,000.00 under a medical payments provision covering accidental injury incurred while the insured was occupying his own vehicle, but refused to pay $5,000.00 under a medical payments provision covering accidental injury incurred if the insured was "struck by an automobile." The threshhold question before the court was whether the occupant of a vehicle struck by an automobile had been "struck by an automobile" when there was no physical contact between the body of the insured and the autobile.

The court stated:

> "The term 'struck by an automobile' is not defined in the policy. Consequently, it is to be given the meaning most favorable to the insured which is consistent with the use of the term in ordinary speech. In strict accuracy, the term is limited to a situation in which there is direct, physical contact between the body of the insured and an automobile. In normal speech the term has, however, a broader coverage and would include one who sustains bodily injury through the striking by an automobile of another vehicle or other object, in or upon which the injured person was. Thus, the term 'struck by an automobile,' as used in this policy, includes, nothing else appearing, one who is injured when the vehicle, occupied by him, is struck by

another automobile and *is not limited* to collisions between automobiles and pedestrians, or *to other situations involving physical contact between the body of the claimant and the automobile in question.* (Citations omitted)" (Emphasis added.) 276 N.C. at 356, 172 S.E. 2d at 523.

Defendant relies on *Gant v. Insurance Co.*, 197 N.C. 122, 147 S.E. 740 (1929) and *Roach v. Insurance Co.*, 248 N.C. 699, 104 S.E. 2d 823 (1958). In *Gant* the insured was injured by a plank that was thrown from beneath the rear wheel of an automobile. At the time of the striking the insured was standing twelve to fifteen feet from the automobile. There was no physical contact between the automobile and the body of the insured. The policy under which plaintiff sought recovery insured against loss from injury sustained by "being struck, run down or run over by a moving automobile." In denying recovery, the court stated that the provision in the policy was "free from uncertainty or ambiguity," and that plaintiff had been struck by a plank, not an automobile.

In *Roach,* the other case relied upon by defendant, the insured was fatally injured as a result of being struck and burned by fuel from an exploding airplane. The policy insured against injury by being "struck, knocked down or run over by . . . airplane." In allowing recovery the court stated that the provision was to be construed most favorably to the insured and that the fuel was an essential part of the airplane.

Defendant contends that *Gant* was not overruled by implication by *Trust Co.*, and the law in North Carolina is this: (1) physical contact between the body of the insured and the automobile is *not* required when the insured occupies a vehicle which collides with an automobile, and (2) physical contact between the body of the insured or some object touching the body of the insured and the automobile or essential part thereof *is* required when the insured is a pedestrian struck by a thrown object. In effect, defendant contends that a distinction exists between the "collision" and "thrown object" cases, such that *Trust Co.* can be reconciled with *Gant.*

The overwhelming majority rule in the United States is that physical contact between the body of the insured and the automobile is not necessary in order to recover under a provision compensating for accidental injury incurred by being "struck by an automobile." Recovery has been allowed in numer-

ous cases in both the "collision" and "thrown object" situations without physical contact between the insured and the striking vehicle. Annot., 33 A.L.R. 3d 962 (1970). E.g., *Bates v. United Security Ins. Co.*, 163 N.W. 2d 390 (Io. 1968); *Wheeler v. Employer's Mutual Casualty Co.*, 211 Kan. 100, 505 P. 2d 768 (1973); *Black v. Hanover Ins. Co.*, 30 Misc. 2d 1081, 220 N.Y.S. 2d 168 (Mun. Ct. 1961); *McKay v. Travelers Indemnity Co.*, 27 O. App. 2d 76, 193 N.E. 2d 431 (1963); *DiMartino v. State Farm Mutual Automobile Ins. Co.*, 201 Pa. Super. 142, 192 A. 2d 157 (1963); *American Casualty Co. v. Cutshall*, 205 Tenn. 234, 326 S.W. 2d 443 (1959). Majority rule jurisdictions have nonetheless denied recovery in certain fact situations involving an automobile where it could not be said that the insured had been "struck by an automobile" according to the common and ordinary meaning of that phrase. See e.g., *Houston Fire & Casualty Ins. Co. v. Kahn*, 359 S.W. 2d 892 (Tex. 1962). A very small minority of jurisdictions have denied recovery on the ground that physical contact between the automobile and the body of the insured is required. See Annot., 33 A.L.R. 3d 962 § 3(c). But only South Carolina has done so since 1945.

Defendant has cited no jurisdiction which has allowed recovery in the "collision" situation but denied it in the "thrown object" situation. Our research reveals that the Supreme Court of South Carolina appears to have done so on the ground that the situations are "factually distinguishable." *Elrod v. Prudence Mutual Casualty Co.*, 246 S.C. 129, 142 S.E. 2d 857 (1965) (collision); *Quinn v. State Farm Mutual Automobile Ins. Co.*, 238 S.C. 301, 120 S.E. 2d 15 (1961) (piece of timber thrown). With all due respect to the Supreme Court of South Carolina, we fail to see any reason why the factual distinction between a collision and a thrown object should have any legal significance. One insured may be injured when the vehicle in which he is riding is struck by an automobile, and another insured may be injured when the parked vehicle next to which he is standing is struck by an automobile and is propelled against the insured's body. The common and ordinary meaning of the phrase "struck by an automobile" compels the conclusion that the insured has indeed been "struck by an automobile" in both these situations. To create a distinction with legal significance between a collision situation where an automobile collides with a car occupied by the insured and a collision situation where an automobile collides with some other object which strikes the insured is to

engage in metaphysical hairsplitting completely at odds with the common and ordinary meaning of "struck by an automobile."

In *Trust Co.* the court did not explicitly overrule *Gant.* It did however apply a rule of construction contrary to that applied in *Gant* in interpreting a provision virtually identical to that interpreted in *Gant. Gant* required physical contact with the body of the insured. *Trust Co.* stated that the term "struck by an automobile" is not limited to "situations involving physical contact between the body of the claimant and the automobile in question." 276 N.C. at 356, 172 S.E. 2d at 523. The fact that the plaintiff in *Gant* was a pedestrian while the plaintiff in *Trust Co.* was an occupant of a vehicle has no legal significance. We must conclude that by implication *Trust Co.* overruled *Gant,* and that the trial judge committed no error in concluding that plaintiff had been "struck by an automobile" within the meaning of the terms of her policy with defendant.

(2) Limits of liability under the policy.

[2] The second question on appeal is whether the limit of defendant's liability is the amount on each ($500.00) or both ($1,000.00) of plaintiff's cars. Defendant now contends that *Trust Co. v. Insurance Co., supra,* is the controlling case. In that case the Court adopted the minority rule that an insurance policy covering more than one vehicle is one contract and denied plaintiff's contention that the $5,000.00 limit on each of the two vehicles insured should be added to make the limit of the insurer's liability $10,000.00. There the plaintiff was claiming that there were two contracts and that medical expenses should be allowed under one clause in each contract, *viz,* in the policy on Car A, under the clause covering accidental injury sustained while driving Car A, and in the policy on Car B, under the clause covering accidental injury sustained by being "struck by an automobile."

Plaintiff contends that the present case is distinguishable since no vehicle insured under the policy in question was involved in the accident and recovery is being sought under only one clause, albeit for an amount equal to that provided for each vehicle multiplied by the number of insured vehicles. We fail to see how that fact has any legal significance given the clear holding in *Trust Co.* that there is but one contract. If there were two contracts, then a reason exists for adding the limits of liability; but no such reason exists if there is but one contract.

Moreover, in *Trust Co.*, the court cited with approval *Sullivan v. Royal Exchange Assurance,* 181 Cal. App. 2d 644, 5 Cal. Rptr. 878 (1960), in support of its construction of the policy. Unlike the plaintiff in *Trust Co.* and like the plaintiff in the present case, the plaintiff in *Sullivan* sought recovery solely under the clause for accidental injury by being "struck by an automobile," and contended the coverage per vehicle should be multiplied by the number of insured vehicles to reach the limit of liability under that clause. The rejection of this contention in *Sullivan* and the citation of that case in *Trust Co.* support our conclusion that the distinction urged by plaintiff in this case is not determinative.

Where there is no ambiguity in an insurance policy, the court must enforce the contract as it is written and may not rewrite the contract so as to impose upon the insurer a liability which it did not assume and for which the policyholder did not pay. *Huffman v. Insurance Co.*, 264 N.C. 335, 141 S.E. 2d 496 (1965). We conclude that the trial judge erred in concluding that the limit of defendant's liability exceeded $500.00.

(3) Attorney's fees.

[3] The final issue upon appeal is whether the trial judge erred in denying attorney's fees under G.S. 6-21.1. G.S. 6-21.1 provides in pertinent part that " . . . upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim . . . the presiding judge may, in his discretion, allow a reasonable attorney fee . . . . " Under the statute to support an award for an attorney fee from an insurance company the presiding judge must first find "an unwarranted refusal" to pay the claim. Such finding was not made by the trial judge in this case. The statute should be construed liberally by the presiding judge to accomplish the obvious purpose to provide relief for a person who has a claim so small that, if he must pay an attorney out of his recovery, it may not be economically feasible to bring suit. *Hubbard v. Casualty Co.*, 24 N.C. App. 493, 211 S.E. 2d 544 (1975). However, the circumstances of this case do not warrant the conclusion that the failure of the trial judge to find that there was an unwarranted refusal to pay the claim was error.

The judgment of the trial court is affirmed in part and reversed in part, and this cause is remanded with the direction that judgment be entered for plaintiff in the amount of $500.00.

Affirmed in part and reversed in part.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LARRY LOCKLEAR

No. 7716SC117

(Filed 20 July 1977)

1. **Larceny § 8— possession of recently stolen property — instruction proper**

In a prosecution for felonious larceny and receiving stolen goods, the trial court properly instructed on the doctrine of possession of recently stolen property where the evidence tended to show that copper wire was stolen from a glass company supply yard; wire found in a secluded wooded area was the wire taken from the supply yard; defendant was seen near the wire by officers on two occasions; defendant told his companion that the material was copper from the glass plant; defendant, upon discovering that the wire's insulation was burning, tried to put out the fire, thus exhibiting an intent to exert control over the stolen property; and defendant stopped his attempts to fight the fire and tried to flee when he heard a noise in the woods.

2. **Larceny § 7— proof of corpus delicti**

In a prosecution for felonious larceny of copper wire from a glass company supply yard, testimony by defendant's girl friend that she accompanied defendant and two others to the glass plant on 6 September 1974 was sufficient to raise the inference that the crime took place on 6 September and thereby *prima facie* established the *corpus delicti* as of that date.

3. **Criminal Law § 113.1— conflict in evidence — jury instructions proper**

Where the State's evidence and defendant's evidence conflicted as to the date of the alleged crime, the trial court properly instructed the jury as to the conflict and explained to them that in order to find defendant guilty, they would have to find that the crime took place on 6 September, as the State contended.

4. **Indictment and Warrant § 17.2— variance between indictment and proof — time — no prejudice**

Defendant in a larceny case was not prejudiced by the variance between the date of the crime alleged in the bill of indictment and the date shown by the State's evidence, though he presented an alibi de-

fense which related to neither date, since it was apparent that defendant did not rely on the date charged in the indictment, nor did the variation in the State's evidence deprive him of his right adequately to present his defense.

ON *certiorari* from *Smith, Judge.* Judgment entered 13 January 1976 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 8 June 1977.

Defendant was charged with felonious larceny and receiving stolen goods. He entered pleas of not guilty and was convicted by a jury of felonious larceny. Judgment was entered thereon sentencing defendant to imprisonment for a term of ten years to begin at the expiration of a term which defendant is presently serving for other charges.

The State called as a witness Marcine Jacobs, a girl friend of defendant. She testified, *inter alia,* that she dated defendant for 18 months prior to the alleged larceny. On the night of 6 September 1974, she was riding in defendant's Chevrolet van along with defendant, Jennings Locklear, and Ronald Oxendine. Defendant, who was driving, announced that " . . . he was going to the Libby Owens Ford Glass Plant to pick up some copper." The group stopped at Maxton to purchase wine and proceeded to the glass plant. They drove onto a small road behind the factory, turned off the vehicle's lights and followed the road for approximately one-quarter mile into the woods. There, defendant, Jennings Locklear and Ronald Oxendine discussed the theft and left Jacobs alone in the van at approximately 11:00 p.m. She then saw the three walk through a field towards the plant. Defendant " . . . had what looked like wire cutters with him and they had gloves." Jacobs waited in the van until 3:00 a.m. and then drove to the place where the van was originally parked because I thought that they would be there at that time." However, no one was there, and Jacobs returned to her home in Pembroke.

At 9:00 a.m., Jacobs received a phone call from defendant, who instructed her to pick him up at a small grocery store near the Libby Owens Ford Glass Plant. When Jacobs arrived, she saw defendant, Jennings Locklear and Ronald Oxendine standing outside the store. They got into the van and "said that they were tired." Defendant took Jennings Locklear and Oxendine home and then went with Jacobs to his house.

On 13 September 1974, the Friday of the following week, defendant and Ronald Oxendine met at defendant's house and discussed going back to the factory to " . . . pick up the copper, but Larry Locklear said it was Friday the 13th and it was bad luck and he did not want to go back." On the night of 8 October, Jacobs, and defendant drove defendant's father's pickup truck down a dirt road in a wooded area. They had gone approximately one-quarter mile when Jacobs "thought I saw a flashlight shine in the woods." Defendant then drove away. The next night, defendant and Jacobs again drove down the same dirt road and stopped at the point where Jacobs had seen the light on the previous night. At that point, Jacobs saw "a pile of copper in a wire form. . . . " Defendant told her that "it was copper from the Glass Plant."

The wire was smoldering, and defendant got out of the truck and began beating the copper with a stick. However, defendant heard a noise, laid down the stick, got back in the truck and began to back down the road. At that moment officers from the Robeson County Sheriff's Department came out of the woods and arrested both Jacobs and defendant.

Ray Priest, a detective with the Robeson County Sheriff's Department, testified that on 9 October 1974, he was searching for marijuana and drove down an old farm road into the woods in a rural section of Robeson County. He saw smoke in the woods and investigated, whereupon he discovered some conduit pipe and a large pile of smoldering copper wire. He heard another vehicle approaching and hid. Soon thereafter, defendant drove his van to the spot, got out to inspect the wire and left. Approximately one hour later, defendant returned to the scene in a pickup truck and was accompanied by Marcine Jacobs and a child. Defendant got out of the truck, beat the smoldering wire with a stick and had started to leave when the officers arrested him and Jacobs.

The following morning, Priest went to the Libby Owens Ford Plant and inquired as to whether any wire was missing. A search of the supply area revealed empty wire reels. A ladder belonging to the plant was discovered in the woods outside the security fence.

William R. Ikner, a security supervisor for the Libby Owens Ford Glass Company, testified that he searched the supply yard of the plant on 10 October 1974 and discovered numerous

spools from which wire had been recently taken. He also found the stock number of the conduit pipe found by the officers to be the same as the number of conduit pipe in the stockyard. Ikner estimated the value of the pipe found by the officers to be $134 and the value of the copper wire to be $7,500.

Defendant's evidence consisted of the testimony of Ronald Oxendine and Fay Dial. Oxendine admitted to stealing the wire on 6 October 1974 with Jennings Locklear and Marcine Jacobs. He further stated that defendant did not take part in the theft and had no knowledge of it. Dial testified that she had been with defendant on 6 October from 4:30 p.m. through 8:30 a.m. the following morning.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Arthur L. Lane, by Paul B. Eaglin, for defendant appellant.

MORRIS, Judge.

[1] In his initial argument on appeal, defendant contends that the trial judge erred in instructing the jury concerning the doctrine of possession of recently stolen goods.

> "It is the general rule in this State that one found in the unexplained possession of recently stolen property is presumed to be the thief. This is a factual presumption and is strong or weak depending on circumstances—the time between the theft and the possession, the type of property involved, and its legitimate availability in the community." *State v. Raynes*, 272 N.C. 488, 491, 158 S.E. 2d 351, 353-54 (1968).

In order for the doctrine to apply, there must be evidence of three things: "(1) That the property described in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. (Citations

omitted.)" *State v. Foster*, 268 N.C. 480, 485, 151 S.E. 2d 62, 66 (1966).

Defendant maintains that the presumption did not properly apply for two reasons. He first argues that the State " . . . never identified the property in the sense of showing that the mass of wiring was the fruit of criminal conduct." This argument is without merit. State's evidence clearly showed that several spools of copper wire and some conduit pipe owned by the Libby Owens Ford Glass plant were missing from the stockyard; that the conduit pipe found at the scene of defendant's arrest was positively identified as belonging to Libby Owens Ford; that although the recovered copper wire was not marked to allow positive identification, it was the same as that used by Libby Owens Ford as "control cable wire"; and that the copper wire was found at the scene of defendant's arrest along with the conduit pipe. We believe that this evidence was sufficient to show, *prima facie*, that copper wire had been stolen from the Libby Owens Ford supply yard and that the wire found in the woods was that wire.

Defendant also contends that the instruction with regard to possession of recently stolen goods should not have been given because the evidence was insufficient to show that the wire and pipe discovered at the scene of his arrest was in his possession. "The possession sufficient to give rise to such inference does not require that the defendant have the article in his hand, or his person or under his touch. It is sufficient that he be in such physical proximity to it that he has the power to control it to the exclusion of others and that he has the intent to control it." *State v. Eppley*, 282 N.C. 249, 254, 192 S.E. 2d 441, 445 (1972).

The State introduced evidence that the wire and pipe were located in a rural, wooded area; that defendant was observed by law enforcement officers in close proximity of the wire on two occasions; that defendant told his companion, Marcine Jacobs, that the material was copper from the Glass Plant; that the wire's insulation was burning; that defendant, upon returning to the area, beat the burning wire with a stick in an apparent attempt to put out the fire; and that defendant stopped beating the wire and attempted to flee the area when he heard a noise in the woods. Obviously, the evidence indicated that defendant was in close physical proximity to the wire on more than one occasion. His actions with respect to putting out the fire

showed that he had the intent to exert control over the stolen property. In view of the clandestine and secluded area in which the wire was deposited as well as defendant's repeated visits to it, we believe defendant's actions were sufficient to show his power to control the material to the exclusion of others. Accordingly, we hold that the State's evidence established defendant's possession of the wire and pipe, and that the trial court did not err in instructing the jury as to the doctrine of possession of recently stolen goods.

Defendant's next argument relates to the following portion of the judge's charge:

> "Now, ladies and gentlemen, for a person to be guilty of a crime it is not necessary that he himself do all of the acts necessary to constitute the crime. If two or more persons act together with a common purpose to commit the crime of larceny, felonious larceny, each of them is held responsible for the acts of the others done in the commission of that crime. So, I charge that if you should find from the evidence, beyond a reasonable doubt, that on or about the sixth day of September, 1974, the defendant, Larry Locklear, acting either by himself or acting together with Ronald Dean Oxendine or Jennings Locklear or either one or both of them, took and carried away copper wire belonging to Libby Owens Ford, Inc., without the consent of Libby Owens Ford, Inc., knowing that he, Larry Locklear, was not entitled to take it, and intending at the time to deprive Libby Owens Ford, Inc., of the use of the property permanently and that the property was worth more than two hundred dollars then it would be your duty to return a verdict of guilty of felonious larceny as charged in the bill of indictment."

[2] Initially, defendant contends that this portion of the charge constitutes prejudicial error because the State never established the *corpus delicti* of the crime of larceny, either on 6 September 1974, or at any other time. As defendant correctly notes in his brief, a larceny conviction may not stand unless there is (1) proof that a crime has been committed, i.e., proof of the *corpus delicti,* and (2) proof that defendant committed the crime. *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868 (1968). However, we do not agree with defendant that the State failed to establish the *corpus delicti.* There can be no question that the

State introduced evidence showing that a larceny had taken place. As for the date the larceny took place, Marcine Jacobs, who was defendant's girl friend, testified that she accompanied defendant and two others to the Libby Owens Ford plant on 6 September 1974. This was sufficient to raise the inference that the crime took place on 6 September and thereby *prima facie* established the *corpus delicti* as of that date. This contention is without merit.

[3] Defendant also argues that this portion of the charge amounts to a fatal variance between the crime alleged in the indictment (larceny on 8 October 1974) and shown by the State's evidence (larceny on 6 September 1974). It is true that the State's evidence tended to indicate that the theft took place on 6 September. On the other hand, defendant's evidence tended to show that the crime took place on 6 October and that defendant had an alibi on that evening. Where the evidence is conflicting, the trial judge has a duty to apply the law to the various factual situations presented. G.S. 1-180; *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450 (1966). Since the State's evidence supported the finding that the crime took place on 6 September, the trial judge properly instructed the jury to that effect. A review of the entire charge further reveals that the trial judge also summarized defendant's evidence and contentions with regard to when the theft took place and his alibi at that time. Thus, the trial judge explained the conflict in the evidence to the jury and instructed them that in order to find defendant guilty, they would have to find that the crime took place on 6 September, as the State contended. We believe, and so hold, that the charge, viewed as a whole, was proper upon the evidence presented at trial.

Defendant's assignment of error, if error there be, is properly addressed not to the judge's instructions but instead to the denial of defendant's motion for nonsuit.

[4] It is well established that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense. *State v. McDowell*, 1 N.C. App. 361, 161 S.E. 2d 769 (1968). Whether there is a fatal variance between the indictment and the proof is properly raised by a motion for judgment as of nonsuit. *State v. Cooper*, 275 N.C. 283, 167 S.E. 2d 266 (1969). Where time is not of the essence of the offense charged and the statute of limi-

tations is not involved, a discrepancy between the date alleged in the indictment and the date shown by the State's evidence is ordinarily not fatal. G.S. 15-155; *State v. Lemmond,* 12 N.C. App. 128, 182 S.E. 2d 636 (1971). "But this salutory rule, preventing a defendant who does not rely on time as a defense from using a discrepancy between the time named in the bill and the time shown by the evidence for the State, cannot be used to ensnare a defendant and thereby deprive him of an opportunity to adequately present his defense." *State v. Whittemore,* 255 N.C. 583, 592, 122 S.E. 2d 396, 403 (1961).

In the present case, defendant presented an alibi defense. His alibi, however, related to 6 October 1974, not to 8 October 1974 as charged in the indictment or 6 September 1974 as shown by the State's evidence. Therefore, it is apparent that defendant did not rely on the date charged in the indictment, nor did the variation in the State's evidence deprive defendant of his right adequately to present his defense. Under these circumstances, we believe, and so hold, that the variance between the date in the indictment and that shown by the State's evidence is not prejudicial. *See State v. Wilson,* 264 N.C. 373, 141 S.E. 2d 801 (1965).

We have reviewed defendant's remaining assignment of error and find it to be without merit.

Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. RONNIE LOUIS CONYERS

No. 7618SC1016

(Filed 20 July 1977)

1. Criminal Law § 66.16— photographic identification — independent origin of in-court identification

The trial court's determination that a robbery victim's in-court identification was of independent origin and not tainted by an out-of-court photographic identification was supported by the evidence where the victim testified that defendant and another man were with him

for three to five minutes in the back of the store where the robbery occurred; that the back area of the store was well lighted with fluorescent lights; and that for much of the time "the man with the knife," whom he identified as the defendant, was facing him.

2. Criminal Law § 66.7— photographic identification — impermissible suggestiveness — effect on in-court identification

The admission over defendant's objection at trial of eyewitness identification testimony following a pretrial identification by photograph will be held reversible error only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

3. Criminal Law § 66.9— photographic identification — yellow border on defendant's photograph — no impermissible suggestiveness — harmless error

A photographic identification procedure was not "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" because the photograph of defendant had a yellow tinged border which resulted from the photographic development process and made it distinctive from the other photographs; therefore, a robbery victim's in-court identification of defendant was not tainted by her pretrial photographic identification of him. Moreover, the admission of the in-court identification testimony, if erroneous, was harmless beyond a reasonable doubt since the witness's identification testimony was so weak—she testified only that defendant "resembles one of the guys who went to the back"—and the other evidence of defendant's guilt, including his signed confession, was so overwhelming.

4. Criminal Law § 76.6— voluntariness of confession — sufficiency of evidence to support findings

The evidence on *voir dire* supported the court's determination that there was no merit in defendant's contention that he confessed only because officers promised that his bail would be reduced and that he would be placed on probation in return for his testimony against an accomplice and that defendant's waiver of his rights and his confession were made knowingly, voluntarily and intentionally.

5. Criminal Law § 112.1— reasonable doubt — possibility of innocence — harmless error

The court's use of the phrase "possibility of innocence" as synonymous with "reasonable doubt," while disapproved, did not result in prejudice to defendant since the instruction was more favorable to the defendant than that to which he was entitled.

6. Criminal Law § 113.7— instructions — acting in concert — aiding and abetting

The trial court in an armed robbery case properly instructed the jury on "acting in concert" and was not required to instruct on aiding and abetting where all the State's evidence tended to show that defendant was present and with a common purpose did some act forming a part of the offense by helping accost one store employee in the

back of the store while a companion was robbing the other store employee in the front of the store.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 15 July 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 5 May 1977.

Defendant was indicted for armed robbery. He pled not guilty. At his trial, the State presented evidence to show: About 9:30 p.m. on 29 August 1974 three young black men entered the Quality Food Market in Greensboro. Only two employees were on duty. One of the men pulled out a gun and threatened to kill the cashier, Burnetta Robertson. The other two proceeded to the rear of the store, where they threatened the other employee, Jerry Fuller, with a knife. The man with the gun took approximately $2,800.00 from the cash register and then ordered Mrs. Robertson to lie down on the floor. The other two men pushed Fuller into a stockroom, threw him to the floor, and tied his hands behind his back. The three men then left the store together just as a customer was entering.

In early January 1975 Detective Brady of the Greensboro Police Department separately showed to Robertson and Fuller a group of photographs of young black males between the ages of eighteen and twenty-five. Each selected a photograph of defendant as being a person resembling one of the participants in the robbery. On 30 January 1975 defendant was arrested. On the following day, after being advised of his constitutional rights, defendant signed a written waiver of his rights and a statement concerning his participation in the robbery. This statement was in substance as follows: Defendant was riding around in a car with Ben Haith, Henry Richardson, and Larry Mitchell, "getting high on wine and reefers." Ben Haith said he was "going in this place" and told defendant and Larry Mitchell to go in with him. Ben had a .25 automatic, and he tried to get defendant to take the gun and rob the place, but defendant would not. While Henry Richardson remained in the car, the other three went in. Ben had the gun and got the money from the cash register. Defendant and Larry Mitchell walked to the far side, and Larry tied "the man" with some rope which defendant had carried in from the car. After leaving the store, they went to Ben's house, where they divided the money. Defendant got about $247.00.

Defendant presented evidence to show that on the night of 29 August 1974 he was with his girl friend. He denied going into the Quality Food Market on that date. He testified that he signed the confession only after the officers promised him a reduction in bail and probation for turning State's evidence to help convict Ben Haith. Defendant also presented as a witness, Larry Mitchell, who testified that although he participated in the armed robbery, defendant did not.

In rebuttal, the State introduced a previous signed statement of Larry Mitchell implicating defendant in the robbery.

The jury found defendant guilty. From judgment imposing a prison sentence, defendant appealed.

Attorney General Edmisten by Associate Attorney Thomas H. Davis, Jr., for the State.

Assistant Public Defender D. Lamar Dowda for defendant appellant.

PARKER, Judge.

Defendant assigns error to the admission of the in-court identification testimony of the State's witnesses, Robertson and Fuller. He contends this testimony should have been excluded because of impermissibly suggestive out-of-court photographic identification procedures. In support of this contention, defendant points out that a border on two of the group of eight photographs which were shown separately to each witness was tinged with yellow; that one of the photographs with a yellow tinge on the border was that of the defendant; and that the other photograph with a yellow tinge on the border was that of one of the other men accused of participating in the same robbery. Defendant contends that because of the distinctive yellow borders on these two critical photographs, the photographic identification procedure in this case was "patently suggestive as a matter of law." From this he argues that reversible error occurred when the court admitted the in-court identification testimony of Robertson and Fuller. We do not agree.

[1] Prior to admitting the in-court identification testimony of these two witnesses, the court in each case conducted a *voir dire* examination. After the *voir dire* examination held to determine the admissibility of Fuller's in-court identification testimony, the court made full findings of fact, both concerning the out-of-

court photographic identification procedure which had been followed and concerning the opportunity which Fuller had had to observe the two men who had come to the back of the store on the night of the robbery. In this latter connection Fuller testified at the *voir dire* hearing that the back area of the store was well lighted with fluorescent lights, which he described as "bright daylight lights," that the two men were in the back of the store with him for approximately three to five minutes, and that for much of that time "the man with the knife," whom he identified as the defendant, was facing him. The court found on this evidence that the store was well illuminated; that Fuller had had an opportunity to observe the man who held the knife at his throat; and that Fuller did observe that man. The court further found as a fact "that Fuller's impression that the defendant resembles the man who put the knife to his throat as aforesaid is based upon his recollection of the appearance of the man who put the knife to his throat as aforesaid, and that it is in nowise based upon his viewing of photographs exhibited to him by Greensboro police officers, as aforesaid." Since these findings are fully supported by the evidence, they are binding on this appeal. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974); *State v. Harmon,* 21 N.C. App. 508, 204 S.E. 2d 883 (1974). Thus, even if the use of a photograph having a yellow tinged border which made it distinctive from the other photographs should be considered by itself to be impermissibly suggestive, the court's finding, which is supported by clear and convincing evidence, that Fuller's identification testimony was of independent origin supports the court's ruling that his testimony was admissible.

[2, 3] The situation in connection with the identification testimony of the witness, Burnetta Robertson, is somewhat different. Following the *voir dire* hearing held to determine the admissibility of her in-court identification testimony, the court made no finding that her identification of the defendant was of independent origin. The court did find that "none of the photographs exhibited to Mrs. Robertson by the detective, K. W. Brady, bore any markings other than markings and shows (sic) and color placed on the photographic paper at the time of the development of the photographs." The court further found that Detective Brady exhibited all of the photographs shown Mrs. Robertson without comment regarding any photograph. On these

findings the court concluded "that no impermissible thing was said or done to or in the presence of (sic) hearing of Mrs. Robertson as the aforesaid photographs were exhibited to her." Defendant now contends that this conclusion was erroneous as a matter of law solely because of the yellow tinge, which the evidence shows resulted from the photographic developmental process and not from any action of the police, which appeared on the border of the photograph of the defendant and which made it distinctive from the other photographs. Defendant's contention presents a serious problem. Obviously, any marking or coloring on a particular photograph, whether placed there deliberately or as a result of accident, which sets it apart from others shown in a photographic lineup, presents the danger that the attention of the person viewing the lineup might be focused unduly upon that photograph and thus lead to the danger of misidentification. Obviously, also, fairness requires that every precaution should be exercised to avoid that danger. Nevertheless, the admission over defendant's objection at trial of eyewitness identification testimony following a pretrial identification by photograph will be held reversible error only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *State v. Knight,* 282 N.C. 200, 192 S.E. 2d 283 (1972). The only feature of the photographic identification procedure in the present case which was even remotely suggestive was the fact of the tinged yellow border on defendant's photograph. We do not believe that this fact alone made the photographic identification procedure followed in this case "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Moreover, Mrs. Robertson's in-court identification testimony before the jury in this case was so weak—she testified only that defendant "resembles one of the guys who went to the back"—and the other evidence of defendant's guilt, including his signed confession was so overwhelming, that the admission of her testimony, if error at all, was harmless beyond a reasonable doubt. We find no reversible error resulted from the court's ruling allowing Mrs. Robertson to testify that defendant resembled one of the robbers.

[4] Defendant assigns error to the admission in evidence of his signed confession. Prior to admitting this evidence, the court conducted another *voir dire* hearing. At this hearing defendant

testified and admitted he signed the confession after signing a waiver of his rights. He testified that he did so only because the officers promised that his bail would be reduced and that he would be placed on probation in return for his testimony against Ben Haith. The officers who took the confession denied making any such promises. At the conclusion of the *voir dire* hearing, the court made full findings of fact. These are fully supported by competent evidence. They are therefore binding on this appeal. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975). These findings in turn fully support the court's conclusion that the defendant "knowingly, intelligently, and intentionally waived his said rights and freely, voluntarily, intelligently, and intentionally" made his confession. There was no error in admitting the confession in evidence.

[5] Defendant has made a number of assignments of error dealing with portions of the court's charge to the jury. For example, defendant assigns error because at one point the court instructed the jury that reasonable doubt "is intended to imply a possibility of innocence." The use of the phrase "possibility of innocence" as synonymous with "reasonable doubt" has been expressly disapproved by our Supreme Court and by this Court. *State v. Edwards,* 286 N.C. 140, 209 S.E. 2d 789 (1974); *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Chaney,* 15 N.C. App. 166, 189 S.E. 2d 594 (1972). However, no prejudice resulted to the defendant, since the instruction was more favorable to the defendant than that to which he was entitled.

Defendant has also assigned error to other portions of the charge dealing with reasonable doubt. The charge, when read contextually, fairly and clearly stated the law; therefore, the isolated portions to which defendant excepted will not be held prejudicial. *State v. Quick,* 20 N.C. App. 589, 202 S.E. 2d 299 (1974).

[6] Defendant has also assigned error to the failure of the court to define the doctrine of aiding and abetting and to apply it to the facts of this case. We find no error. "A person who actually commits the offense or is present with another and does some act which forms a part thereof, although not doing all of the acts necessary to constitute the crime, is a principal in the first degree." *State v. Mitchell,* 24 N.C. App. 484, 486, 211 S.E. 2d 645, 646 (1975). Where the defendant is present with another and with a common purpose does some act which

forms a part of the offense charged, the judge must then explain and apply the law of "acting in concert." *Id.* Here, defendant was indicted as an active participant for the crime of armed robbery. All the State's evidence tended to show that defendant was present and with a common purpose did some act forming a part of the offense charged by helping accost one employee in the back of the store while Ben Haith was robbing the other employee in the front of the store. The court properly instructed the jury on "acting in concert" and was under no duty to instruct on aiding and abetting. Defendant's assignment of error is without merit.

Defendant's assignments of error to the denial of his motion for nonsuit and to the denial of his motion to set aside the verdict are also overruled. There was plenary evidence to send the case to the jury. Since the motion to set aside the verdict is discretionary, the refusal to grant said motion is not reviewable on appeal, absent an abuse of discretion. *State v. Dull,* 289 N.C. 55, 220 S.E. 2d 344 (1975). Defendant has failed to show an abuse of discretion.

Defendant received a fair trial free from prejudicial error.

No error.

Judges BRITT and MARTIN concur.

CLIFTON H. HOOVER, PLAINTIFF v. KLEER-PAK OF NORTH CAROLINA, INC., A CORPORATION, DEFENDANT v. LAWRENCE E. HOWARD, THIRD-PARTY DEFENDANT

No. 7626DC878

(Filed 20 July 1977)

1. Rules of Civil Procedure § 59— judgment set aside — sufficiency of affidavits — no abuse of discretion

The trial court did not abuse its discretion in granting plaintiff's motion to set aside a judgment for defendant pending the hearing of additional testimony where plaintiff supported his motion with affidavits which presented sworn facts by a person who did not testify at the trial; the affidavits also showed why this person did not testify at the trial; and the judge was of the opinion that his testimony could lead to a new and different judgment. G.S. 1A-1, Rule 59.

2. Trial § 58— trial by judge without jury — conclusiveness of findings

In an action tried before the judge without a jury, the findings of the trial court are conclusive on appeal if supported by competent evidence, even though the evidence might sustain a finding to the contrary.

3. Contracts § 17— commission contract — contract not terminable at will

Defendant's contention that its contract with plaintiff was terminable at will is without merit where the evidence showed that, by the terms of the written contract, plaintiff was to receive a 5% commission as long as defendant sold its products to a named customer whom plaintiff had acquired for defendant.

APPEAL by plaintiff from *Johnson, Judge.* Judgment entered 28 July 1976 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 May 1977.

Clifton H. Hoover, plaintiff, filed a complaint on 23 September 1974 seeking $4,693.04 allegedly owed him by Kleer-Pak of North Carolina, Inc. (Kleer-Pak), defendant, pursuant to a 15 December 1971 written contract signed by plaintiff and signed in the name of defendant by L. E. Howard, Vice President and General Manager. As far as pertinent to this appeal, the contract provided for plaintiff to develop sales of Kleer-Pak products to Brevoni Hosierv. a Division of Schulte & Dieckhoff (USA), Inc. (Brevoni), for which plaintiff was to receive a 5% commission on all such sales "as long as Kleer-Pak sells its product to Brevoni." Plaintiff alleged that since 12 December 1973 Kleer-Pak had sold $93,860.80 worth of its products to Brevoni upon which plaintiff had not received his 5% commission. Defendant answered, denying liability on the grounds that the written contract alleged in the complaint was not executed in accordance with statutory requirements and that Howard had no authorization to execute such contract on behalf of defendant. Defendant also counterclaimed, alleging damages in the amount of $7,960.00 resulting from an order placed by plaintiff on 28 November 1972 for the sale of finished products from Kleer-Pak to Brevoni that Brevoni claimed it never authorized. On the ground that no authorization was given to Howard to execute the contract with plaintiff, defendant, as third-party plaintiff, filed a complaint in this action against Howard, as third-party defendant, seeking to establish Howard's liability over to Kleer-Pak in case plaintiff established his claim. Howard answered asserting that at all times he acted pursuant to an authorization from Murray Greiff, President of Kleer-Pak.

On 1 and 2 March 1976, a non-jury trial on this matter was held in District Court. After the presentation of his evidence, plaintiff was granted a motion to amend his complaint to conform the evidence to include an allegation as to the existence of a similar oral agreement prior to the execution of the written contract between the parties. Plaintiff presented the following evidence:

Since 1957 plaintiff has been self-employed in the business of "selling packaging materials such as cellophane and polyethylene in the form of printed or unprinted bags or rolls." After defendant opened its Charlotte plant, plaintiff held discussions some time prior to 15 December 1971 upon the request of defendant's president, Murray Greiff, about selling some packaging to Brevoni for Kleer-Pak, since plaintiff already had several contacts with Brevoni. Pursuant to these discussions, Greiff orally agreed to pay plaintiff a 5% commission on all gross sales "as long as Kleer-Pak chose to do business with Brevoni Hosiery." After plaintiff informed Greiff that he would need a written contract before he could set up sales on this account, Greiff told plaintiff to have his attorney draft one. When the contract embodying the above-mentioned oral terms was prepared, plaintiff gave it to Howard, who wanted to check with Grieff before signing it. About a week later, on 15 December 1971, plaintiff and Howard, the latter acting on behalf of defendant, signed the written contract at defendant's offices in Charlotte. Thereafter, plaintiff began obtaining orders from Brevoni for Kleer-Pak's products for which he received his agreed upon 5% commission from Kleer-Pak. Plaintiff testified that although occasionally he received a written order from Brevoni, the normal routine was to get a verbal order from Brevoni, to transmit the order verbally to Kleer-Pak, thereafter to receive a written acknowledgment from Kleer-Pak, and then to obtain a copy of the invoice, against which he checked the accuracy of his commission checks. On 28 November 1972, Hubert Bertmaring, then the purchasing agent for Brevoni, submitted a verbal order for 20 million bags to plaintiff, who thereafter transmitted it to Kleer-Pak. However, Bertmaring left shortly thereafter to return to West Germany, and his replacement, Hans Lengers, refused to acknowledge the placing of the order. As a result of defendant then having to store these bags, Greiff sent plaintiff a letter on 4 December 1973 terminating plaintiff's relationship with defendant. Since that date,

plaintiff has received no commissions although the sales from defendant to Brevoni have totaled approximately $93,860.80.

Testifying for defendant, Greiff stated that the verbal agreement guaranteeing plaintiff a 5% sales commission on the new accounts he obtained for Kleer-Pak arose in the latter part of 1970 but that it was only "to continue as long as there were no problems of any nature that we would both object to." Greiff further testified that he wrote the letter terminating plaintiff's relationship with defendant because of the 28 November 1972 order which plaintiff had reported he had obtained from Brevoni but which Brevoni refused to acknowledge that it had placed. Because of this rejection the material, which was a special gauge and which could not be readily sold to other customers, had to be stored in defendant's warehouse with the estimated loss to defendant, based upon the various storage and resale costs, of approximately $10,000.00. Despite the initial rejection, about 40% of the material from the 28 November 1972 order was ultimately sold to Brevoni.

On 9 March 1976 the Court found: that plaintiff materially breached its contract with defendant by reason of his conduct surrounding the 28 November 1972 order; that defendant had suffered no actual damages in consequence of said breach; and that the third-party defendant incurred no personal liability by signing the 15 December 1971 paper writing on behalf of defendant. The court then entered judgment dismissing plaintiff's complaint, defendant's counterclaim, and defendant's third-party complaint. In apt time plaintiff filed, along with supporting affidavits, a motion for a new trial pursuant to G.S. 1A-1, Rule 59. On 14 June 1976, the court granted plaintiff's motion by entering an order setting aside the 9 March 1976 judgment and reopening the case for the taking of additional testimony.

On 2 July 1976 the reopened hearing was held with Hubert Bertmaring testifying for plaintiff and Hans Lengers testifying in rebuttal for defendant. Bertmaring testified that his normal course of operation while he was Brevoni's purchasing agent in 1972 was to place the orders verbally with plaintiff and to confirm them later with an acknowledgment and purchase order number; that he placed an order for 10 million clear bags and 20 million printed bags with plaintiff verbally in November 1972; that before he left for military duty in West Germany he had an acknowledgment for 10 million bags from defendant

but had not yet received a confirmation for the 20 million bags; that when he left for West Germany the only way Lengers could know of his orders was through a memorandum Bertmaring left for him; and that he did not include the 20 million bag order in the memorandum since he had not received the acknowledgment. Defendant's witness, Lengers, testified that while the memorandum mentioned Kleer-Pak was reserving materials for the 20 million bags, he interpreted the memorandum to mean that Brevoni was not committed to make this purchase and that Brevoni had no binding order for the 20 million bags from Kleer-Pak; therefore, he refused to confirm that order.

Amending the 9 March 1976 judgment by making new findings of fact and conclusions of law, the court on 28 July 1976 entered a new judgment awarding plaintiff his claim of $4,693.04 and dismissing defendant's counterclaim and third-party complaint. From the entry of this new judgment, defendant assigns error and appeals.

Wardlow, Knox & Knox by William G. Robinson and John S. Freeman for plaintiff appellee.

Harkey, Faggart, Coira & Fletcher by Philip D. Lambeth for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the order allowing plaintiff's motion pursuant to G.S. 1A-1, Rule 59, whereby the judgment of 9 March 1976 was set aside pending the hearing of additional testimony. Defendant asserts that the trial court abused its discretion in reopening the case in that the affidavits supporting the motion were insufficient to establish the grounds enumerated under Rule 59 for granting such a motion. It is well established that a motion for a new trial under G.S. 1A-1, Rule 59, is addressed to the sound discretion of the trial judge, whose ruling is not reviewable on appeal absent an abuse of discretion. *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970). Defendant has failed to show any such abuse of discretion. Plaintiff's affidavits presented sworn facts by Hubert Bertmaring which tended to show that he did in fact place the questioned order with plaintiff as well as to show why he had not testified at the earlier trial. The judge, being of the opinion that this additional testimony could lead to a new and different judgment, ordered the original judgment reopened.

Having wide latitude under Rule 59 to grant new trials, the judge did not abuse his discretion in seeking to have all the facts before him before reaching a final decision in this case. *See Finance Corp. v. Mitchell,* 26 N.C. App. 264, 215 S.E. 2d 823 (1975). Defendant's first assignment of error is overruled.

[2] Defendant assigns as error the entry of the 28 July 1976 judgment. Defendant argues that the court's findings of fact and conclusions of law are not supported by the evidence when the testimony "is considered as a whole." There is no merit in defendant's position. In an action tried before the judge without a jury, the court's findings of fact have the force and effect of a jury verdict. Thus, it is the function of the trial judge to pass on the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. Therefore, the findings of the trial court are conclusive on appeal if supported by competent evidence even though the evidence might sustain a finding to the contrary. *Knutton v. Cofield,* 273 N.C. 355, 160 S.E. 2d 29 (1968). Although the evidence presented by the parties in this case was conflicting, there was competent evidence to support the findings by the trial court. Defendant's assignment of error is overruled.

[3] Defendant finally assigns as error the court's conclusion as a matter of law that defendant terminated plaintiff's contract without just cause and thereby committed a material breach of contract. Defendant argues that the contract was terminable at will because no definite time was set for its duration. We find defendant's position untenable. The purpose of the contractual arrangement between the parties was for plaintiff to use his contacts to develop Brevoni as a customer for defendant in consideration for which plaintiff would receive a 5% commission on all gross sales made by defendant to Brevoni. Both the initial oral agreement and later the written agreement contained terms to the effect that the 5% commission would be paid to plaintiff as long as defendant sold its products to Brevoni. The terms of the contract were definite; therefore, it was not terminable at will. Finding no error in the trial court's conclusions of law, we overrule defendant's final assignment of error.

Affirmed.

Judges BRITT and MARTIN concur.

STATE OF NORTH CAROLINA v. BRUCE E. ELLIS

No. 779SC62

(Filed 20 July 1977)

1. **Embezzlement §§ 4, 6— allegation of ownership by "Provident Finance Company" — proof of ownership in corporation — no fatal variance**

There was no fatal variance in an embezzlement case because the indictment placed ownership of the embezzled funds in "The Provident Finance Company" and the evidence placed ownership of the funds in the "Provident Finance Company of Henderson, Inc.," since the words "Provident Finance Company" clearly import a corporation pursuant to G.S. 55-12.

2. **Embezzlement § 5— proof of transaction — specific date not alleged**

The trial court in an embezzlement case did not err in the admission of a witness's testimony concerning transactions on dates which were not particularly listed in the indictment where the indictment alleged that the transactions constituting the alleged embezzlement occurred between two specified dates and then listed particular dates, and the transactions to which the witness testified occurred within the period stated in the indictment, since the defendant had ample notice of the time frame upon which the State relied.

3. **Criminal Law § 128.2— use of word "embezzle" in cross-examining defendant — failure to declare mistrial**

The trial court did not err in refusing to declare a mistrial in an embezzlement case when the prosecutor used the word "embezzle" during his cross-examination of the defendant where the court sustained defendant's objection to the prosecutor's question and instructed the jury to disregard it.

4. **Embezzlement § 6.1— evidence of frugal life style — refusal to give requested instruction**

The trial court in an embezzlement case properly refused to instruct the jury that evidence of defendant's financial condition and the absence of any large expenditures by him should be considered by the jury in determining guilt or innocence where the State did not attempt to prove that defendant converted and spent the missing funds on himself but presented evidence tending to show that defendant misapplied the funds within his employer's company to reduce bad debt accounts and thereby protect his job and enhance his income under the company profit sharing plan, since the requested instruction applied to a situation not at issue in the trial.

5. **Criminal Law § 114.1— recapitulation of evidence — disparity in time**

The fact that the trial court in a complicated case consumed more time in recapitulating the State's evidence than that of the defendant did not constitute an expression of opinion on the evidence.

6. **Criminal Law § 122.2— jury unable to agree — instruction to deliberate further**

The trial court did not coerce a verdict in sending the jury back for further deliberations after the jury announced that a verdict had not been reached where the court stressed to the jury that its verdict was not to be bought at the price of the surrender of the conscientious convictions of any of its members.

7. **Embezzlement § 6— allegation of "embezzlement and conversion" — proof of misapplication — no fatal variance**

There was no fatal variance between indictment and proof where the indictment alleged that defendant did "embezzle and convert to his own use" funds of a finance company and the State's evidence tended to show that defendant fraudulently misapplied the funds but failed to show that defendant converted the funds to his own use, since the term "embezzle" includes fraudulent misapplication, and the allegation of conversion may be treated as surplusage.

APPEAL by defendant from *Baley, Judge.* Judgment entered 15 October 1976, Superior Court, VANCE County. Heard in the Court of Appeals 1 June 1977.

Defendant was charged in a bill of indictment with embezzlement of funds from the Provident Finance Company in whose Henderson branch he was employed as manager. The jury returned a verdict of guilty, and defendant appeals from the judgment entered on the verdict imposing imprisonment for a term of three to five years.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Joan H. Byers, for the State.

Rogers & Senter, by Bobby W. Rogers, for defendant.

BROCK, Chief Judge.

[1] Defendant first assigns error to the trial court's denial of his motion for directed verdict at the close of State's evidence. As ground for his motion defendant argued a fatal variance between the indictment and proof. The indictment placed ownership of the embezzled funds in the "Provident Finance Company." Evidence educed at trial placed ownership of the funds in the "Provident Finance Company of Henderson, Inc." Defendant contends the difference in names constitutes a fatal variance. We disagree.

In an indictment for embezzlement it is necessary to allege ownership of the property in a person, corporation, or other legal entity able to own property. Where the property belongs to a corporation: " . . . the name of the corporation should be given, and the fact that it is a corporation stated, unless the name itself imports a corporation." *State v. Thornton,* 251 N.C. 658, 662, 111 S.E. 2d 901, 903 (1960). General Statute, Chap. 55, Business Corporations Act, Art. 3, Formation, Name and Registered Office, Section 55-12, Corporate name, states: "The corporate name shall contain the wording 'corporation,' 'incorporated,' 'limited' or 'company' or an abbreviation of one of such words." The words "Provident Finance Company" clearly import a corporation; therefore, as to placing ownership in a corporate entity, the indictment is sufficient.

The issue then is whether the variance between "Provident Finance Company" and "Provident Finance Company of Henderson, Inc." is so material as to be fatal. We hold that it is not. The defendant was adequately informed of the corporation which was the accuser and victim. A variance will not be deemed fatal where there is no controversy as to who in fact was the true owner of the property. *State v. Wyatt,* 254 N.C. 220, 118 S.E. 2d 420 (1961).

[2] Defendant next assigns as error the admission of testimony of State's witness Allen. Allen testified concerning a loan transaction in which he made final payment on his account and received a paid-in-full receipt from defendant. Allen's payment was not applied to his loan account. Defendant argues that the State should be restricted to proof of the transactions set out in the indictment and that since the dates of the transactions testified to by Allen were not included in those listed in the indictment, admission of the testimony was error. Defendant's argument is without merit.

Where time is not of the essence in the crime charged, an indictment charging the crime is not defective when the date is left out. *State v. Tessnear,* 254 N.C. 211, 118 S.E. 2d 393 (1961). Embezzlement in violation of G.S. 14-90 requires the establishment of four elements: (1) that the defendant was the agent of the prosecutor; (2) that by the terms of his employment he was to receive the property of his principal; (3) that he received the property in the course of his employment; and (4) knowing it was not his own, converted it to his own use or fraudulently

misapplied it. *State v. Buzzelli,* 11 N.C. App. 52, 180 S.E. 2d 472 (1971); *State v. Smithey,* 15 N.C. App. 427, 190 S.E. 2d 369 (1972). There was sufficient evidence presented to prove the elements necessary to establish the crime charged in the bill of indictment. Furthermore, the indictment expressly stated that transactions constituting the alleged embezzlement occurred between 6 July 1970 and 7 May 1974. The transactions testified to by Allen occurred within the period stated in the indictment. The defendant had ample notice of the time frame upon which the State relied. If defendant had wanted more information than that provided in the indictment, it was his obligation to request a bill of particulars. *State v. Cox,* 244 N.C. 57, 92 S.E. 2d 413 (1956).

[3] Defendant next assigns error to the trial court's refusal to declare a mistrial. The prosecutor, in cross-examining the defendant, asked the following question: "And these were the 90 day account cards that you had to *embezzle* some money from to pay off delinquent loans?" (Emphasis added.) The defendant's objection was immediately sustained by the trial court. Defendant moved for mistrial. The trial judge denied the motion but immediately thereafter admonished the jury to disregard the prosecutor's remark. The defendant argues that the prosecutor's use of the word "embezzle" was so inflammatory as to require a mistrial. We disagree. The trial judge moved swiftly to excise any prejudicial effect of the prosecutor's question. The conduct of the trial rests in the discretion of the trial court. *State v. Lindsey,* 25 N.C. App. 343, 213 S.E. 2d 434 (1975). The ruling denying the motion for mistrial was sound and in no way evidences an abuse of discretion.

[4] The defendant next assigns as error the trial court's failure to submit a requested charge to the jury. In substance the requested charge stated that evidence as to defendant's reputation for honesty and fair dealing, his financial condition, and the absence of any large expenditures by him should be considered by the jury in determining guilt or innocence. This assignment of error is without merit.

The court need not give a requested instruction which is not germane to the issue. *State v. Smith,* 202 N.C. 581, 163 S.E. 554 (1932). The purpose of the instruction requested was to place in counterpoise defendant's evidence of a frugal life with the prosecution's evidence that defendant converted the

allegedly embezzled funds to his own use. In the present case the State did not attempt to prove that defendant converted and spent the missing funds on himself. The State's evidence tended to show that defendant misapplied the funds within the company to reduce bad debt accounts and thereby protect his job and enhance his income under the company profit sharing plan. The requested instructions were inappropriate in that they applied to a situation not at issue in the trial.

[5] The defendant next contends that the trial court, in its recapitulation of the evidence, unduly stressed the State's case to the prejudice of the defendant. The fact that the trial court in a complicated case consumes more time in recapitulating the State's evidence than that of the defendant does not constitute an expression of opinion on the evidence. *State v. Murray,* 21 N.C. App. 573, 205 S.E. 2d 587 (1974). After reviewing the record in light of the charge, we find no undue weight given to the State's evidence.

[6] The defendant next assigns as error the trial court's request that the jury continue its deliberations after the jury announced that a verdict had not been reached. The defendant argues that sending the jury back for further deliberations coerced the dissenting juror. This assignment of error is without merit. In sending the jury back, the trial judge was fulfilling his obligation to achieve the most efficient administration of the judicial process possible under the particular circumstances. Furthermore, he assiduously stressed to the jury that its verdict was not to be bought at the price of the surrender of any of its members' conscientious convictions.

[7] Defendant assigns as error that part of the trial judge's charge in which he explained that for the jury to find defendant guilty, it must find beyond a reasonable doubt that the defendant, as an employee, received funds and with fraudulent intent used the property for a purpose other than that for which it was received. The indictment charged that defendant did "embezzle and convert to his own use." Defendant argues that the State proved only misapplication of funds. He contends that there is a fatal variance between the allegations and the proof and that the court's charge was in error in that it allowed the jury to find him guilty without a finding that he converted the funds to his own use.

While defendant claims the judge erred in defining "embezzlement" in his charge, he is really arguing a fatal variance between allegation and proof. The proper method for raising the issue of fatal variance is not by exception to the charge, but rather by motion to dismiss as in case of nonsuit. *State v. Grace,* 196 N.C. 280, 145 S.E. 399 (1928). Since defendant did move for directed verdict and did except to the denial of the motion, we will consider the substantive issue raised by this assignment of error.

The indictment charged that defendant did "embezzle and convert to his own use" funds from Provident Finance Company. Defendant argues that because of the quoted language the State elected to try defendant on a theory of embezzlement by conversion. We do not agree. Embezzlement is a statutory crime. G.S. 14-90 declares that a person will be guilty of a felony if he " . . . shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use. . . . " By its wording there are six possible means of violating the statute, two of which are embezzlement and conversion to one's own use.

In *State v. Foust,* 114 N.C. 842, 19 S.E. 275 (1894), it was held that the statute which is now G.S. 14-90 "renders it indictable to embezzle or fraudulently convert to one's own use . . . these acts are not necessarily and strictly synonymous." "To embezzle may mean to 'appropriate to one's own use,' but it embraces also the meaning 'to misappropriate.' " *Id.* at 843, 19 S.E. at 275. In *Foust* the indictment charged that defendant "willfully, fraudulently, knowingly and feloniously did convert to his own use *and* embezzle." (Emphasis added.) Our Supreme Court held that the court correctly charged the jury when it "told the jury that to embezzle was for an agent fraudulently to misapply the property of his principal; that it was not necessary that the agent should convert it to his own use . . . . " *Id.* at 843, 19 S.E. at 275.

The present case is controlled by *Foust.* The indictment charged that defendant did "embezzle and convert to his own use." (Emphasis added.) The State, as in *Foust,* proved fraudulent misapplication. The trial court, as in *Foust,* correctly charged the jury on fraudulent misapplication. Thus the crime

of embezzlement was properly charged in the indictment, proved by the State, and explained to the jury by the trial court. As to that part of the indictment alleging conversion, where an averment as to the manner of committing an offense can be omitted without affecting the charge in the indictment, it may be rejected as surplusage. 41 Am. Jur. 2d, Indictments and Information, § 266, p. 1042.

Defendant's remaining assignment of error have been reviewed. Examination thereof discloses no error. The defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and MARTIN concur.

STATE OF NORTH CAROLINA v. CEDRICK BOST

No. 7610SC968

(Filed 20 July 1977)

1. **Burglary and Unlawful Breakings § 5.8; Larceny § 7— breaking into apartment — larceny of TV — sufficiency of evidence**

In a prosecution for breaking and entering and larceny, evidence was sufficient to be submitted to the jury where it tended to show that the crimes were committed by a black male wearing a light, sleeveless, undershirt type shirt; defendant, a black male wearing a similar type shirt, was observed within a few minutes after the crimes were committed at a location only two blocks away from the scene of the crimes; he was perspiring, short of breath, and had been running; an automobile arrived and parked near the scene of the crimes only a few minutes before they were committed and the person who committed the crimes placed the stolen TV in this automobile; and defendant's fingerprint was found on this automobile.

2. **Criminal Law § 60.5— fingerprint evidence — time of impression — competency**

In a prosecution for breaking and entering an apartment and larceny of a TV therefrom, the trial court properly allowed into evidence testimony concerning defendant's fingerprint on a car in the apartment parking lot, though there was no showing that the fingerprint was impressed at the time of the commission of the crimes, since the fingerprint evidence was logically relevant, not to show defendant's presence at the apartment where the crimes were committed, but to connect defendant with the automobile in which the stolen

TV was placed, and, for that purpose, the fingerprint evidence would be relevant even though defendant's fingerprint had been impressed on the car at some time other than when the apartment was broken into.

3. **Criminal Law § 66.2— identification of thief — witness's statement "I imagine" — competency**

In a prosecution for breaking and entering and larceny, the trial court did not err in allowing a witness to testify with respect to the man she saw carrying a TV from the direction of the apartment broken into that "I imagine he was around five feet," since the witness was merely indicating that she was giving a rough estimate of what she had perceived.

4. **Criminal Law § 162.2— objectionable question — failure to object — motion to strike answer properly denied**

The trial court did not err in denying defendant's motion to strike a responsive answer of a State's witness which constituted hearsay where the form of the question should have sufficiently apprised defendant's counsel of the hearsay nature of the answer for which it called, but counsel made no objection to the question.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 16 July 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 3 May 1977.

This is an appeal from sentence imposed on defendant's conviction of felonious breaking and entering and felonious larceny.

The State's evidence showed that during the early evening hours of 17 August 1975 Louise Honeycutt's apartment in the Cameron Village Apartments in Raleigh was broken into in her absence and that a portable TV and items of jewelry were taken. About 8:30 p.m. a car, later determined to be a Ford Mustang registered to one Gregory Bullock of Fuquay-Varina and reported stolen, was seen to pull into the apartment parking lot and to park in the space marked for the Honeycutt apartment. About 8:45 p.m. a neighbor, Ruby Kimball, saw a black man having an Afro hairstyle and wearing a "light looking sleeveless undershirt type shirt" come from the direction of the Honeycutt apartment carrying what appeared to be a TV. When the lights of a passing car shone on him, he squatted down beneath an apple tree until the car passed. He then went to the parked Mustang and put the TV in it. Ruby Kimball phoned the police, who arrived shortly thereafter. The police found the Ford Mustang still parked in the parking lot. A TV set, identified by Louise Honeycutt as hers and as having been

left by her locked in her apartment, was in the back of the Ford. A window screen to the Honeycutt apartment had been torn or cut out and the apartment had been ransacked.

Officer Davis of the Raleigh Police Department started patrolling the immediate vicinity in his patrol car. About ten minutes after first receiving word of the break-in, Officer Davis observed a black male, the defendant, running west on Peace Street toward the Cameron Village Apartments about two blocks east of the apartments. Defendant was perspiring heavily and was short of breath. He was wearing a sleeveless multi-colored tank top shirt. Officer Davis asked defendant for some identification, which defendant produced, but Davis did not search the defendant or further detain him at that time. When Officer Davis left, he saw defendant continue to walk westward, toward the apartments. Approximately thirty minutes later, after a call was put out to find defendant, he was apprehended while using a public telephone at a location approximately 15 blocks away from the Cameron Village Apartments.

A fingerprint expert testified that a latent fingerprint found on the outside of the door just below the window on the driver's side of the Ford Mustang matched the print made by defendant's right hand middle finger. In the opinion of this expert, the fingerprint could have been placed on the vehicle as much as 48 hours prior to the time he examined the vehicle on the night the break-in occurred.

Defendant did not introduce evidence. He was found guilty by the jury, and sentence was imposed on the verdict, from which defendant now appeals.

Attorney General Edmisten by Assistant Attorney General Robert R. Reilly for the State.

Brenton D. Adams for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to the denial of his motion for nonsuit. We find the evidence, when considered in the light most favorable to the State, sufficient to take the charges against defendant to the jury. There was evidence that the crimes were committed by a black male wearing a "light looking sleeveless undershirt type shirt." Defendant, a black male wearing a similar type shirt, was observed within a few minutes

after the crimes were committed at a location only two blocks away from the scene of the crimes. He was perspiring, short of breath, and had been running. That he was running toward rather than away from the scene of the crimes presented a factor for the jury to evaluate. The State's evidence in this connection at least unequivocally established his presence near the scene of the crimes at a time shortly after they were committed. There was evidence that an automobile arrived and parked near the scene of the crimes only a few minutes before they were committed and that the person who committed the crimes placed the stolen TV set in this automobile. Defendant's fingerprint was found on this automobile. Although all automobiles are meant to be driven on public streets and are frequently parked in public places, this particular automobile had been stolen from its owner, who lived outside of Raleigh, and nothing in the evidence suggests any legitimate reason why defendant should ever have been sufficiently near the automobile to place his fingerprint upon it. In our opinion the evidence was sufficient to support a legitimate inference which the jury might draw that defendant was the person who was seen placing the stolen TV set in the automobile and that he was the person who committed the crimes with which he was charged. Defendant's motion for nonsuit was properly denied.

[2] Defendant assigns error to the admission in evidence over his objections of the testimony by the fingerprint expert identifying as defendant's the latent fingerprint found on the door of the automobile in which the stolen television set was placed. He contends this testimony should not have been admitted because the evidence failed to show that the fingerprint could have been placed on the automobile only at the time the crime was committed. Evidence that fingerprints found at the scene of a crime are those of the accused is relevant to show that at some time he had been present at the scene. However, the probative force of such evidence to show that the accused committed the crime depends upon the strength of evidence of circumstances from which the jury might find that the fingerprints could have been impressed only at the time of the crime was committed. Thus it is that "[t]he probative force, not the admissibility, of a correspondence of fingerprints found at the crime scene with those of the accused, depends on whether the fingerprints could have been impressed only at the time the crime was perpetrated." *State v. Irick*, 291 N.C. 480, 489, 231

S.E. 2d 833, 839 (1977). Ordinarily, the question whether the fingerprints could have been impressed only at the time the crime was committed is a question of fact for the jury and not a question of law to be determined by the court prior to admission of the fingerprint evidence. *State v. Irick, supra.* In the present case, the fingerprint evidence was logically relevant, not to show defendant's presence at the Honeycutt apartment where the crimes were committed, but to connect defendant with the automobile in which the stolen TV set was placed. For that purpose, the fingerprint evidence in this case would have been relevant even though defendant's fingerprint had been impressed on the car door at some time other than when the Honeycutt apartment was broken into. Such evidence, standing alone, would certainly not have been sufficient to support the verdicts finding defendant guilty in this case. However, it has never been the rule that fingerprint evidence, to be admissible, must be so strong that, considered alone and unsupported by any other evidence showing defendant's guilt, it would withstand a motion for nonsuit. We find no error in the admission of the fingerprint evidence in this case.

[3] Ruby Kimball, the witness who testified to seeing the man who carried the TV set from the direction of the Honeycutt apartment to the parked car, was asked by the District Attorney if she recalled either the build or the height of the person she saw. To this she replied: "Oh, I imagine he was around five—." At this point defendant's counsel objected. The objection was overruled, and the witness completed her answer by saying, "five feet." Defendant assigns the overruling of his objection as error, contending that the witness should have been permitted to testify only to what she saw, not what she imagined. We find no error. The witness was testifying from first-hand observation. Her use of the expression, "I imagine," merely indicated that she was giving a rough estimate of what she had perceived, and the jury must have understood it in this sense. The evidence was competent; its weight was for the jury. *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544 (1965). This assignment of error is overruled.

[4] The record shows that the following occurred during the direct examination of one of the Raleigh police officers who made an investigation at the scene of the crimes:

> "Q. Now, while you were on the scene, did you get any further information about that vehicle?

A. Yes, sir. While we were still on the scene at approximately eleven minutes after I arrived at the scene, this Mustang was called in to the Raleigh Police Department as being stolen.

Q. Thank you.

Mr. Riley: No further questions.

The Court: Mr. Adams, have you questions?

Mr. Adams: If the Court pleases, I move to strike that last statement of the officer.

The Court: Denied."

Defendant assigns error to the denial of his motion to strike. We find no error. It is true, as defendant contends, that the witness's statement that the automobile "was called in to the Raleigh Police Department as being stolen" was hearsay. However, the very form of the question should have sufficiently apprised defendant's counsel of the hearsay nature of the answer for which it called, and "it is well settled that an objection must be interposed to an improper question without waiting for the answer and, if the objection is not made in apt time, a motion to strike a responsive answer is addressed to the discretion of the trial court, except where the evidence is rendered incompetent by statute." *State v. Perry*, 275 N.C. 565, 571, 169 S.E. 2d 839, 844 (1969). Here, no objection was made when the question was asked; the answer was responsive; no statute is involved; and we find no abuse of the trial court's discretion in denying defendant's motion to strike. Moreover, with commendable candor, defendant's counsel admitted during oral argument on this appeal that he had interposed no objection to the question when it was asked because he had hoped for a favorable answer. Having thus speculated and lost, defendant may not now justly complain because of the denial of his motion to strike. This assignment of error is overruled.

We have carefully examined all of defendant's remaining assignments of error and find them without merit. In defendant's trial and in the judgment appealed from we find

No error.

Judges BRITT and MARTIN concur.

JAMES RUDOLPH STREETER v. BETTY JEAN COREY STREETER

No. 763DC906

(Filed 20 July 1977)

1. **Divorce and Alimony § 16— effect of delay in seeking alimony**

The mere delay by the dependent spouse in seeking maintenance from the supporting spouse, absent any showing of prejudice to the supporting spouse resulting from the delay, does not bar the dependent spouse's action to enforce the right to support.

2. **Rules of Civil Procedure § 50— motion for judgment n.o.v. — necessity for directed verdict motion**

The timely making of an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment notwithstanding the verdict.

3. **Rules of Civil Procedure § 49; Trial § 56— waiver of jury trial on issue of fact**

The court's finding that the attorney for the plaintiff agreed that the question of laches by defendant in seeking alimony would be determined solely by the judge was supported by the record where plaintiff's attorney failed to demand that the issue of laches be submitted to the jury, and plaintiff's attorney admitted in his brief that he agreed that no issue of laches would be submitted to the jury, since the judge was authorized by G.S. 1A-1, Rule 49(c) to make a finding upon an issue of fact absent a request that the issue be submitted to the jury.

4. **Trial § 58— findings by court after jury verdict**

The trial court did not usurp the jury's authority in making detailed findings of fact in its judgment awarding a divorce to plaintiff and alimony to defendant where the findings were made after the jury had returned its verdict and were not inconsistent with the verdict; furthermore, if some of the findings were not necessary to the determination of issues which were before the court to decide, they may be treated as surplusage.

APPEAL by plaintiff from *Whedbee, Judge.* Judgment entered 27 May 1976 in District Court, PITT County. Heard in the Court of Appeals 12 May 1977.

Plaintiff-husband commenced this action on 11 September 1975 seeking an absolute divorce on the ground of separation for more than one year. Defendant-wife answered alleging facts in recrimination as affirmative defenses and counterclaiming for alimony and counsel fees. Plaintiff replied, pleading laches as a defense to defendant's counterclaim. An interlocutory award to defendant of alimony *pendente lite* and counsel fees

was affirmed by this Court in an unpublished opinion filed 3 November 1976. *Streeter v. Streeter,* 31 N.C. App. 334, 229 S.E. 2d 259 (1976).

At trial on the merits before a jury, plaintiff testified that the parties married on 21 April 1965, that they separated on 30 May 1966, and that since then they have lived continuously separate and apart. He also testified that no children were born of the marriage.

Defendant testified in substance to the following: Initially the marriage was a happy one. In October 1965 defendant was seriously injured and disfigured in an automobile accident. Thereafter, plaintiff's attitude toward her changed. He began spending considerable time away from home and finally told defendant he did not love her and she would be better off living with her aunt or mother. On 30 May 1966 defendant was very sick and needed medication. Plaintiff left in the early morning to get the medicine but did not return. That afternoon defendant saw him in the company of another woman. Defendant left that same day. Plaintiff has not given her any financial support since 30 May 1966, but his mother has given her money and purchased clothes. In April 1967 defendant went to Washington, D. C., where plaintiff was then living, to discuss their marital situation. When she arrived, Barbara Tucker answered the door and defendant saw a woman's clothing and a baby crib in plaintiff's apartment.

Prior to the accident in October 1965, defendant taught school. In September 1966 she went back to work without the doctor's permission and continued teaching until December 1967. Since then she has become totally disabled and her sole income is $260.00 per month from social security. Plaintiff is employed by Proctor & Gamble in Greenville, N. C., and earns approximately $930.00 per month. Defendant delayed bringing an action for support because she understood she needed money to seek a lawyer and she was financially unable to pay legal expenses. She always hoped they would make up.

In rebuttal, plaintiff testified that defendant had not asked for any support since their sparation on 30 May 1966, that he had given her none since that time, and that he had made no attempt to reconcile their differences.

Issues were submitted to and were answered by the jury as follows:

"1. Did the plaintiff commit adultery as alleged?

No.

2. Did the plaintiff willfully abandon the defendant without just cause or provocation, a statutory ground for permanent alimony and a bar to divorce?

No.

3. Has the plaintiff without provocation rendered the condition of the defendant intolerable and her life burdensome?

Yes."

Following return of the verdict by the jury, a hearing was held before the judge sitting without a jury to determine whether there should be an award of permanent alimony, and if so, in what amount. Thereafter, the court entered judgment making findings of fact, conclusions of law, and granting plaintiff an absolute divorce but ordering him to pay defendant $25.00 per week support and her counsel fees. From this judgment, plaintiff appealed.

Laurence S. Graham for plaintiff appellant.

Blount, Crisp & Grantmyre by Nelson B. Crisp for defendant appellee.

PARKER, Judge.

Plaintiff made twelve assignments of error. He discusses only the first four of these in his brief. The rest are deemed abandoned. Rule 28(a), Rules of Appellate Procedure.

[1] In his first assignment of error plaintiff challenges the court's conclusion that there had been "no laches on the part of the defendant who hoped for a reconciliation of her marriage and had no money for attorney's fees." We find no error.

Laches is an affirmative defense, G.S. 1A-1, Rule 8(c), which in this case was plaintiff's burden to prove. Plaintiff has neither alleged nor offered any evidence to prove that he has been prejudiced by defendant's delay in seeking to enforce her

rights. "[I]n the absence of such showing the benefits of the defense of laches may not be invoked." *Holt v. May,* 235 N.C. 46, 50, 68 S.E. 2d 775, 778 (1952). On competent evidence the court made findings that "[t]he defendant is substantially in need of maintenance and support from the plaintiff in that she must borrow money to meet her fixed monthly expenses and has no one else upon whom she may depend for support and does in fact need additional support to supplement the Two Hundred Sixty and No/100 Dollars ($260) per month she receives as disability payments." On competent evidence the court also found the facts as to plaintiff's earnings and his ability to support the defendant. Plaintiff does not challenge these factual findings nor does he question the court's conclusions that defendant is the dependent spouse and plaintiff the supporting spouse. Plaintiff's sole contention in support of his first assignment of error seems to be that the mere lapse of nine years between 1966, when he quit furnishing support, and 1975, when defendant first asserted in court her claim for support, constituted laches as a matter of law. We do not agree.

> "There is no express statute of limitations in North Carolina relating to the commencement of actions for alimony or support. Since the obligation of the husband to furnish support to his wife and minor children is a continuing one, it would seem that a mere lapse of time alone should not be a bar to the commencement of the action." 2 Lee, N.C. Family Law, § 164, p. 269.

Authorities elsewhere are in accord.

> "Generally, a wife's right to maintain an action for separate maintenance is not lost by mere lapse of time before bringing the action, since such a cause of action is a continuing one, and not affected by lapse of time." Annot., 10 A.L.R. 2d 466, 544 (1950).

We hold that the mere delay by the dependent spouse in seeking maintenance from the supporting spouse, absent any showing of prejudice to the supporting spouse resulting from the delay, does not bar the dependent spouse's action to enforce the right to support. *See Nall v. Nall,* 229 N.C. 598, 50 S.E. 2d 737 (1948). Defendant's first assignment of error is overruled.

[2] Plaintiff's second assignment of error is directed to the court's denial of his motion for judgment notwithstanding the

verdict. Plaintiff made no motion for a directed verdict. The timely making of an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment notwithstanding the verdict. *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970). Plaintiff's second assignment of error is overruled.

[3] Plaintiff's third assignment of error is directed to "[t]he finding of fact by the Court that the attorney for the plaintiff agreed that the question of laches would be determined solely by the Judge." The judgment appealed from contains the following recitation:

> "It was agreed that the issues of amount of permanent alimony, if any; who is the dependent and who is the supporting spouse; and whether or not the grounds for an absolute divorce are proved would be questions to be determined by the Judge, as well as the issue of laches."

The record supports this recitation. Under G.S. 1A-1, Rule 49(c), absent a timely demand made before the jury retires that an issue of fact raised by the pleadings or by the evidence be submitted to the jury, the judge may make a finding or if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered. Here, plaintiff failed to make such a demand, and in his brief plaintiff's counsel admits that he agreed that no issue of laches would be submitted to the jury. This assignment of error is overruled.

[4] Plaintiff's fourth assignment of error is directed to some of the detailed findings of fact made by the court. He contends that in making these findings the court "usurped authority which rests in the hands of the jury." However, the findings to which plaintiff excepts were made by the court after the jury had returned its verdict. They were not inconsistent with the jury's verdict. If some of them may not have been necessary to determination of the issues which were before the court to decide, plaintiff has shown no prejudice. Such findings may be treated as surplusage. The appropriate findings which the court made were fully supported by competent evidence and support the court's conclusions and the judgment entered.

The judgment appealed from is

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. BEVERLY RAY GILLESPIE

No. 7718SC207

(Filed 20 July 1977)

1. **Bills of Discovery § 6— evidence not subject to discovery — failure to follow proper discovery procedures**

The trial court did not err in refusing to grant defendant's motion for discovery of internal police reports and memoranda pertaining to the case, statements by witnesses other than defendant, and the criminal records of witnesses other than defendant, since such evidence was not made discoverable by the Criminal Procedure Act, and defendant failed to follow the mandatory procedure of G.S. 15A-902(a) in that he failed to lodge a written request for discovery with the district attorney prior to filing his discovery motion with the court.

2. **Criminal Law § 114.2— jury instructions — summary of evidence — no expression of opinion**

The trial court in a homicide prosecution did not violate G.S. 1-180 when he instructed the jury that "there is evidence which tends to show that the defendant confessed that he committed the crime charged," where there was in fact some evidence tending to show a confession.

3. **Criminal Law § 75.12— statement admissible for impeachment only — error in admission not prejudicial**

The trial court in a homicide prosecution erred in failing to instruct the jury that defendant's recorded statement to the police, made without an express waiver of the right to counsel, was admissible only for the purpose of impeaching his testimony at trial; however, defendant was not prejudiced by such error, since the recorded statement was generally consistent with defendant's in-court testimony and it was almost entirely exculpatory.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 21 October 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 29 June 1977.

On 13 February 1976 defendant, Gillespie, shot and killed Ronald Lee Norman, the estranged husband of the defendant's

girl friend, Judy Norman. All the evidence tended to show that both defendant and Norman were dangerous men with previous convictions for violent crimes, and that Norman had threatened "to get" Gillespie. On the night of the shooting, Norman came to Gillespie's home, entered, shouted at his wife who was living with Gillespie, and then left, slamming the door and saying, "I'll get you [Gillespie], you son of a bitch; I'll get you." A few minutes later Gillespie and Judy Norman also left; Gillespie was carrying a handgun. When they reached the public drive next to Gillespie's apartment, Ronald Lee Norman drove his car at them at a high speed. Norman stopped the car beside Gillespie with a squeal of tires. Gillespie drew the gun out of his pocket and held it by his side. He and Norman exchanged words. According to Gillespie, Norman then leaned over to his right as if to reach the glove compartment. Gillespie testified that he believed Norman was reaching for a weapon, that he raised his gun and that it accidentally discharged, shooting Norman in the arm. The bullet passed through the flesh of Norman's arm, entered his chest and severed his aorta. He quickly bled to death.

Other relevant evidence tended to show that Tammy Wilson, Judy Norman's niece, lived near Gillespie. She testified that she saw Norman and heard him threaten Gillespie just before the shooting. She heard the squealing tires and the gunshot. Very shortly thereafter the defendant Gillespie came into Tammy Wilson's home and said, "That son of a bitch thought I wouldn't shoot him."

Evidence also showed that Gillespie gave a statement to the police between 3:00 and 4:00 a.m. on 14 February 1976. The statement was made in response to police questions. The trial court found that it was a voluntary statement. However, the defendant did not—either orally or in writing—expressly waive his right to counsel prior to making his statement to the police. The entire statement was placed in evidence by the State as rebuttal evidence after the defendant had testified in his own behalf. In his statement, Gillespie said, among other things:

> ". . . And [Norman] started running his mouth. 'I'm going to kill you. I'm going to kill you.' And I said, 'Ronnie, there ain't no need in all this. . . . ' I said, 'I can kill you right now.' He said, 'Well, go ahead.' And he reached over like

that, and when he did, I thought he was reaching for a gun.

"Q. How many times did you shoot him?

"A. I didn't never shoot him. The gun went off accidentally. He scared me.

. . . .

"Q. After the gun went off what did you do then?

"A. I started crying and I hollered, 'Call an ambulance.' Don't ask me what I done, come on, please.

. . . .

"Q. . . . you say that Ronald told you to go ahead and kill him?

"A. Ronald told me . . . .

. . . .

"A. The gun actually went off accidentally. Did you know that when — that I stuck that gun up there and it went off, I was so God damned shocked, the only thing I knew to do was run.

. . . .

"A. Yeah. You want me to tell you something—when that gun went off it surprised me as much as any, and that's the God's truth. If I knew that when he was in that house, that I could have pulled that trigger on him, you think I'm going to walk out there in that yard and shoot him? I'm that big a fool? I didn't know the gun would go off. It surprised me. I thought the safety was on that gun. The son of a bitch fired."

Another rebuttal witness, Craig Amele Thomas, testified for the State. Thomas said that he heard the gunshot and thereafter a woman's voice cried, "Oh, God, don't shoot him again," and a man replied, "I'll God damn well shoot him if I want to." The witness did not see the speakers.

The case was submitted to the jury with instructions to find the defendant guilty of first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter or to find the defendant not guilty. The jury convicted the defendant of second degree murder, and judgment was entered accordingly. He appeals.

Attorney General Edmisten, by Assistant Attorney General Archie W. Anders, for the State.

Assistant Public Defender Frederick G. Lind, for defendant appellant.

ARNOLD, Judge.

[1] By assignments of error duly brought forth defendant makes twenty-three arguments in this appeal. Assignments of error nos. 2, 3, 5-12 all pertain to rulings on the evidence, and in no instance was there prejudicial error. Assignments of error nos. 13-16, 19-22 pertain to the court's instructions which we also find to be correct. In assignment of error no. 1 the defendant objects to the court's refusal to grant his motion for discovery of certain evidence, to wit: internal police reports and memoranda pertaining to the case, statements by witnesses other than the defendant and the criminal records of witnesses other than the defendant. This evidence is not made discoverable by the Criminal Procedure Act. G.S. 15A-903. Therefore, discovery of this material is not compelled under the Act. G.S. 15A-904(a). Moreover, defendant failed to lodge a written request for discovery with the district attorney prior to filing his discovery motion with the court. Thus he failed to follow the mandatory procedure of G.S. 15A-902(a). Finally, we have considered the defendant's argument that the U. S. Supreme Court decisions of *Giles v. Maryland,* 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed. 2d 737 (1967), and *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), require reversal of his conviction for failure to grant his discovery motion. Because nothing in the record shows that the State *suppressed material evidence, Giles* and *Brady* are inapposite. They do not require a new trial. *State v. Branch,* 288 N.C. 514, 220 S.E. 2d 495 (1975); *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839 (1973).

Defendant also made timely motions for a nonsuit and judgment n.o.v. Plenary evidence supports his conviction. Therefore, these motions were properly denied, and assignments of error nos. 4 and 23 have no merit.

[2] We disagree with defendant's argument that the trial judge expressed an opinion and violated G.S. 1-180 in the following portion of his instructions to the jury:

"Also, there is evidence which tends to show that the defendant confessed that he committed the crime charged. If you find that the defendant made the confession then you consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it."

The jury was not instructed that defendant had confessed to the crime charged, first degree murder. They were instructed that there was some evidence tending to show such a confession, and, in fact, there was some evidence tending to show a confession. Defendant's statement, for example, to Tammy Wilson, "The son of a bitch thought I wouldn't shoot him," was some evidence. There is no reason, however, to think that the jury attached any importance to the words "confessed that he committed the crime charged" since they only found defendant guilty of the lesser offense of second degree murder.

[3] In his final assignment of error defendant argues that the court erred in instructing the jury about the purposes for which it could consider his recorded statement to the police. Because the defendant did not expressly waive his right to counsel prior to the questioning, his recorded statement was admissible only for the purpose of impeaching his testimony at the trial. *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971); *State v. Huntley,* 284 N.C. 148, 200 S.E. 2d 21 (1973); *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972).

Nowhere in the judge's charge to the jury did he instruct the jurors that they could only consider the defendant's recorded statement for the purpose of judging the credibility of his testimony during the trial. In fact the portion of the charge quoted above alludes to the statement and appears to treat it as substantive evidence.

We have carefully reviewed all of the evidence in the record, and we conclude that even though the court erred in failing to limit the use of defendant's recorded statement to the purpose of impeachment, it was harmless error. Defendant's recorded statement was generally consistent with his in-court testimony, and it was almost entirely exculpatory. Only once in the recorded statement did defendant say anything which might indicate that he shot Ronald Lee Norman deliberately,

premeditatedly, with malice and with the specific intent to kill. That is when he stated:

> " . . . And I said, 'Ronnie, there ain't no need in all this. . . . ' I said, 'I can kill you right now.' He said, 'Well go ahead.' . . . . "

The effect of this statement, which is more of a statement of capacity than a threat, is entirely overshadowed by the testimony of Tammy Wilson ("That son of a bitch thought I wouldn't shoot him."), Craig Amele Thomas ('I'll God damn well shoot him if I want to.") and the circumstantial evidence of the shooting. We are certain beyond a reasonable doubt that the possible consideration by the jury of the defendant's recorded statement as substantive evidence did not contribute to his conviction of second degree murder. Because the use of the recorded statement was harmless beyond a reasonable doubt, there was no prejudicial error in defendant's trial. *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967).

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROY EDWARD YOUNG

No. 772SC180

(Filed 20 July 1977)

1. Criminal Law § 75.2— promise to inform solicitor of cooperation — effect on confession

An officer's statement to defendant that he would tell the solicitor if defendant cooperated did not render defendant's subsequent confession involuntary, since the statement in no way intimated that defendant could expect easier or preferred treatment in exchange for his confession.

2. Criminal Law § 75.11— waiver of right to counsel

Defendant affirmatively waived his right to counsel at his in-custody interrogation where defendant, after being advised of his rights, told the interrogating officer that a named lawyer had represented him in the past and asked the officer whether he needed a

lawyer; the officer told defendant that he could not tell him what to do; and defendant then stated that he would talk to the officer without a lawyer.

APPEAL by State from *Peel, Judge.* Order entered 28 December 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 28 June 1977.

Defendant was indicted for possession of marijuana with intent to sell.

Prior to trial the defendant moved to suppress evidence of a confession made after his arrest. At the hearing, Louis Young of the State Bureau of Investigation, who had questioned the defendant in the Martin County Jail after his arrest, testified for the State. He testified that after the defendant had been informed of his rights, defendant stated that a Mr. LeRoy Scott had represented him in the past, and asked Agent Young whether he needed a lawyer. Agent Young told defendant that he could not tell him what to do. Defendant then stated, "I'll go ahead and talk to you without a lawyer." Agent Young also testified that, "I may have told him (the defendant) that I would tell the Solicitor if he cooperated. I didn't tell him it would be easier or that anything would have happened for him." After making inculpatory statements, defendant stated he did not want to talk anymore, at which time the questioning stopped.

Defendant presented no evidence at the hearing.

Among the court's findings were that:

"4. That Mr. Young asked the defendant if he wanted a lawyer now, and the defendant asked him if he needed a lawyer. That he stated that LeRoy Scott had represented him or that he had been represented by Mr. Scott in the past. That the defendant did not indicate that he wanted Mr. Scott present. That finally after a few minutes the defendant said he would talk to the officers, without a lawyer present.

* * * *

6. That no threats or coercion of any sort was made to induce the defendant to talk and that no promises of any sort were made to him to talk, except insofar as may appear below.

* * * *

9. The Court finds as a matter of law, and considering these facts and all of the uncontested evidence to be true, that the defendant did not affirmatively waive his right to have a lawyer present at his questioning by the officers.

10. That after the defendant indicated he would talk, Mr. Young of the State Bureau of Investigation told the defendant that if he said anything he would tell the Solicitor. That he did not tell the defendant that it would be any easier on him.

11. That a man such as the defendant with a prior record and of his age, intellect, and experience, should have realized, and the Court finds as a fact that he did realize that in any event the Solicitor would necessarily know in preparing the case if any statements were made by the defendant to Mr. Young.

12. That even so, in view of the rulings of our Appellate Court, the Court finds, as a matter of law, that such statement made to the defendant by Mr. Young was in the nature of a promise and that it made the confession involuntary as a matter of law."

The court granted the motion to suppress on the grounds that (1) the confession was involuntary, and (2) that the defendant had not affirmatively waived his right to counsel.

From this order the State appeals.

Attorney General Edmisten by Associate Attorney Joan H. Byers for the State.

Stephen A. Graves for defendant appellee.

CLARK, Judge.

[1] The first question upon appeal is whether any promises were made to induce the confession so as to render it involuntary.

An involuntary confession is not admissible to establish the guilt of the defendant. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968). A statement is involuntary when it is induced by some suggestion of hope or fear made by the interrogating officer. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968).

Defendant contends that this case is controlled by *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68 (1967), where the court held involuntary a confession made subsequent to the officer's statement that if a confession were made he "would be able to *testify* that he (the defendant) talked to me and was cooperative." (Emphasis added.) We think the present case is clearly distinguishable. In *Fuqua* the statement by the officer about his ability to *testify* was said to arouse a hope for lighter punishment. In the present case, as findings 6 and 10 make clear, the only statement relied upon by the judge to support his conclusion that the confession was involuntary was the statement by Agent Young that "if he (the defendant) said anything he (Agent Young) would tell the Solicitor." The judge specifically found that Agent Young "did not tell the defendant that it would be any easier on him." We conclude that this statement by the officer could not have aroused in the defendant any hope of easier treatment. Any suspect should expect that in accordance with normal police procedure, the interrogating officer will make a report of the substance of the suspect's statements, and that this report will be conveyed to the district attorney. The statement made by Agent Young in no way intimated that defendant could expect easier or preferred treatment in exchange for his confession. The absence of such intimation distinguishes this case from *Fuqua* and the line of cases in which it falls, and we must therefore conclude that the judge erred in concluding that the statement was involuntary by reason of the statement made by Agent Young.

[2] The second issue upon appeal is whether defendant affirmatively waived his right to counsel.

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966) required that prior to custodial interrogation a suspect must be warned of his right to have counsel present, and further placed upon the prosecution a heavy burden to show an affirmative waiver of this right in the event that a statement were made without an attorney present. In *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), *Miranda* was interpreted to require that the affirmative waiver must be by an express statement. The recent cases of *State v. Siler,* 292 N.C. 543, 234 S.E. 2d 733 (1977), and *State v. Swift,* 290 N.C. 383, 226 S.E. 2d 652 (1976) have modified this interpretation of *Miranda.* In *Siler* the court stated that,

" . . . Although failure to request an attorney after the *Miranda* warnings have been given does not ordinarily constitute a waiver, we believe a waiver by silence can be inferred where subsequent comments of the defendant indicate that he *intended* his silence as a waiver of his right to an attorney during interrogation." 292 N.C. at 550, 234 S.E. 2d at 738. See also *State v. Rives,* 31 N.C. App. 682, 230 S.E. 2d 583 (1976).

In the present case the judge found as a fact that "the defendant said he would talk to the officers, without a lawyer present." Defendant contends that the judge's conclusion that there had been no affirmative waiver was correct because the statement related only to the presence of *the* lawyer, Mr. LeRoy Scott, of whom defendant had spoken to Agent Young. This interpretation is supported by neither the judge's finding nor the evidence offered by Agent Young. The statement by defendant that he "would talk to the officers without an attorney present" constitutes an affirmative waiver. *State v. White,* 288 N.C. 44, 215 S.E. 2d 557 (1975) (valid waiver where defendant stated he would proceed without an attorney); *State v. Smith,* 26 N.C. App. 283, 215 S.E. 2d 830 (1975). Therefore we hold that it was error for the judge, based upon a finding that such statement had been made, to conclude that defendant had not affirmatively waived his right to counsel.

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES LEE MONTGOMERY

No. 7718SC80

(Filed 20 July 1977)

1. Constitutional Law § 66— proceeding with trial in defendant's absence — no error

Where defendant participated in jury selection and accepted and passed the jury, but chose not to return following a recess which the court had ordered prior to impaneling the jury, the trial had begun; defendant waived his right to be present during the remainder of the trial; and the court did not err in proceeding with the trial in his absence.

2. Constitutional Law § 49— right to counsel — waiver

Defendant waived his constitutional right to effective assistance of counsel and to obtain counsel of his choice where defendant employed local counsel of his choice before trial and appeared with his counsel when the case was called for trial; at that time defendant requested that he be allowed to discharge his local counsel and moved for a continuance in order to obtain other counsel from Charlotte; the trial court denied the motion; and defendant chose to proceed without counsel rather than with his local counsel.

APPEAL by defendant from *Crissman, Judge.* Judgment entered 17 September 1976 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 June 1977.

Three cases in which felonious larceny and receiving of checks and money were charged against defendant Montgomery and codefendants Alan Lee Johnson and Eugene Wilburn were consolidated for trial. All defendants pled not guilty.

The cases were duly calendared and were called for trial on 14 September 1976. Defendant, his counsel of record, the two codefendants and their counsel were present. Defendant informed the court that he wanted to proceed without his counsel of record and to employ a Charlotte attorney with whom he had made some arrangements. The court informed defendant that it was too late to obtain Charlotte counsel, and that he would have to proceed with his counsel of record or without counsel. Defendant discharged his counsel of record, who was allowed to withdraw by the court. Defendant passed on the jury. The court ordered a recess for lunch. After recess the defendant did not appear. The two codefendants made no changes in the composition of the jury, which was impaneled.

The evidence for the State tended to show that on 1 October 1975 an employee of an auto parts store saw two men standing at the office door and a third man bent over inside the office near the safe. One asked for a "lug bolt" and was told that the store did not have such an item. They left. The employee saw two of the men leave in an old blue Buick and saw the third (defendant Montgomery) walk down the street. The employee went into the office and saw that the safe had been tampered with. He followed the defendant Montgomery down the street and into the woods, but lost sight of him. In the woods where the employee followed defendant Montgomery he found two envelopes containing checks and currency which had been in the office safe. While returning to the office, the employee saw the

three defendants in a parking lot standing beside the old blue Buick. He called the police, who then apprehended the three men.

At the close of the State's evidence, the receiving charges against all three defendants were dismissed. Codefendants Johnson and Wilburn then pled guilty to misdemeanor larceny, and the court imposed suspended sentences.

The jury returned a verdict of guilty as charged against defendant Montgomery in his absence. On 17 September defendant appeared in court with counsel, a partner of the Charlotte counsel whom defendant had originally advised the court he wanted to represent him. From judgment imposing imprisonment, defendant appealed.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Alan S. Hirsch for the State.

Levine & Goodman by Paul L. Pawlowski for defendant appellant.

CLARK, Judge.

[1] The defendant contends that the trial court erred in beginning and proceeding with his trial in his absence. We conclude that the trial had begun when defendant voluntarily left, and that in so doing he waived his right to be present.

In every criminal prosecution it is the right of the accused to be present throughout the trial. In misdemeanor cases this right can be waived by defendant through his counsel. In felony cases other than capital ones the right to be present can be waived only by the party himself. In capital cases this right cannot be waived, and it is the duty of the court to see that the accused is present during the entire trial. *State v. Dry,* 152 N.C. 813, 67 S.E. 1000 (1910). It is the prevailing view that once a trial for a noncapital felony has been begun in the defendant's presence, the defendant waives his right to be present if he is on bail and voluntarily absents himself, or if he escapes from custody and flees and the trial can be validly completed in his absence. 21 Am. Jur. 2d, Criminal Law § 286 (1965); Annot., 26 A.L.R. 2d 762 (1952); *see State v. Kelly,* 97 N.C. 404, 2 S.E. 185 (1887).

In *Pratt v. Bishop,* 257 N.C. 486, 504, 126 S.E. 2d 597, 610 (1962), the court held that the purpose of G.S. 8-81 (providing at any time before trial for a motion to reject a deposition) would not be served by holding that the trial did not begin until after the jury was impaneled. The court quoted with approval 53 Am. Jur., Trial § 4 (now 75 Am. Jur. 2d, Trial § 3) as follows: "In general, it has been held that the trial begins when the jury are called into the box for examination as to their qualifications—when the work of impaneling the jury begins—and that the calling of a jury is a part of the trial."

Sub judice, the defendant participated in jury selection. He accepted and passed the jury. Before impaneling the jury the court ordered a recess. During the recess defendant voluntarily absented himself. The trial had begun. The defendant waived his right to be present during the remainder of the trial, and the court did not err in proceeding with the trial in his absence.

[2] The defendant also assigns as error the denial of his request to obtain counsel of his choice. All defendants are entitled to effective assistance of counsel. *State v. Beeson,* 292 N.C. 602, 234 S.E. 2d 595 (1977). A defendant who retains counsel should be afforded a fair opportunity to secure counsel of his own choice. *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. McFadden,* 292 N.C. 609, 234 S.E. 2d 742 (1977).

In reviewing the record on appeal it appears that defendant was not indigent. He employed local counsel of his choice before trial, and there is nothing in the record to indicate that his counsel had not fully prepared the case for trial. The case was duly calendared for trial. When the case was called for trial the defendant appeared with his counsel. His request to discharge local counsel was allowed, but his motion for continuance in order to obtain other counsel from Charlotte was denied. The trial court explained to defendant that he could elect to proceed to trial with his present counsel or to proceed to trial without counsel. In electing to discharge his local counsel and to begin the trial without counsel, the defendant waived his right to counsel.

The right of the accused to select his own counsel cannot be insisted upon in a manner that will obstruct an orderly procedure in the courts and deprive the courts of their inherent

power to control the same. *State v. Robinson,* 290 N.C. 56, 224 S.E. 2d 174 (1976); *United States v. Young,* 482 F. 2d 993 (5th Cir. 1973).

The case before us is distinguishable from the recent case of *State v. McFadden, supra,* where defendant moved to continue on the grounds that his retained counsel was engaged in a trial in a federal court. The court held that the denial of this motion by the trial court violated defendant's right to counsel of his own choice. "The fact that his counsel had accepted other employment which prevented his presence at the trial cannot be charged to the defendant so as to deny him his constitutional right to counsel of his own choice. We find nothing in this record that indicates that defendant exercised his right to select counsel of his choice in a manner calculated to disrupt or obstruct the orderly progress of the court." 292 N.C. at 615, 234 S.E. 2d at 747. But in the present case the attempt to change counsel when the case was called for trial, which would have resulted in the disruption and obstruction of orderly procedure in the court, must be charged to the defendant. See *State v. Smith,* 27 N.C. App. 379, 219 S.E. 2d 277 (1975), where defendant, after signing a waiver of right to have assigned counsel, moved to have counsel assigned on the day the case was scheduled for trial. It was held that since defendant had failed to show good cause for the delay, the signed waiver of counsel remained valid and effective during trial.

We conclude that defendant waived his constitutional right to effective assistance of counsel and to obtain counsel of his choice, and that defendant's other assignments of error are without merit.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. GARY W. RAYNOR

No. 774SC158

(Filed 20 July 1977)

1. **Arrest and Bail §§ 3.9, 6— disorderly conduct — warrantless arrest proper — no right to resist**

Where the evidence tended to show that defendant threatened a cab driver and used abusive and profane language in an officer's presence, the officer's warrantless arrest of defendant for disorderly conduct was lawful; therefore, defendant had no right to resist the arrest, and the trial court did not err in denying defendant's motions for nonsuit on the charges stemming from the arrest.

2. **Criminal Law § 26.5— resisting arrest and assault on law officer — two offenses based on same conduct — double jeopardy**

Defendant who was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence was twice convicted and sentenced for the same criminal offense; therefore, the citation charging defendant with assault on a police officer in the performance of his duties is quashed, the verdict is set aside as to that charge, and the judgment entered thereon is vacated.

APPEAL by defendant from *Rouse, Judge*. Judgment entered 11 November 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 June 1977.

Defendant was charged by citations with disorderly conduct, resisting arrest and assaulting a police officer in the performance of his duties. From conviction in the District Court, he appealed to the Superior Court. There he entered a plea of not guilty to each offense and was convicted by a jury of all counts. Judgment was entered thereon sentencing defendant to imprisonment for 30 days on the disorderly conduct charge and concurrent terms of six months on the charges of resisting arrest and assault on a police officer.

The State introduced evidence which tended to show: On 21 August 1976, Dennis Nail operated a cab in Jacksonville. At approximately 3:00 a.m., he stopped to let a passenger out in downtown Jacksonville, and defendant attempted to get in the cab. Nail informed defendant that he had to do some paperwork and could not take defendant anywhere at that time, whereupon defendant "started bad mouthing" Nail and called him unkind names. Defendant struck the hood of the cab "at least twice" and threatened to beat Nail. Nail then summoned help, and

shortly thereafter, Patrolman Acevedo of the Jacksonville Police Department arrived on the scene.

Acevedo asked defendant what the problem was. At that time, defendant was " . . . very uncooperative, was cursing and threatening Mr. Nail. . . . " Acevedo requested identification, but defendant claimed he did not have any. Meanwhile defendant "kept using abusive language." A crowd of 12 to 15 people gathered, and, because of defendant's actions, Acevedo placed him under arrest for disorderly conduct. Defendant continued to threaten Mr. Nail, "saying that he was going to get him and using profane language." Defendant was escorted to the police car, "patted down" and ordered into the rear seat of the vehicle. When Acevedo began to close the door, defendant kicked it open, causing it to strike the officer on the leg. Defendant attempted to get out of the car, and a struggle ensued. Roger Paul, also of the Jacksonville Police Department, assisted Acevedo in subduing defendant. Defendant repeatedly hit and kicked Paul in the chest, and struck Acevedo with his fists. After fighting defendant for 5 to 10 minutes, the officers managed to handcuff him and took him to police headquarters.

Defendant and another witness testified, *inter alia,* that defendant became angry when Nail refused to take him where he requested, that defendant did not use abusive language and that the policeman hit him first.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

Billy Sandlin for defendant appellant.

MORRIS, Judge.

[1] In his sole assignment of error brought forward on appeal, defendant contends that the trial court erred in overruling his motion for judgment as of nonsuit as to the charges of resisting arrest and assault on a police officer.

Of course, it is well settled in North Carolina that a person has a right to resist an unlawful arrest. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954); *State v. Williams,* 32 N.C. App. 204, 231 S.E. 2d 282 (1977); *State v. Allen,* 14 N.C. App. 485, 188 S.E. 2d 568 (1972). G.S. 15A-401(b) sets forth the instances in which a police officer may legally make an arrest without a warrant.

"(1) Offense in Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

(2) Offense Out of Presence of Officer.—An officer may arrest without a warrant any person who the officer has probable cause to believe:

a. Has committed a felony; or

b. Has committed a misdemeanor, and:

1. Will not be apprehended unless immediately arrested, or

2. May cause physical injury to himself or others, or damage to property unless immediately arrested."

Defendant argues that his warrantless arrest was unlawful because there was no evidence showing that he committed a criminal offense in the officer's presence within G.S. 15A-401 (b) (1). We cannot agree. Although Officer Acevedo did not quote defendant's precise language to the jury, he did testify that defendant "was cursing and threatening Mr. Nail," "kept using abusive language" and said that "he was going to get" Nail. Thus, the threats to the cab driver and defendant's profane language were continued by defendant in the presence of Officer Acevedo. We believe, and so hold, that this evidence was sufficient to sustain the legality of defendant's arrest for disorderly conduct. Therefore, defendant had no right to resist, and the trial judge did not err in denying the motions for nonsuit on the charges stemming from the arrest.

[2] However, this appeal presents an additional problem not raised by defendant. The citation in No. 76CR13385 alleged that:

". . . on or about Sat. 3:40 a.m. the 21 day of Aug., 1976 in the named county, the named defendant did unlawfully and wilfully assault a police officer to wit: by striking officers G. Acevedo and R. Paul on chest and hands of both said officers while said officers were discharging a duty of this office to wit ~~discharging~~ arresting the defendant for disorderly conduct."

The citation in No. 76CR13386 (after allegations sufficient to support a charge of disorderly conduct) alleged that:

> " . . . on or about Sat. 3:40 a.m., the 21 day of Aug. 1976, in the named county, the named defendant did unlawfully and wilfully resist arrest to wit by kicking and punching officers G. Acevedo and Roger Paul while they were discharging a duty of their office to wit arresting defendant for disorderly conduct."

Moreover, the record reveals that defendant was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence.

In this situation, the State should have been required to elect between the two charges at the close of all the evidence. Its failure to do so, and the subsequent judgments of guilty on both charges, resulted in defendant's being twice convicted and sentenced for the same criminal offense. Nor does the fact that defendant was given concurrent sentences make the duplication of punishment and sentences any less a violation of defendant's constitutional right not to be put in jeopardy twice for the same offense. *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972). Accordingly, the citation charging defendant with assault on a police officer in the performance of his duties is quashed, the verdict is set aside as to that charge and the judgment entered thereon is vacated. *State v. Summrell, supra; State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892 (1970).

As to defendant's convictions for disorderly conduct and resisting arrest in No. 76CR13386, we find no error.

As to defendant's conviction for assault on a police officer in the performance of his duties in No. 76CR13385, the conviction is set aside and the judgment is vacated.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. RANDOLPH NICHOLS, ALIAS RONNIE JOHNSON

No. 7716SC232

(Filed 20 July 1977)

Kidnapping § 1; Rape § 5— sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for kidnapping and first degree rape where it tended to show that defendant stopped by the home of the seventeen year old victim's aunt at 4:00 a.m. and asked for water for his overheated car; after being given water, defendant displayed a sawed-off rifle and forced his way into the home; defendant then took the victim at the point of the gun to a secluded spot and forced her to have intercourse with him; a medical examination revealed that the victim had had intercourse on the day in question and that she was a virgin; and defendant gave the police a written statement admitting the offenses.

APPEAL by defendant from *Canaday, Judge.* Judgment entered 15 December 1976 in Superior Court, ROBESON County. Heard in the Court of Appeals 30 June 1977.

Defendant was indicted for felonious kidnapping and first degree rape. Prior to trial, defendant moved to suppress the introduction of a written statement made by him following his arrest on the ground that it was not voluntarily made. A *voir dire* was held during trial after which the court ruled the statement admissible. At trial, the State's evidence tended to show the following: At 4:00 a.m. on 2 October 1976 a man knocked on the front door at the home of Flora Ford, the aunt of Connie McQueen. Miss McQueen, who was 17 years old at the time, went with her aunt to answer the door and the man they found there identified himself as the relative of one of Ms. Ford's neighbors. He then asked Ms. Ford for some water for his overheated vehicle and Miss McQueen brought a bucket of water which the man put in his car. When Ms. Ford opened the door to take back the bucket, the man had a gun and he forced his way in. He then grabbed Miss McQueen at gunpoint, forced her out of the house and into his car, and drove her down a farm road. Miss McQueen attempted to jump out of the car but the man grabbed her and she also took the man's gun but was unable to operate it. He stopped the car and made Miss McQueen get in the back seat where he raped her while still holding the gun at her side. The man left her on the road and she ran to a nearby house for help. An examination of Miss

McQueen revealed extensive bleeding from a torn hymen and the presence of sperm indicating recent intercourse. She further testified that she had never before had intercourse and the doctor who examined her stated his opinion that she was a virgin. The investigating police found distinctive tire marks in front of Miss McQueen's house and found the same tracks at the home of J. P. Melvin. A lady at the Melvin residence stated that the defendant had been there the night before. Defendant was then arrested, informed of the nature of the charge, and advised of his rights twice. Defendant signed a waiver and made an oral statement which he reduced to writing. In the statement he admitted taking a girl from her house at 4:00 a.m., driving to a place in Marietta, having intercourse with her and releasing her but stated that the pistol was a blank one and had been thrown away after leaving the girl. Upon further questioning defendant admitted that he had not thrown the gun away and went with the officers to his house where he gave them a sawed-off .22 rifle. Miss McQueen, her sister Kay, and Ms. Ford all identified the defendant as the man who came to their house at 4:00 in the morning and took Miss McQueen, and both Miss McQueen and her sister identified the .22 rifle as the gun which he had with him.

Defendant testified that on the night in question he was out listening to music and drinking at several different places in North Carolina and South Carolina with his friend Lennox Davis. At the time, he was driving his brother's car and the sawed-off rifle was in the car. He drove Lennox to his home at about 4:30 a.m. and then returned to his own home and went to bed. He said that he did not stop off on the way at the home of Ms. Ford and kidnap and rape Connie McQueen. He further testified that he wrote the confession for police as the result of promises of leniency by them and that he had never been convicted of using profane language in public, assault with a deadly weapon, or non-support of an illegitimate child. Following his own testimony, defendant presented a written motion to quash, actually a motion for mistrial, on the basis of conduct of the district attorney during cross-examination of defendant and the motion was denied. Defendant also moved for dismissal of his court-appointed attorney, but this motion was also denied because not timely made and because of the adequate preparedness and experience of defendant's counsel. Nancy Davis, sister of Lennox Davis, then testified that he returned home at 4:35

a.m. on the morning of the alleged rape. On cross-examination, she denied having a conversation with Clemnora Oxendine during a recess in which she stated that defendant had committed the rape and should have killed the victim. Joyce Cross, defendant's niece, testified that defendant returned home at 4:50 a.m. on the morning of the alleged rape. On rebuttal, Clemnora Oxendine testified that during a recess, in response to her own comment that "that damn liar is finally off the stand," Nancy Davis stated: "Girl, you don't know nothing about that case. . . . Yeah, he raped her and he ought to killed her. . . . That's the way you all damn Indians is taking up for the white folks."

Defendant was convicted by a jury of both offenses and sentenced to consecutive terms of 20 and 50 years. He appealed.

Attorney General Edmisten by Associate Attorney Donald W. Grimes, for the State.

I. Murchison Biggs, P.A., by Robert D. Jacobson, for the defendant.

MARTIN, Judge.

The defendant assigns as error the court's denial of his motion for judgment as of nonsuit. Upon such a motion the trial judge is required to

> " . . . take the evidence for the State as true, to give to the State the benefit of every reasonable inference to be drawn therefrom and to resolve in the favor of the State all conflicts, if any, therein." (Citations omitted.) *State v. Edwards,* 286 N.C. 140, 145, 209 S.E. 2d 789, 792 (1974).

The State's evidence, taken in this light, tends to show the following: On 2 October 1976, the defendant appeared at the residence of Connie McQueen in the early morning hours. He knocked on the door of her residence claiming that his car had overheated and that he needed water. After being given water, he displayed a .22 caliber sawed-off rifle and forced his way into the house. He then took Connie McQueen by force and against her will to a secluded spot on a farm road near Marietta, North Carolina. After several futile attempts to get away, Miss McQueen was forced to remove her clothing and, at gunpoint, the defendant had intercourse with her. A medical examination

revealed that Miss McQueen had had intercourse on the day in question and that she was a virgin. The defendant was later picked up by the police and after being given his constitutional rights, gave a written statement admitting the offenses. This evidence, taken as true, supports a conclusion that the denial of defendant's motion for nonsuit was proper.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and ARNOLD concur.

STATE OF NORTH CAROLINA v. LEVI SIMMONS, JOE LOUIS SIMMONS AND TIMOTHY BOLDEN

No. 774SC177

(Filed 20 July 1977)

Criminal Law §§ 66.15, 66.16— in-court identification of defendant — independent origin

Evidence was sufficient to support the trial court's conclusion that witnesses' in-court identifications of defendant Simmons were based upon their observation of him at the scene of the crime and later walking beside the street with the other two defendants where the evidence tended to show that the crime took place in an area well lighted with street lights; the witnesses gave officers a description of their assailants and later that evening were shown photographs including one of defendant Simmons; one witness identified defendant's photograph as that of one of the robbers but the other witness was unable to identify defendant's photograph; the witness who identified defendant's photograph was unable to identify defendant in a "show-up"; and later that evening the witnesses saw the three defendants walking beside the street and recognized them as the robbers.

APPEAL by defendants from *Rouse, Judge.* Judgment entered 20 August 1976 in Superior Court, ONSLOW County. Heard in the Court of Appeals 28 June 1977.

Defendant Levi Simmons was charged in a proper bill of indictment with the armed robbery of Brett Wasson, and defendants Joe Louis Simmons and Timothy Bolden were charged

in proper bills of indictment with the common law robbery of David Nola.

At trial the State offered evidence tending to show the following:

Just before midnight on 17 June 1976, Brett Wasson and David Nola, marines stationed at Camp LeJeune, were walking down Kerr Street in Jacksonville, North Carolina, when they were accosted by four black males. Defendant Levi Simmons held a gun to Wasson's throat, took Wasson's money, and ran away. Defendant Bolden asked Nola for some money for food. Nola said, "Yes, sir," and took out his wallet. When he did so defendant Bolden grabbed the wallet and ran. Defendant Joe Louis Simmons pushed Nola on the ground face down, told him to keep his face down, and then ran away.

Defendants offered evidence tending to show that they were all at Shaw's Cafe on Kerr Street dancing and playing pinball from 9:30 p.m. until 1:30 a.m. on the night of the robbery.

Defendant, Levi Simmons, was convicted as charged, and defendants, Joe Louis Simmons and Timothy Bolden, were convicted of felonious larceny from the person. From judgments of the court imprisoning each defendant for a term of five to seven years, defendants appealed.

Attorney General Edmisten by Assistant Attorney General Elizabeth C. Bunting for the State.

Joseph C. Olschner for defendant appellant Levi Simmons.

Grady Mercer, Jr., for defendant appellant Joe Louis Simmons.

Billy G. Sandlin for defendant appellant Timothy Bolden.

HEDRICK. Judge.

Counsel for defendant Timothy Bolden concedes in his brief that he can find no error, but requests this court to review the record. Since no assignments of error are brought forward and argued in defendant's brief, no question is presented for review. *State v. McMorris,* 290 N.C. 286, 225 S.E. 2d 553 (1976). The defendant Timothy Bolden had a fair trial free from prejudicial error.

Defendants, Levi Simmons and Joe Louis Simmons, contend the court erred in denying their motions for judgment as of nonsuit. When all the evidence is considered in the light most favorable to the State, it is obviously sufficient to require submission of the cases to the jury, and to support the verdicts.

Defendant, Joe Louis Simmons, contends the court erred in denying his motion to suppress Nola's and Wasson's in-court identification of him as one of the robbers. Defendant argues that the in-court identification was tainted by impermissibly suggestive pre-trial identification procedures. The trial court held a *voir dire* to determine the admissibility of the witnesses' in-court identifications. At *voir dire* the State offered evidence tending to show the following:

On 17 June 1976 Nola and Wasson were the victims of a robbery by four black males on Kerr Street in Jacksonville. The area was well lighted with street lights. The victims gave police officers a description of their assailants, and later that evening were taken to the police station and shown defendant Joe Simmons' photograph along with several other photographs. Wasson identified defendant's photograph as that of one of the alleged robbers. Nola was unable to identify defendant's photograph. Wasson observed defendant in a "show up" but was unable at that time to identify him as one of the robbers. Defendant who had not been placed under arrest was released. Later in the evening Nola and Wasson were being driven back to the Camp LeJeune in a military van when they saw all three defendants walking beside the street. Upon seeing the three defendants together both Wasson and Nola recognized the defendants as the robbers. The police subsequently arrested the defendants. Both victims identified defendant in court as one of the robbers.

After *voir dire* the court found the facts to be substantially as set out above and concluded that the witnesses' in-court identification of Joe Louis Simmons "was based on their observations of the defendant at the time of the robbery, his clothing . . . and subsequent observation of the defendant just shortly before he was arrested."

The findings and conclusions made by the trial court upon *voir dire* are conclusive on appeal if supported by competent evidence. *State v. Tuggle,* 284 N.C. 515, 201 S.E. 2d 884 (1974).

In the present case the court's conclusion that the witnesses' in-court identifications of defendant were based upon their observation of him at the scene of the crime and later walking beside the street with the other two defendants is sufficient to allow the identifications into evidence. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). This conclusion is supported by the findings of fact which are based upon competent evidence in the record. The assignment of error upon which this contention is based is not sustained.

Finally defendant, Joe Louis Simmons, contends the trial court erred in its instructions to the jury by charging the jury as to elements of larceny from the person with respect to defendant, Timothy Bolden, but not repeating the same as to defendant, Joe Louis Simmons.

The State prosecuted defendant, Joe Louis Simmons, upon the theory that he aided and abetted the principal defendant Bolden, in committing larceny from the person. The court adequately and properly instructed the jury as to what it must find to convict Bolden as the principal. It then instructed the jury in order to find defendant, Joe Louis Simmons, guilty of larceny from the person it must find that Bolden is guilty of larceny from a person, and that Simmons aided and abetted him in the commission of that crime. The court then adequately and properly instructed the jury on the law of aiding and abetting.

We find no error in the court's instructions to the jury with respect to defendant, Joe Louis Simmons.

We hold that each defendant had a fair trial free from prejudicial error.

No error.

Chief Judge BROCK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. RANDOLPH DOUGLAS BECRAFT AND GARY WAYNE HARDIN

No. 7719SC236

(Filed 20 July 1977)

Criminal Law § 86.8— robbery case — defendant's rejection of victim's homosexual proposition — competency to show bias

In this prosecution for the armed robbery of a grocery store employee, testimony by one defendant that he had previously rejected a homosexual proposition by the victim was competent to show bias on the part of the victim toward such defendant, and the exclusion of such testimony was prejudicial where the victim was the only witness who could identify the robbers.

APPEAL by defendants from *Long, Judge.* Judgments entered 27 October 1976 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 30 June 1977.

Defendants were indicted for armed robbery. Their trials were consolidated and both were convicted. At trial Douglas Chestnut testified that he was managing his mother's grocery store when the two defendants entered, pulled a gun, demanded money and cleaned out the cash register. Defendants then forced Chestnut to drive them in his mother's car to a dirt road about seven miles from the store. Chestnut was able to give positive identification of defendants based upon his observations at the time of the robbery.

Chestnut's mother was in the store when the two defendants entered. She observed that her son waited on them and then left with the defendants. She sensed that something was wrong, checked the cash register, which was empty, and called the police. Mrs. Chestnut gave no identification testimony.

Testimony by defendants was offered to show that they did not commit the robbery.

Attorney General Edmisten, by Associate Attorney Nonnie F. Midgette, for the State.

Bell and Ogburn, P.A., by Deane F. Bell and William H. Heafner, for defendant appellant Randolph Douglas Becraft.

Cahoon & Swisher, by Robert S. Cahoon, for defendant appellant Gary Wayne Hardin.

ARNOLD, Judge.

The only identification testimony tending to prove that defendants were the robbers came from Douglas Chestnut. During cross-examination Chestnut denied that he was a homosexual and that he had propositioned the defendants on a previous occasion. Thereafter, the court refused to permit defendant Becraft to testify that on a previous occasion Chestnut had propositioned him and that he, Becraft, had refused.

Defendants contend that the testimony which was offered to show that Becraft had rejected Chestnut's homosexual proposition should have been allowed because it tends to show bias on the part of the witness towards defendant, Becraft. We agree. The State's case depends on the credibility of the witness, Chestnut, the only witness who could identify the alleged robbers. While there is strong evidence of guilt by defendants we cannot say that the exclusion of this testimony was not prejudicial. *See State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769 (1961); *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901 (1954).

New trial.

Judges PARKER and MARTIN concur.

T. A. PIPKIN, D. J. DUDLEY, P. M. WILLIAMS, AND MACK DONALD WEEKS, INDIVIDUALLY AND TRADING AS P. W. D. & W. A NORTH CAROLINA GENERAL PARTNERSHIP v. THOMAS & HILL, INC.

No. 7610SC891

(Filed 3 August 1977)

1. **Principal and Agent § 5— scope of apparent authority**

The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him.

2. **Principal and Agent § 5— apparent authority — contract binding on principal**

An agent with apparent authority can bind his principal to a contract if the other party to the contract does not know that the agent's actual authority is less than his apparent authority.

3. Principal and Agent § 5— apparent authority of agent to bind principal to make loan

Defendant mortgage broker's agent had apparent authority to bind defendant to a contract to make a permanent loan to plaintiffs for a motel construction project where the agent was the assistant vice president of defendant and the manager of defendant's North Carolina office; defendant's letterhead and business cards indicated defendant was in the business of making business loans; the loan application form used by defendant did not show that defendant limited its service to that of a broker but indicated that defendant was committed to making a loan once it accepted the application in writing; and the agent was authorized to execute these loan applications.

4. Contracts § 27.1— contract to make permanent loan

The evidence supported the court's finding that defendant entered a contract to lend plaintiffs $1,162,500 for permanent financing of a motel construction project where it tended to show that consideration by plaintiffs consisted of their promise to pay interest, their payment of a $500.00 application fee, and establishment of an escrow account containing defendant's loan fee, and that defendant accepted plaintiffs' loan application by letters from the manager of its North Carolina office to the construction lender, copies of which were sent to plaintiffs, stating, "Please accept this letter as our commitment to fund the permanent loan on or before September 1, 1974, in an amount of $1,162,500 . . . . "

5. Contracts § 29— breach of contract to lend money — damages

A borrower injured by a breach of contract to lend money may generally recover from the lender the difference between the interest at the contract rate and the rate of interest which the borrower, because of the breach, must pay to obtain money, any other costs of obtaining new financing, and any consequential damages resulting from the breach which were contemplated by the parties at the time of the contract.

6. Contracts § 29— breach of contract to lend money — damages

Where defendant breached a contract to make a permanent loan for a motel construction project and plaintiff borrowers were unable to obtain a new loan at any interest rate for permanent financing of the motel, but had to continue financing by an interim loan at a fluctuating rate of interest, plaintiffs were entitled to recover as damages for breach of the contract to lend (1) the present cash value of the difference between the amount of interest for the agreed time of credit at the contract rate and the rate generally available to borrowers on the date of the breach; (2) the cost of additional title insurance and accounting, appraisal and brokers' fees, and (3) the interest plaintiffs have had to pay on the interim loan since defendant's breach.

7. Contracts § 29— breach of contract to lend money — damages — deduction for likelihood of prepayment

In an action to recover for breach of a contract to provide permanent financing for a motel construction project, the trial court erred

in making a deduction from damages for the likelihood of prepayment of the permanent loan by plaintiffs.

APPEAL by defendant from *McKinnon, Judge.* Judgment entered 28 May 1976 in Superior Court, WAKE County. Heard in the Court of Appeals 10 May 1977.

The gravamen of this action is an alleged breach by the defendant, Thomas & Hill, Inc., of its contract to make a permanent loan to the plaintiffs, P. W. D. & W. and its general partners, for the purpose of paying off a construction loan from Central Carolina Bank (CCB) which the plaintiffs had used to build a motel. The trial court, sitting by consent without a jury, found that the defendant made and breached a contract with the plaintiffs. The court entered judgment accordingly, but did not award all the damages which the plaintiffs requested.

In 1972 the plaintiffs, who are experienced businessmen but not experienced real estate developers, undertook to build a motel south of Raleigh. They located a possible site, obtained a satisfactory feasibility study, and then signed a franchise contract with Happy Inns of America. The franchiser introduced the plaintiffs to O. Larry Ward, Assistant Vice President and manager of the North Carolina office of Thomas & Hill, Inc., a mortgage banking company with headquarters in Charleston, West Virginia. As a mortgage banking firm the defendant customarily arranged so-called "permanent" financing for builders by placing the builder's request for a loan with a large lending institution. In other words, the defendant was a broker or "go-between" for builders requiring permanent financing. These permanent loans, if obtained, are used to "take-out," i.e., pay off, the construction loan which the builder usually obtains from a local lending institution, such as a bank or savings and loan company, for the limited purpose of obtaining labor and materials and building a building. One customary condition of a contract for a construction loan is that the builder obtain a permanent loan "commitment" prior to approval of the construction loan.

Defendant was a mortgage broker and did not make permanent commercial construction loans. It was capitalized for something in excess of one million dollars and had lines-of-credit with lending institutions for several millions more. The plaintiffs

knew of these lines of credit; they did not know that they were limited to use in financing residential construction.

O. Larry Ward had no actual authority to make a permanent loan. In fact, Ward only had the actual authority to solicit loan applications. The defendant's firm policy even prevented Ward from committing his company, defendant, to try to place a permanent loan with a lender. However, the plaintiffs did not know about these restrictions on Ward's authority.

On 19 April 1973 the plaintiffs executed the defendant's application form for a permanent loan of $1,162,500 repayable over twenty-five years at nine and one-half percent interest. The application was signed by each of the individual plaintiffs, and nothing on the application indicated that if the application were accepted the defendant would not be the actual permanent lender. The application said:

"Applicant . . . agrees:

> 18. This application and your [the lender's] written approval of it, when given and accepted, shall constitute the entire agreement for loan . . . . "

The application was accompanied by a check for $500 as the agreed upon application fee. This check was not cashed. The application was also accompanied by a letter promising to pay a fee in consideration for the loan in the event a loan commitment was made. O. Larry Ward transmitted this application to the defendant's home office in Charleston. Personnel there attempted to place it with a lender, but they failed. The officers and executives at the defendant's home office were unaware of the events which subsequently transpired in North Carolina between the plaintiffs, their banker at CCB, and O. Larry Ward.

The plaintiffs began negotiations with CCB for a construction loan. They dealt with Scott Edwards, the credit manager at CCB's home office in Durham. On behalf of the plaintiffs, Edwards investigated the defendant's financial position and concluded that defendant was a reputable company and financially capable of making plaintiffs' permanent loan.

On 7 June 1973 O. Larry Ward received word from the defendant that it had not placed the plaintiffs' loan application. Nevertheless, on 11 June 1973, in response to a request from

Edwards at CCB for a permanent loan commitment, Ward wrote to Edwards, saying:

> "Thomas & Hill, Inc., is processing an application for a permanent loan for Mr. P. M. Williams, Mr. D. J. Dudley, Mr. Thomas A. Pipkin, and Mr. MacDonald [sic] Weeks, on the above property.
>
> "Please accept this letter as our commitment to fund the permanent loan on or before September 1, 1974, in an amount of $1,162,500.00, as outlined in the loan submission mailed to you May 24, 1973."

Copies of this letter were sent to each of the individual plaintiffs.

Soon thereafter Edwards sent details of the CCB construction loan to Ward and asked him to incorporate them into defendant's commitment. Ward replied in a letter apparently signed by his secretary, saying:

> "Please accept this letter as our commitment to fund the permanent loan on or before October 1, 1974, in an amount of not less than $1,162,500 as outlined in my loan package submitted to you on May 24, 1973.
>
> "Please be further advised that your commitment dated June 26, 1973, for the construction loan is hereby made a part of our commitment to the borrowers and is attached as Exhibit A."

Again, each plaintiff received a copy of this letter.

In a third letter from Ward to Edwards, concerning modifications in CCB's construction loan commitment, Ward agreed to the change and said:

> "[M]y only concern will be that the borrowers have the necessary fee available to pay for the permanent commitment when same is supplied to them."

In light of Ward's representations to CCB, the bank issued a construction loan to plaintiffs. Of that loan $11,625 was earmarked as the defendant's fee for its permanent loan commitment. At O. Larry Ward's direction the money was held by plaintiffs. In August 1974 an additional $11,625 was added to this amount and the entire fund of $23,250 was placed in escrow for the defendant. The money remains in that account.

In August 1974 the defendant denied any commitment to make a permanent loan. During September the plaintiffs entered negotiations with CCB for an interim loan. On 1 October 1974 CCB accepted a new demand note from the plaintiffs at a floating interest rate of prime plus 2% in replacement for the construction loan. In December 1975 the interest rate was changed to prime plus 3%. Between 1 October 1974 and the time of the trial the plaintiffs paid $184,619.49 in interest on this interim loan; they have paid nothing on the principal. The plaintiffs have been unable to find permanent financing elsewhere.

Evidence indicates that on 1 October 1974 the "going" commercial rate of interest for a long term loan was 10½%. However, little or no money was available in the country for motel financing. In their attempt to find permanent financing the plaintiffs spent $3,000 for broker's fees, $1,025 for accounting fees and $250 for appraisal fees. They also spent $1,613.12 for title insurance in connection with the interim loan from CCB.

The trial court, as the finder of fact, found that O. Larry Ward was an agent of the defendant and had the apparent authority, though not the actual authority, to bind the defendant to make a permanent loan. He further found that Ward made such a contract and that the defendant breached it. Damages were awarded to the plaintiffs equal to the total of the fees and insurance they paid plus the present value of the difference between the interest which the plaintiffs would have paid on the 9½% loan and the interest which they would have paid on a 10½% loan had they been able to obtain one. With regard to this final element of damages, the court further reduced it by more than $20,000 in order to adjust for the likelihood of early payment. However, no evidence in the record shows that the plaintiffs intended to make early payment.

Both parties appeal.

Manning, Fulton & Skinner, by M. Marshall Happer III and Charles L. Fulton, for plaintiffs.

Smith, Anderson, Blount & Mitchell, by Henry A. Mitchell, Jr., Michael E. Weddington and Carl N. Patterson, Jr., for defendant.

ARNOLD, Judge.

Defendant's position is that there was no contract, but if there was, plaintiffs were only entitled to nominal damages. Plaintiffs contend that in addition to damages awarded them they were entitled to recover interest paid on the interim loan to CCB. Thus, two questions are presented in this appeal. Was there a contract, and what is the measure of damages?

Defendant contends that it made no contract with the plaintiffs. Principally, it relies on the argument that O. Larry Ward had no authority to bind it to a contract to lend money. All parties agree that Ward lacked actual authority to make such a contract. Whether he had the apparent authority to do so is, however, a question of fact to be answered by the fact finder in light of the evidence. The evidence was mixed, and we cannot say that the court erred in finding that Ward had the apparent authority to make the contract.

[1, 2] The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him. Restatement (2d) of Agency, § 27 (1958). In a recent decision by our Supreme Court apparent authority was defined as " . . . that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses. . . . " *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 31, 209 S.E. 2d 795 (1974). An agent with apparent authority can bind his principal to a contract if the other party to the contract does not know that the agent's actual authority is less than his apparent authority.

[3] In the present case there is evidence that Ward was held out by defendant as its agent with authority to make a loan. Ward's position as an assistant vice president and, later, vice president of the defendant is some evidence of this apparent authority. His position as the manager of the North Carolina branch is even stronger evidence. While assistant officers customarily have little authority, managers in charge of an office usually have all the authority necessary to conduct the business of that office. In a case involving an assistant bank cashier's apparent authority, it was said: "[I]t is immaterial what the person's official position may be if he is actually engaged in the *management* of the bank's interests." *Sears, Roebuck & Co. v.*

Banking Co., 191 N.C. 500, 505, 132 S.E. 468 (1926) (emphasis added).

Other facts indicate that Ward had the apparent authority to bind defendant to a loan commitment. The defendant's letterhead and business cards, which were in evidence, indicated that the company was in the business of making mortgage loans. The letterhead carried the words "Mortgage Financing." The loan application form used by the defendant said nothing which indicated that the defendant limited its service to that of a broker. On the contrary, the application indicated that the defendant was committed to make a loan once it accepted the application in writing. O. Larry Ward was authorized to execute these loan applications, and nothing in the record shows that his authority in this regard was limited to that of a scrivener. This evidence, taken together, is sufficient to support the court's findings, and these findings bind this Court.

[4] Defendant also argues that there is insufficient evidence to support the court's finding that a contract was made. This argument has no merit. The letters sent by O. Larry Ward to Scott Edwards at CCB, copies of which were sent to the individual plaintiffs, constituted written acceptance of the plaintiffs' loan application and established the contract. The contract was supported by consideration, principally, the plaintiffs' promise to pay interest, and, additionally, their payment of a $500 application fee and establishment of an escrow account containing the defendant's fee. Evidence of a contract is ample, and that part of the judgment concluding that defendant entered a contract to loan plaintiffs on or before 1 October 1974, the sum of $1,162,500, is affirmed.

The issue of damages is now examined.

We find only a limited number of decisions in American case law which consider the measure of damages for breach of a contract to lend money. In no case do we find a determination of the question presented by this appeal: what is the measure of damages for breach of a contract to make a permanent loan for a building where the borrower is unable to obtain a new loan at any interest rate to permanently finance the building, but has to continue financing by an interim loan at a fluctuating rate of interest?

The general rule of damages handed down in England in *Hadley v. Baxendale,* 9 Exch. 341 (1854), and followed ever after is that

> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally; i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach."

In other words, the injured party may recover all of the damages which were *foreseeable* at the time of the contract as a probable result of the breach either because they were a *natural* result or because they were a *contemplated* result of the breach. 5 Corbin on Contracts, § 1007, p. 70 (1964).

Still another rule of damages is that they must be measurable with reasonable certainty, i.e., they must be more than speculative. This rule is not a rigid one, and it usually applies in the context of a claim to recover expected but unrealized profits, which, allegedly, would have been earned but for the breach. 5 Corbin on Contracts, § 1022, p. 138 (1964). If a breach is such that in the usual course of things it leads to a substantial loss of such a character that the loss cannot be precisely measured, substantial compensatory damages will be awarded even though they cannot be precisely measured. 5 Corbin on Contracts, § 1021, p. 134 (1964). This is fair and reasonable. Damages are more than simple restitution. They are a means of making the injured party as whole as possible by the use of money. Some injuries are nothing more than the loss of a sum certain, and there the injured party is easily made whole. Other injuries involve loss of time, opportunity, special chattel, good will, prospective profits and other things which are difficult to measure in money. The contention that no injury has occurred because the measurement of damages is too difficult is not favored.

These simple rules of *Hadley v. Baxendale, supra,* are basic to the common law, and they are part of the law in North Carolina. *Perkins v. Langdon,* 237 N.C. 159, 74 S.E. 2d 634 (1953); *Machine Co. v. Tobacco Co.,* 141 N.C. 284, 53 S.E.

885 (1906). To recover damages for breach of a contract the plaintiff must show that the damages were the natural and probable consequence of the breach, and that they can be calculated with reasonable certainty. *Pike v. Wachovia Bank and Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). The damages are to be measured at the time of the breach. *Maxwell v. Proctor & Gamble Distributing Co.*, 204 N.C. 309, 168 S.E. 403 (1933). Special damages may also be awarded for injury which occurred after the breach if such an injury was within contemplation of the parties at the time the contract was made. *Perkins v. Langdon, supra.*

Very few decisions in North Carolina have dealt with the breach of a contract to lend money. In *Coles v. Lumber Co.*, 150 N.C. 183, 188, 63 S.E. 736 (1909), it is stated:

> "The measure of damage for a failure [to lend money as contracted] would be any extra expense to which [the borrower] was put to obtain the money. The failure to perform an agreement to loan a man money, unless some special and conseqential damages were shown to be in contemplation of the parties when the contract was made, would not subject [the lender] to speculative damage."

In accord is *Newby v. Realty Co.*, 180 N.C. 51, 103 S.E. 909 (1920), where it was held that the plaintiffs might recover both the money lost and the profits they failed to make when defendant breached the contract to lend them money to acquire an option on land. These two cases are in accord with the general rules already discussed, and they would seem to allow the injured borrower to recover any money spent to make himself whole, including the cost of negotiating a new loan and the difference, if any, between the interest in the original contract and in the new loan, if such costs are a natural or contemplated consequence of the breach.

[5] From decisions throughout the country it can be seen that the difference between the interest at the contract rate and the rate of interest which the borrower, because of the breach, must pay to obtain money is the common measure of damages for breach of a contract to lend money. *Bank of New Mexico v. Rice*, 78 N.M. 170, 429 P. 2d 368 (1967); *Columbian Mut. life Assur. Soc. v. Whitehead*, 193 Ark. 598, 101 S.W. 2d 455 (1937); *F. B. Collins Inv. Co. v. Sallas*, 260 S.W. 261 (Tex. Civ. App., 1924); *Culp v. Western Loan & Building Co.*, 124 Wash. 326,

214 P. 145 (1923); *Shurtleff v. Occidental Building & Loan Ass'n*, 105 Neb. 557, 181 N.W. 374 (1921); *Murphy v. Hanna*, 37 N.D. 156, 164 N.W. 32 (1917); *Hedden v. Schneblin*, 126 Mo. App. 478, 104 S.W. 887 (1907); 5 Corbin on Contracts, § 1078, p. 446 (1964); Restatement of Contracts § 343.

In addition to the difference in interest rates, the injured borrower may recover any other costs of obtaining new financing, plus consequential damages which result from the breach where they were contemplated by the parties at the time of the contract. *Coles v. Lumber Co., supra; Davis v. Small Business, Inv. Co. of Houston*, 535 S.W. 2d 740 (Tex. Civ. App., 1976); *Bank of New Mexico v. Rice, supra; Zelazny v. Pilgrim Funding Corp.*, 244 N.Y.S. 2d 810 (1963); *Dodderidge v. American Trust and Savings Bank*, 98 Ind. App. 334, 189 N.E. 165 (1934); *Hunt v. United Bank & Trust Co.*, 210 Cal. 108, 291 P. 184 (1930); *F. B. Collins Inv. Co. v. Sallas, supra; Culp v. Western Loan & Building Co., supra; Corbin, supra;* Restatement of Contracts, *supra.*

It has been said that an injured borrower can recover nothing but nominal damages for breach of a contract to lend money, because, in contemplation of law, there is always money available in the marketplace. *Lowe v. Turpie*, 147 Ind. 652, 44 N.E. 25 (1896). Not every injury resulting from a breach of contract to lend money can be made whole by money, but the holdings of such old, uncommon cases are ill-reasoned, unjust, and they should be rejected. *See 5 Corbin on Contracts*, § 1078, pp. 447-448 (1964). In the increasingly complex world of business and economics money is a commodity which not only becomes scarce but unavailable to particular would-be borrowers. A lender who, with knowledge of the borrower's purpose for acquiring the loan, contracts to lend the money, and then reneges, should reasonably be able to foresee the injury caused by his breach. In the case at bar, but for the lender's commitment to lend the money the borrowers would have acquired another commitment, or else they would not have proceeded with their project. It is natural and foreseeable that the borrower may have to pay new fees and higher interest for refinancing. It is likewise within the contemplation of the lender, where the lender knew the borrower's purpose for acquiring the loan, that future loans for such purposes may become unavailable in the money market. A lender who breaches a contract to

lend money is liable for all the foreseeable damages, both natural and contemplated, which proximately arise from the breach.

The plaintiffs, in the case at bar, clearly have been injured by defendant's breach. They have been forced to negotiate an interim loan with CCB at a high interest rate, and they have been forced to attempt to negotiate for a new permanent loan, incurring expenses they would not have incurred but for the breach. They were forced into a different, and unfavorable, money market where the commercial rate of interest, at the time of the breach, was 10½ percent instead of the contract rate of 9½ percent, and, more importantly, they were unable to obtain money for permanent financing of their motel.

[6] The trial court correctly ruled that plaintiffs were entitled to recover: (1) the cost of additional title insurance; (2) the cost of additional brokers' fees; (3) the cost of additional accounting fees; (4) and the cost of additional appraisal fees. All of these were foreseeable expenses which, but for the breach, plaintiffs would not have incurred.

With respect to the remaining damages the proper measure is the interest calculated at 10½% for 25 years from the date of trial, less the interest calculated at 9½% for 25 years from 1 October 1974, which but for the breach the plaintiffs would have had to pay. This difference must then be discounted to its present cash value as of the time of trial.

The basic measure of damages here is the difference between the rate of interest during the agreed time of credit (twenty-five years in the case at bar) as specified in the contract, and the rate of interest generally available to borrowers on the date of the breach. *See, Hedden v. Schneblin, supra;* 36 A.L.R. 1408, 1411 (1925). The purpose of awarding money damages for any injury is to try to put the injured party in as good a position as if the injury had not occurred. Obviously this cannot be done with mathematical certainty, but in all fairness the difficulty in measuring damages should not bar recovery.

Applying the principle that a lender who breaches a contract to lend money is liable for all the foreseeable damages, both natural and contemplated, which proximately arise from the breach, the trial court also should have allowed recovery for interest plaintiffs had to pay to CCB on the interim loan after defendant's breach. This interest was part of the cost of

negotiating new financing. It was foreseeable, and but for the breach it would not have occurred.

[7] Finally, the trial court found that there was a likelihood of prepayment of the permanent loan by plaintiffs and made an additional reduction, or discount, for the likelihood of prepayment. This portion of the judgment cannot be sustained and is stricken. While there is evidence to indicate that prepayment is common there is no evidence that plaintiffs contemplated early payment.

This case is remanded to Superior Court of Wake County for entry of judgment in accordance with this opinion.

Affirmed in part.

Modified in part and remanded.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. ERNEST RAYMOND HARDY AND DENNIS RAY HARDY

No. 773SC81

(Filed 3 August 1977)

1. **Arrest and Bail § 6.2; Assault and Battery § 15.4— assault on law enforcement officer — resisting arrest — no lesser included offense**

In a prosecution for assaulting a police officer while the officer was attempting to discharge a duty of his office, the trial court erred in charging that resisting arrest was a lesser included offense of assault on a police officer, since the evidence in this case clearly showed that if the defendant did resist arrest it was by the same means as were charged in the assault case; however, the court's error in charging on resisting arrest was not prejudicial to defendant.

2. **Arrest and Bail § 6.2; Assault and Battery § 15.4— assault on law enforcement officer — resisting arrest — no election by State — no prejudice to State**

Where warrants charging a defendant with assault upon a law enforcement officer in the performance of his duty and with resisting arrest charge the same conduct, and the evidence clearly shows that no line of demarcation between defendant's resistance of arrest and his assaults upon the officer can be drawn, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges; however, defendant was not

prejudiced in this case, though the State failed to make an election, since the trial court submitted the charges within the context of greater and lesser offenses and instructed the jury to convict defendant of one or the other of the charges but not of both, and the jury convicted defendant only of the offense carrying the lesser punishment.

APPEAL by defendants from *Webb, Judge.* Judgments entered 1 September 1976 in Superior Court, CRAVEN County. Heard in the Court of Appeals 2 June 1977.

All charges against defendants resulted from one incident. As to the incident, the State's evidence tended to show the following:

Officer Randy Hall of the Havelock Police Department was driving his patrol car on Highway 70 East on 7 May 1976 at approximately 6:00 p.m. when he observed a gold Chevrolet pass a church school bus and force it off the road. He pulled in behind the car and observed that it was weaving from side to side and "crossing the white line of the highway." The road was a 4-lane highway on which the lanes are divided by a white line. At one point, the Chevrolet ran off onto the shoulder of the road. On four other occasions, it crossed the white center line, at one time being one-half car length over the center line. The driver apparently paid no attention to the blue lights which Officer Hall turned on, but did respond to the siren and pulled over and stopped on the grass at the intersection of Highway 70 and Shepard Street.

Both Dennis and Ernest Hardy exited the vehicle, Ernest from the driver's side and Dennis from the passenger's side. Officer Hall was wearing a blue uniform with badge and firearm. Ernest Hardy stumbled as he got out of the car and walked to the back of the vehicle with his hand on the car. Officer Hall told Dennis Hardy to get back in the car, and he did. When Officer Hall asked Ernest for his driver's license and registration card, Ernest asked for a break, saying he had not had too much to drink. Hall detected a strong odor of alcohol about Ernest. He gave Hall his driver's license and returned to the car to get the registration from the glove compartment. He agreed to go through a sobriety test, but did not perform the tests adequately. Hall then told Ernest that he was placing him under arrest for driving under the influence, whereupon Ernest responded "You are not going to arrest me." Officer Hall placed his hand on Ernest's arm and told him that he would have to

go with him. Ernest jerked away, and Dennis jumped out of the car and started toward them and refused to comply with Hall's direction that he get back in the car. Ernest swung at Hall and struck his arm, and Hall grabbed him and pushed him up against the car. Dennis took Officer Hall's right arm and told him to leave his brother alone. When Hall informed Dennis that he was under arrest for obstructing an officer, Dennis jumped on Hall's back, and they started fighting.

Hall tried to get away from the two to get to his walkie-talkie but could not. Ernest and Dennis continued to strike Hall and he continued to try to get them off of him, and all three slid down in the ditch by the car. The Hardys kept telling Hall that they were going to get him and teach him a lesson. After some time, Hall was able to extricate himself long enough to get to his walkie-talkie, call Sgt. Mylette and give his location. Although cars stopped and people got out to watch, no one offered assistance. Hall ran around to the front of the Hardy car, and the brothers again started hitting him in the head, chest and arms with their fists. They again rolled in the ditch, both of them grabbing him around the head and Dennis trying to "claw" his eyes. Sgt. Mylette arrived and got Dennis Hardy off Hall, and Hall stood up. Mylette went to get Ernest, and Dennis again jumped on Hall. Hall managed to get him down on his stomach and held him there. Sgt. King arrived and helped handcuff Dennis who continued to kick and scream. As they carried him to the car, he kicked Hall and King in the chest, legs and knees. When they got him to the patrol car and tried to get him inside, he kicked Sgt. Mylette in the face. Ernest was in the car and tried to kick Dennis out as they put him in. When they finally succeeded in getting him in the car and closed the door, he tried to kick the window out, was unsuccessful, and began kicking the plexiglass shield between the front and back seats. The two men continuously screamed during the trip to New Bern. They threatened "to get the families" of the officers. At the magistrate's office, Ernest Hardy threw the warrants at the magistrate "and made some obscene remarks to him concerning the warrants." Officer Hall did not use any weapon in the fight but thought he hit Ernest Hardy in the face and learned later that Ernest Hardy suffered a fracture of the left malar bone.

Charles Strunk testified that he came upon the scene and saw a police officer and two men go in the ditch. He stopped

his car in front of the Hardy vehicle and ran to the scene. He knew Ernest Hardy and had met Dennis once or twice. Both of them were hitting Officer Hall. One of them had the officer around the throat. He yelled at them, and Dennis told him that if he didn't want the same thing he had "better get the hell out of there." At that point, Sgt. Mylette came up and yelled at them, and Ernest responded and got up. Sgt. Mylette grabbed Ernest, and Officer Hall was able to control Dennis. He had Dennis down and was sitting on his back. Strunk started to help Hall handcuff Dennis when Officer King came up. As Hall and King tried to get Dennis out of the ditch, Dennis continued kicking and yelling verbal threats.

Joe Stone, a retired Marine Corps Major, testified that when he came upon the scene, he saw Officer Hall retreating down the shoulder of the road trying to ward off Ernest and Dennis Hardy, both of whom were swinging at him and trying to kick him. By the time he got his car parked, Officer Hall was in the ditch and both the Hardys were on top of him hitting him with their fists. Officer Mylette arrived, and Stone assisted him in handcuffing Ernest. He did not see anyone using a knife or other weapon other than fists and feet. Stone also was kicked and received several small bruises.

Sgt. Mylette's testimony was substantially the same as the witnesses who preceded him with respect to the fight and the difficulty in getting the Hardys in the patrol car. He testified that when he took Ernest to the patrol car, Ernest told him that "he knew who I was and that he was going to get me one of these nights when I was working by myself and make sure that I never bothered him again."

Officer King's testimony was also substantially the same as that of Hall and Mylette. All three officers testified that they believed the threats that were made.

Deputy Sheriff Woodard met Officer Hall at the jail and assisted in getting Dennis and Ernest Hardy into the breathalyzer room. He testified that they were boisterous, hard to handle, cursing and threatening Officer Hall and his family.

Defendant Ernest Hardy testified that when Officer Hall told him he was under arrest, he grabbed his arm; that Ernest jerked away; that Hall then hit him with something beside the head as hard as he had ever been hit; that it knocked him down

and he was "knocked out for a couple of minutes"; that when he looked up his brother and Hall were over in the ditch wrestling and he got up to try to help his brother who had apparently come to his rescue when Hall hit him; that he never attempted to hit Hall until Hall hit him; that a deputy sheriff wiped his face and head after he was carried to jail; that he was released on bond the next morning and some 10 days later underwent surgery for the reduction of a fracture of the left malar bone; that he "blew 16" on the breathalyzer test; that he threw the papers in the magistrate's face because he was mad; and that when Hall was backing away from him and he was swinging at him, he was just protecting himself and his brother and was still mad.

Dennis Ray Hardy was charged with two counts of threatening a police officer (Nos. 76CR4704 and 76CR4710) and was found guilty of each. He was also charged with two counts of assaulting a police officer (Nos. 76CR4706—Officer King, and 76CR4707—Officer Mylette). As to these, the trial court, in its instructions to the jury, submitted in connection with each count the offense of resisting arrest as a lesser included offense. The jury found the defendant guilty of resisting arrest on each count. He was also charged with assaulting a police officer (No. 76CR4708—Officer Hall) and resisting arrest (No. 76CR4709—Officer Hall). As to these, the judgment recites: "In open court, the defendant appeared for trial upon the charge or charges of 76CR4708—Assault Police Officer; 76CR4709—Resisting Arrest (The two charges consolidated for trial) and thereupon entered a plea of Not Guilty." The judgment further recites that defendant was found guilty of the offense of resisting arrest.

Ernest Raymond Hardy was charged with two counts of threatening a police officer (No. 76CR4711—Officer Hall, and 76CR4713—Officer Mylette) and was found guilty of each count. He was also charged with resisting arrest (No. 76CR4712—Officer Hall) and assaulting a police officer (No. 76CR4715—Officer Hall). The judgment stated that the two charges were consolidated for trial and that defendant was found guilty of the offense of resisting arrest. In No. 76CR4714, Ernest Raymond Hardy was charged with assaulting a police officer (Officer Mylette). The trial court submitted to the jury the assault charge and resisting arrest as a lesser included offense, and the jury found defendant guilty of resisting arrest.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Ernest C. Richardson III for defendant appellant Ernest Raymond Hardy.

Law Offices of Alfred D. Ward, by Alfred D. Ward, Jr. and Susan E. Barco, for defendant appellant Dennis Ray Hardy.

MORRIS, Judge.

We believe that because of the variety of charges against each defendant, clarity requires that we discuss the appeal of each defendant separately.

Dennis Hardy was charged in case No. 76CR4704 with threatening Officer King and in No. 76CR4710 with threatening Officer Hall. By his assignment of error No. 6, he challenges the sufficiency of the court's instruction to the jury, contending that the court failed adequately to apply the law to the facts. He correctly concedes that the charge is correct as to the elements of the crime of communicating a threat. We are of the opinion that the trial court adequately explained the law as it related to the facts of the case, having sufficiently recapitulated the evidence and stated the contentions of the appellant. While we would not adopt the charge as model, we think the jury was fully apprised of the law as it applied to the facts and could not have been misled. This assignment of error is overruled.

[1] In case No. 76CR4706, Dennis Hardy was charged with assaulting Officer King, and in case No. 76CR4707, he was charged with assaulting Officer Mylette. He was convicted, in each case, of resisting arrest, the trial court having charged the jury that if they found the defendant not guilty of assaulting a police officer they would then determine whether he was guilty of resisting arrest. By assignments of error Nos. 5 and 9, appellant contends that the court erred in charging that resisting arrest is a lesser included offense of assault on a police officer. Under the facts of this case, we are constrained to agree. After instructing the jury with respect to the charge of assaulting a police officer while the officer was attempting to discharge a duty of his office, a violation of G.S. 14-33(b)(4), the court instructed that if the jury did not find the defendant guilty of that offense, they should determine whether he was

guilty of resisting arrest and " . . . that differs from assaulting an officer in the performance of his duties in that you need not be satisfied beyond a reasonable doubt that the defendant Dennis Hardy assaulted C. R. King, but you would have to be satisfied beyond a reasonable doubt that he resisted, delayed, or obstructed C. R. King while C. R. King was making an arrest." Substantially similar instructions were given in No. 76CR4707 in connection with the charge of assaulting Officer Mylette. We do not discuss the question of whether resisting arrest *can*, under certain circumstances, constitute a lesser offense of assaulting a police officer in the performance of his duties, nor do we think it necessary to discuss the applicability, if any, of *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972), to the facts here. Suffice it to say that in this case, the evidence clearly shows that if the defendant did resist arrest it was by the same means as were charged in the assault case. Evidence of resisting arrest by any other means is completely lacking, and defendant was not entitled to the charge given.

While it is our opinion that the court erred in charging on resisting arrest, we do not perceive prejudice to the defendant. As Justice Huskins said in *State v. Thacker,* 281 N.C. 447, 457, 189 S.E. 2d 145, 151 (1972), "[i]n legal fiction, if not in fact, the jury has acquitted" defendant on the assault charge which carries a maximum penalty of a fine and imprisonment for 2 years, and convicted him of an offense carrying a maximum penalty of a fine and 6 months imprisonment. We think the principles enunciated in *State v. Thacker, supra,* and *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956), are applicable here. Therefore, appellant's convictions and sentences in Nos. 76CR4706 and 76CR4707 will not be disturbed.

The two remaining charges against Dennis Hardy are No. 76CR4708, assaulting Officer Hall, and No. 76CR4709, resisting Officer Hall, in his attempt to arrest Ernest Hardy. These two offenses were submitted to the jury in the same manner. The jury was instructed that they could find the defendant guilty of assaulting Officer Hall or not guilty, and if they found him not guilty of that offense they would then consider whether he was guilty of resisting arrest. Appellant assigns this treatment by the court as error.

[2] In *State v. Kirby,* 15 N.C. App. 480, 489, 190 S.E. 2d 320, 326, *appeal dismissed,* 281 N.C. 761, 191 S.E. 2d 363 (1972), this Court said:

> "We further hold that the charge of resisting an officer (of which the defendant was acquitted in district court) and the charge of assaulting a public officer while discharging or attempting to discharge a duty of his office are separate and distinct offenses and that the trial judge did not err in failing to 'merge' them. See *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). No actual assault or force or violence is necessary to complete the offense described by G.S. 14-223. *State v. Leigh,* 278 N.C. 243, 179 S.E. 2d 708 (1971). . . . "

However, where the warrants charge the same conduct and the evidence clearly shows that "no line of demarcation between defendant's resistance of arrest and his assaults upon the officer could be drawn," *State v. Summrell, supra,* at 173, 192 S.E. 2d at 579, the assaults being the means by which the resistance was accomplished, the State must elect between the duplicate charges. *Id., See also State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66 (1967).

Here, the warrant in No. 76CR4708 charged that the defendant did "assault and strike Randy E. Hall, a law enforcement officer of Havelock Police, by fist fighting the officer." The warrant in No. 76CR4709 charged that defendant resisted, delayed, and obstructed Officer Hall "by fighting officer." The evidence was uncontradicted that if defendant was guilty of resisting, obstructing, or delaying the result was accomplished by the very same acts as constituted the alleged assault on Officer Hall. These were duplicated charges, and under *State v. Summrell, supra,* the offenses could not be submitted so as to convict defendant of both. Generally, the State should elect as to which charge it would submit to the jury. *State v. Summrell, supra.* In the case *sub judice,* however, the trial court submitted the charges within the context of greater and lesser offenses, i.e., the jury was instructed that they could find defendant guilty of assaulting Officer Hall *or* guilty of the lesser included offense of resisting arrest, or not guilty. Thus, the jury was instructed so as to convict defendant of one or the other charges but not of *both.* Therefore, the double jeopardy rationale of *Summrell* has no application to the present case. Any error the court made in this portion of the charge could not have prejudiced defendant since the jury convicted him only of the offense carrying the lesser punishment. Accordingly, the judgment as to resisting arrest will stand.

Ernest Hardy was charged with threatening Officer Hall (No. 76CR4711) and Officer Mylette (No. 76CR4713). He contends that the trial court's instructions with respect to these charges were not sufficient. His arguments and contentions are the same as those raised by Dennis Hardy. We find the charge adequate and overrule this assignment of error.

Ernest Hardy was also charged with assaulting Officer Mylette (No. 76CR4714). As to this charge, the trial court instructed the jury that if they found him not guilty of that charge they should determine whether he was guilty of resisting Officer Mylette upon substantially similar instructions as those given in Dennis Hardy's two charges of assault. For the reasons assigned there, this conviction will not be disturbed.

Ernest Hardy was also charged with assaulting Officer Hall (No. 76CR4715) and resisting Officer Hall (No. 76CR-4712). The language of the warrants was the same—"fist fighting" and "fighting." The evidence clearly showed that if he resisted he did so by the same means, and only those, that he used in the assault. The charges were merged, and the trial court instructed the jury to find defendant guilty or not guilty of assault, and if they found him not guilty of assault, to determine his guilt or innocence of the resisting charge. The jury found him guilty of resisting the officer. We see no necessity for repeating the discussion applicable to the same charges against Dennis Hardy. For the reasons stated there the conviction for resisting the officer, the conviction in No. 76CR4712, will stand.

Both defendants assign as error the court's charge on self-defense. The charges on self-defense was applicable only to the assault charge of which both were acquitted. These assignments are, therefore, overruled.

As to Dennis Hardy:

No. 76CR4704—Threatening Officer King—No error.

No. 76CR4706—Assaulting Officer King—Convicted of resisting Officer King—No error.

No. 76CR4707—Assaulting Officer Mylette—Convicted of resisting Officer Mylette—No error.

No. 76CR4709—Resisting Officer Hall—No error.

No. 76CR4710—Threatening Officer Hall—No error.

As to Ernest Hardy:

No. 76CR4711—Threatening Officer Hall—No error.

No. 76CR4712—Resisting Officer Hall—No error.

No. 76CR4713—Threatening Officer Mylette—No error.

No. 76CR4714—Assaulting Officer Mylette—Convicted of resisting Officer Mylette—No error.

Judges PARKER and CLARK concur.

STATE OF NORTH CAROLINA v. HERBERT EARL SPRUILL

No. 772SC226

(Filed 3 August 1977)

1. **Searches and Seizures § 1— examination of vehicle — warrantless inventory search — admissibility of evidence**

In a prosecution for felonious breaking or entering and felonious larceny of an automobile and other items, the trial court did not err in admitting testimony identifying wheels and tires on defendant's car as the ones stolen or in admitting evidence obtained from a warrantless inventory search of defendant's vehicle, since identification of the wheels and tires was not made pursuant to a search but was made when an officer and a witness merely looked at defendant's vehicle and since warrantless inventory searches of vehicles properly in the custody of the police pursuant to established police policy have been held to be reasonable in terms of the Fourth Amendment in that their purpose is to protect the accused and the police.

2. **Criminal Law §§ 145, 159— instructions improperly included in record — costs taxed against defense counsel**

Defendant's counsel is taxed with the costs of printing the jury instructions in the record where no error was assigned to the instructions. App. R. 9(b) (3) and (5).

APPEAL by defendant from *Peel, Judge.* Judgment entered 12 November 1976 in Superior Court, MARTIN County. Heard in the Court of Appeals 30 June 1977.

Defendant was charged with felonious breaking or entering and felonious larceny of several tape players, a CB antenna, and a set of car keys (76CR3018). He was also charged with larceny

of an automobile (76CR3020). The State's evidence tended to show that between the close of business on 27 July 1976 and opening time on the morning of 28 July 1976, the premises of Griffin Motor Company, Inc. in Williamston were broken into or entered. A 1975 Camaro automobile, a J. C. Penney tape player, and a toolbox and tools were taken therefrom. Defendant, a Williamston resident, had been seen on the premises earlier in the day. He was driving a black, 1968 Chevrolet with regular wheels and tires.

The Williamston police were notified of the thefts on 28 July 1976. On 29 July 1976 a warrant was issued charging the defendant with larceny of the 1975 Camaro. The Camaro was equipped with Krager chrome mag wheels and rims and wide tires which had been sold to Griffin Motors by Carl Taylor a short time prior to the theft. At about noon on 29 July 1976 the Camaro was discovered abandoned on a little used road on the outskirts of Williamston. The Krager Mag rims and the wide tires had been removed and replaced with the rims from an older car.

Defendant was observed in Robersonville, North Carolina at about 8:00 p.m. by Robersonville police officers. At that time they were aware of an outstanding Williamston warrant charging defendant with larceny of an auto. They arrested him pursuant to that warrant. At the time of his arrest, defendant was standing beside his 1968 black Chevrolet which was parked at a mobile home park. After taking the defendant, a Williamston resident, into custody, the Robersonville police caused his car to be taken to R & R Salvage for storage and safekeeping.

The Williamston police were then notified of the arrest, and Officer Fink of that department came to Robersonville, took custody of defendant and transported him back to Williamston. Officer Fink had been the investigating officer at the scene when the Camaro, less its special wheels and tires, had been discovered earlier in the day. After incarcerating the defendant in Williamston, Officer Fink returned to Robersonville accompanied by Carl Taylor who sold the special wheels and tires to Griffin Motor Co. They went to R & R Salvage where Taylor identified the rims and tires on defendant's 1968 Chevrolet as being the ones he had sold to Griffin Motors and had installed on the Camaro which was later stolen. Officer Fink then impounded the car and inventoried its contents. The

inventory revealed the stolen tape player, toolbox, and tools. No search warrant had been obtained prior to the examination of the car or its contents.

Defendant did not put on evidence. He was found guilty by the jury and sentenced to five to seven years imprisonment on each offense, sentences to run concurrently.

Attorney General Edmisten by Associate Attorney Amos Dawson, for the State.

Regina A. Moore for the defendant.

BROCK, Chief Judge.

[1] The sole issue brought forward for review is whether the trial court committed reversible error in denying defendant's motion to suppress the evidence obtained from the warrantless search of defendant's automobile. Defendant maintains that the present case is similar to *Preston v. United States,* 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964) and should be controlled by it. We disagree.

In *Preston* the defendants were arrested for vagrancy. Their auto was towed to a garage by the police where it was searched several hours after the arrest. Evidence obtained from the warrantless search was excluded at defendants' subsequent trial for conspiracy to commit bank robbery. The prosecution argued that the search was valid because it was incident to and part of a lawful arrest. The Supreme Court held exclusion to be proper solely on the grounds that once an accused is arrested and in custody, a search made at a later time, in another place and without a warrant is simply not incident to arrest. In the present case introduction of evidence obtained from the warrantless search is not being justified on the grounds that the search was incident to a lawful arrest.

Whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case. *Preston v. United States, supra.*

> "[T]he Fourth Amendment does not require that every search be made pursuant to a warrant. It prohibits only 'unreasonable searches and seizures.' The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all

the circumstances. The test of reasonableness cannot be fixed by per se rules; each case must be decided on its own facts." *Coolidge v. New Hampshire*, 403 U.S. 443, 509-10, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971).

As to automobile searches in relation to the Fourth Amendment, the Supreme Court has "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts." *United States v. Chadwick*, 45 U.S.L.W. 4797, 4800 (U.S. June 21, 1977). These differences extend even to warrantless searches of automobiles in cases where there is no danger of removal of the vehicles or destruction of the evidence within them. *Cady v. Dombrowski*, 413 U.S. 433, 37 L.Ed. 2d 706, 93 S.Ct. 2523 (1973). The rationale behind the more flexible approach to warrantless automobile searches is in the realization that there is a diminished expectation of privacy in a motor vehicle. "[I]ts function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell v. Lewis*, 417 U.S. 583, 41 L.Ed. 2d 325, 94 S.Ct. 2464 (1974).

Under the circumstances of the present case, we find the inventory of defendant's vehicle reasonable. Defendant, a Williamston resident, was arrested in Robersonville pursuant to an outstanding warrant issued in Williamston. He was taken to jail; his vehicle was taken to a private auto salvage lot for safekeeping. After defendant had been transferred to Williamston, the Williamston officer who had investigated the discovery of the stolen Camaro returned to Robersonville to examine defendant's vehicle. That officer knew that the Camaro had been equipped with chrome mag rims and wide tires and that those items had been taken off the Camaro after its theft. The officer was accompanied by the man who had sold the rims and tires to Griffin Motors and who had installed them on the Camaro. A simple look at the exterior of defendant's car was all that was required to identify the rims and tires. They were in plain view, susceptible of being seen by anyone who looked at the car. No search was conducted by virtue of the fact that the officer and witness merely looked at the rims and tires on defendant's car.

Upon identification of the wheels and rims, the defendant's car became evidence in the case. The Williamston police properly impounded the car. A Williamston police officer, pursuant to

department policy, then conducted an inventory search of the car at which time the stolen tape recorder and toolbox were discovered. Defendant was given a written list of the items inventoried and held by the police for safekeeping. Warrantless inventory searches of vehicles properly in the custody of the police, pursuant to established police policy have been held to be reasonable in terms of the Fourth Amendment in that their purpose is to protect the accused and the police. *South Dakota v. Opperman,* 428 U.S. 364, 49 L.Ed. 2d 1000, 96 S.Ct. 3092 (1976); *Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *Cooper v. California,* 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788 (1967); *State v. All,* 17 N.C. App. 284, 193 S.E. 2d 770 (1973). Inventory searches are all the more reasonable when, as here, the limited resources of small police departments require impoundment in private or unsecured areas. *Cady v. Dombrowski, supra.*

We find no error in the admission of the testimony identifying the wheels and tires or the admission of the evidence obtained from the inventory search of defendant's vehicle. The motion to suppress was properly denied.

[2] Rule 9(b)(3) provides, *inter alia:* "The record on appeal in criminal actions shall contain: . . . (vi) *where error is assigned* to the giving or omission of instructions to the jury, a transcript of the entire charge given; . . ." (Emphasis added.) The clear purpose of this rule is to eliminate from the record on appeal the instructions to the jury where no error is assigned thereto. In this case no error was assigned to the instructions to the jury.

Rule 9(b)(5) provides: "It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned. The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion."

The trial court's instructions to the jury in this case, to which no error is assigned, were included in the record on appeal by defendant's counsel. The instructions consumed over twelve pages of the printed record on appeal. The costs of printing these unnecessary twelve pages are $22.20 ($1.85 per page). Counsel for defendant, Regina A. Moore, P. O. Drawer

1086, Williamston, North Carolina, will be taxed with costs of $22.20 in this case.

No error.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. FRED DAVIS

No. 7720SC214

(Filed 3 August 1977)

1. **Criminal Law § 66.6— in-court identification — pretrial lineup**

The evidence on *voir dire* supported findings by the court that a pretrial lineup at which a robbery victim identified defendant was not impermissibly suggestive and that the victim's in-court identification was of independent origin and not tainted by the lineup identification.

2. **Criminal Law § 66.19— lineup — voir dire — reversal of ruling on evidence**

Defendant was not prejudiced when the court sustained the State's objection to a line of questions defense counsel asked a deputy sheriff on *voir dire* concerning counsel's objections to police officers about a lineup at the time it was conducted where the court thereafter reversed its ruling limiting counsel's questioning of the officer on *voir dire*.

3. **Criminal Law § 66.5— lineup — poor quality of photograph — right to counsel**

Defendant was not denied his right to counsel at a lineup because of the poor quality of a police photograph of the lineup where counsel was present during the entire lineup procedure and made frequent suggestions and criticisms to the conducting officers.

4. **Constitutional Law § 68; Criminal Law § 91.7— absence of subpoenaed alibi witness — denial of continuance — right to present defense**

Defendant was denied the opportunity to prepare and present his defense by the denial of his motion for continuance made on the ground of the absence of his sole alibi witness where the court denied the motion because the clerk's file showed no return of service of a subpoena on the witness when in fact the witness had been subpoenaed, but the return had not worked its way through the administrative machinery to the clerk's file at the time the motion was made.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 19 November 1975 in Superior Court, STANLY County. Heard in the Court of Appeals 29 June 1977.

Defendant was charged by indictment in proper form with attempted armed robbery. He entered a plea of not guilty and was convicted by a jury on the charge. Judgment was entered thereon sentencing defendant to imprisonment for a term of 25 to 30 years.

The State introduced evidence which tended to show that on 21 July 1975, Faye C. Blalock was working in Blalock's Grocery Store in the Cottonville area of Stanly County. At approximately 6:00 that afternoon, two young black men, whom Blalock identified as defendant and Chester Melton, entered the store. Defendant asked for cigarettes and a soft drink. When Blalock turned around to give them to him, defendant pointed a sawed-off shotgun at her and announced "This is a hold-up." Blalock replied "Oh, no, it's not," turned, and ran screaming from behind the counter out of the store. She looked back and saw the defendant and Melton also running away from the rear of the store.

Chester Melton testified that he was charged with attempted armed robbery with defendant in the case. Melton saw defendant on the morning of 21 July 1975 at Melton's sister's house in Charlotte. Defendant told Melton "he wanted to pull a job." They went to Cottonville where defendant gave Melton a gun. Defendant carried a sawed-off shotgun concealed in the sleeve of the jumpsuit he was wearing, and the pair entered Blalock's grocery. Defendant asked the woman behind the counter for some cigarettes and a soft drink. While she turned to get the items he requested, defendant produced the shotgun and pointed it at her. She ran out the front of the store. Defendant asked Melton where the cash register was located, and Melton falsely replied he did not know, whereupon they ran out the back door to their car.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Thomas H. Davis, Jr., for the State.

Gerald R. Chandler for defendant appellant.

MORRIS, Judge.

Prior to Blalock's in-court identification of defendant, a voir dire was conducted. On voir dire, Blalock testified that the

two men entered her store at approximately 5:50 p.m. on 21 July 1975; that the store was illuminated by 12 ceiling lights as well as by outside light coming through the store's windows; that the door through which the men entered was located six or seven feet from her position; that she could see the faces of both men; that defendant came within two feet of her; that the men were in the store six or seven minutes; that she had no difficulty in seeing the men's faces; that she identified defendant from a lineup of six men; that she recognized defendant from his eyes and the shape of his face; and that her in-court identification of defendant was based solely upon defendant's appearance at the time of the robbery attempt.

Defendant's evidence on voir dire tended to show that his attorney was present at the lineup; that Blalock had described the robber as 20-25 years of age, 6'-6'2" tall, wearing a green jumpsuit, with plaited hair, heavy sideburns and a moustache; that defense counsel made certain objections to the makeup of the lineup, particularly as to the height and head and facial hair of some of the suspects; that a photograph was taken of the lineup; that the quality of the photograph was very bad due to defective film; and that the six young black males in the lineup were 6'½", 160 pounds; 5'10", 160 pounds; 6'2", 180 pounds, 6'2", 170 pounds; 5'11", 160 pounds; and 6'1", 160 pounds, respectively.

At the conclusion of the evidence, the trial court made findings of fact and concluded " . . . that the witness' in-court identification of the defendant was based solely on her observation of the defendant at the time he came into her store and that the lineup was not impermissibly suggestive or otherwise tainted as to affect her independent observation of the defendant at the time of the alleged crime." It then ordered that Blalock's in-court identification of defendant be admitted into evidence.

[1] By assignments of error numbered 2, 9(a), and 10, defendant contends that the trial court erred in allowing Blalock's in-court identification of defendant on the grounds that it was based primarily on an impermissibly suggestive lineup procedure. We disagree.

> "When the admissibility of in-court identification testimony is challenged on the ground it is tainted by out-of-court identification(s) made under constitutionally impermissible circumstances, the trial judge must make findings as to the

background facts to determine whether the proffered testimony meets the tests of admissibility. When the facts so found are supported by competent evidence, they are conclusive on appellate courts. (Citations omitted.)" *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974).

In the present case, the trial court's findings were supported by competent evidence and are binding on this Court. Moreover, the evidence clearly shows that Blalock had ample opportunity to observe and identify the robber, that her in-court identification was of independent origin and that the pretrial lineup was not so impermissively suggestive as to abridge defendant's constitutional rights. These assignments are overruled.

[2] During the lineup proceedings, defense counsel made various objections to the police officers concerning what he alleged to be suggestive procedures which they employed. On voir dire, counsel attempted to question a deputy sheriff as to his (counsel's) conversation and objections to the officers at the lineup. The State, while conceding defendant's right on voir dire to cross-examine the officers fully concerning the lineup procedures and the appearances of the suspects, objected to the line of questioning on the grounds that counsel's own thoughts at that time were incompetent. The court sustained the State's objections. By his 8th assignment of error, defendant contends that the trial court erred in so limiting counsel's interrogation of the witness on voir dire. Again, we disagree. The record reveals that subsequently during the voir dire, the trial court reversed its ruling limiting counsel's questioning of the officer. Thus, defense counsel had a full and fair opportunity to interrogate the officer concerning the alleged improprieties in the lineup procedure. Consequently, defendant's rights have not been prejudiced thereby. This assignment is overruled.

[3] By assignment of error numbered 9(b), defendant argues that his right to counsel at the lineup was denied by virtue of the State's failure to provide an adequate photograph of the lineup. This argument is feckless. It is true that a person against whom criminal charges have been formally brought is constitutionally guaranteed counsel at an in-custody lineup, and that, absent waiver thereof, when counsel is not present at the lineup, testimony of the identification of the accused at the lineup is rendered inadmissible. *Kirby v. Illinois,* 406 U.S. 682, 32 L.Ed. 2d 411, 92 S.Ct. 1877 (1972); *United States v. Wade,* 388 U.S.

218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926 (1967); *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951 (1967); *State v. Harris,* 279 N.C. 177, 181 S.E. 2d 420 (1971). The rationale of this rule is that

> " . . . unfairness in the 'lineup' or other arranged identification process may arise by exhibiting the accused so as to suggest his identity to the witness and thereby obtain a positive identification from the witness which the witness will not later admit was indefinite or mistaken; and that the absence of counsel at this stage of the proceeding would prevent any effective cross-examination of the witness relative to the identification process." *State v. Hunsucker,* 3 N.C. App. 281, 284, 164 S.E. 2d 507, 509 (1968).

Where counsel is present at a lineup, his role is that of observer as well as advocate so that any impermissibly suggestive procedures, if not corrected, may be identified and exposed at trial through effective examination and cross-examination of witnesses. The key factor is the presence of the attorney during the identification proceedings. *E. g., State v. Brown,* 280 N.C. 588, 187 S.E. 2d 85, *cert. den.,* 409 U.S. 870, 34 L.Ed. 2d 121, 93 S.Ct. 198 (1972). Defendant does not cite, and research does not reveal, any authority to support his position that the poor quality of a police photograph constitutes a denial of effective assistance of counsel. The uncontroverted facts are that counsel was present throughout the entire identification process and that he made frequent suggestions and criticisms to the conducting officers. Under these circumstances, we believe, and so hold, that defendant suffered no denial of his constitutionally-protected right to counsel. This assignment is overruled.

[4] The trial of this case began on Monday, 17 November 1975, and continued through the next day. The State rested its case at approximately 10:20 Tuesday morning. Defendant's sole witness was to have been Wilbert Davis, who according to defense counsel, would have testified that defendant was with him at the time of the attempted robbery. Defendant issued a subpoena for Davis' appearance on 12 November, and the subpoena was served on Davis on 13 November. Davis was in court on 17 November, the first day of the trial, but did not return the following day. Thus, when the State rested its case, Davis was not present to testify as to defendant's alibi. When Davis' absence was discovered, defendant moved for a mistrial or, alter-

natively, for a continuance. The trial court conducted an inquiry outside the presence of the jury and determined that the clerk's file contained no return of the subpoena to show service upon Davis. Although the record is unclear, it appears that the return had not worked its way through the administrative machinery to the clerk's file by the morning of 18 November and did not do so for several days. The trial court found that the witness was absent, issued an instanter subpoena and denied defendant's motions. Defendant presented no evidence. After receiving the court's charge, the jury retired at 11:52 a.m. on 18 November and returned with a verdict of guilty at 12:07 that afternoon.

By his 21st assignment of error, defendant contends that the trial court erred in denying his motions for a mistrial or continuance. We are constrained to agree.

A motion for a continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon will not be reviewed on appeal absent an abuse of discretion. *State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). "But when the motion is based on a right guaranteed by the Federal and State Constitutions, the question presented is one of law and not of discretion, and the decision of the court below is reviewable." *State v. Smathers,* 287 N.C. 226, 230, 214 S.E. 2d 112, 114-15 (1975). The right to assistance of counsel and the right to face one's accusers and witnesses with other testimony are guaranteed by the Sixth Amendment to the United States Constitution and applicable to the States by the Fourteenth Amendment. This right includes the right to present one's defense. *State v. Smathers, supra; State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962).

In the present case, defendant's entire defense was predicated upon Davis' alibi testimony. Without it, defendant was prevented from putting on any defense. Moreover, defendant took all possible steps to secure Davis as a witness. In this situation, we hold that defendant was denied the opportunity to prepare and present his defense. The trial court should have granted defendant's motion for a continuance, and its failure to do so constitutes prejudicial error. Accordingly, there must be a

New trial.

Judges PARKER and CLARK concur.

ELVA L. LITTLE, EMPLOYEE, PLAINTIFF v. ANSON COUNTY SCHOOLS FOOD SERVICE, EMPLOYER; TRAVELERS INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 7620IC929

(Filed 3 August 1977)

1. **Master and Servant § 65— workmen's compensation — back injury — no total disability**

The Industrial Commission did not err by failing to find that plaintiff suffered a permanent total disability where there was medical testimony that plaintiff could perform other jobs and where plaintiff failed to show a total inability to work.

2. **Master and Servant § 65— workmen's compensation — back injury — sufficiency of evidence**

In an action to recover for an injury sustained as a result of a fall which occurred while plaintiff was employed as a cook by defendant, evidence was sufficient for the Industrial Commission to find that the injury was to plaintiff's back, even though the injury resulted in weakness in other areas of plaintiff's body, and that plaintiff suffered a 45 percent disability therefrom.

3. **Master and Servant § 94— workmen's compensation — employee's average weekly wage — stipulation — sufficiency of evidence**

The Industrial Commission did not err in concluding that plaintiff's average weekly wage was $62.40 per week including overtime and all allowances where plaintiff stipulated to that fact.

APPEAL by plaintiff from Industrial Commission. Opinion and order filed by the full Commission 25 August 1976. Heard in the Court of Appeals 8 June 1977.

On 20 November 1973, plaintiff sustained injuries as a result of a fall which occurred while she was employed as a cook for defendant Anson County Schools Food Service. All parties are agreed that plaintiff's injury is compensable within the North Carolina Workmen's Compensation Act.

Dr. Jerry H. Greenhoot, who originally treated plaintiff, testified before the hearing commissioner that she suffered a traumatic injury to her spinal cord from the fall; that the injury was "[a]n incomplete spinal cord injury but a significant injury"; that on 24 January 1974, he performed surgery on plaintiff in the hope that it would yield improvement but that her condition did not improve significantly thereafter; that plaintiff "has incomplete use of all her extremities"; that she had a myelopathy resulting in "weakness" in her extremities; that she

was 100 percent disabled to work at her job; and that, in terms of her total life functions, she was 50 percent disabled.

Dr. Stephen Mahaley, a neurosurgeon at Duke Medical Center, examined plaintiff on 19 September 1974. He testified that plaintiff had suffered a traumatic injury to her spinal cord; that her neurological and functional disability was 40 percent; and that plaintiff could still pursue some types of work.

Following the evidentiary hearings, Deputy Commissioner C. A. Dandelake entered an opinion and award in which he entered a stipulation that plaintiff's average weekly wage at the time of her injury was $58.31 and that the compensation rate equalled $38.87. He then found, *inter alia*, " . . . that the Plaintiff has an average permanent partial disability of 45% or loss of use of her back" and concluded that plaintiff was entitled to compensation at a rate of $38.87 per week for a period of 135 weeks.

On appeal, the majority of the full Commission affirmed the finding that plaintiff had a 45 percent partial disability for loss of use of her back. They also modified the hearing commissioner's opinion to add a new finding that plaintiff's average weekly wage was $62.40 and, based on this amount, computed plaintiff's compensation to be $41.60 per week.

Other relevant facts are set out in the opinion below.

Henry T. Drake for plaintiff appellant.

Boyle, Alexander & Hord, by B. Irvin Boyle and Norman A. Smith, for defendant appellees.

MORRIS, Judge.

[1] Plaintiff contends that the full Commission erred in failing to find that she suffered a permanent total disability. We disagree.

G.S. 97-2(9) defines "disability" as " . . . *incapacity* because of injury *to earn the wages* which the employee was receiving at the time of injury *in the same or any other employment.*" (Emphasis supplied.) Thus, the injured employee's disability is determined by the impairment of his wage-earning capacity and not by the extent of his physical impairment. *E.g., Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755

(1967); *Dail v. Kellex Corp.*, 233 N.C. 446, 64 S.E. 2d 438 (1951); *Snead v. Mills, Inc.*, 8 N.C. App. 447, 174 S.E. 2d 699 (1970).

In the present case, plaintiff introduced evidence that at the time of her injury he was a 49-year-old laborer with an eighth grade education. Dr. Greenhoot testified that plaintiff's 50 percent disability rating " . . . is not related to work. It's related to total overall life functions." He also stated that plaintiff was 100 percent disabled "[t]o work *at her job*," but indicated that there were other jobs which could be performed under similar disability. Dr. Mahaley similarly testified that " . . . there are some gainful occupations that someone with [plaintiff's] degree of neurological problem could pursue."

This situation is clearly distinguishable from that in *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972), cited by plaintiff. In *Mabe*, the Commission found that the plaintiff, age 61, had a fifth grade education, that his occupational abilities extended only to jobs requiring hard labor, and that his injury prevented him from performing hard labor. These findings were supported by competent evidence in the record and were not excepted to on appeal. The Commission concluded that the plaintiff was totally incapacitated to earn wages "in the same *or any other* employment," even though his medical disability rating was only 40 percent. This Court, noting that crucial findings were not excepted to and were supported by competent evidence, affirmed the Commission's finding of total disability, even though the claimant's medical disability was only 40 percent.

Thus, such factors as a claimant's age and educational level *may* justify enlarging a partial medical disability into a finding of total incapacity. This is not to say, however, that the Commission is *required* to so find where, as here, there is medical testimony that plaintiff can perform other jobs and where plaintiff has failed to show a total inability to work. Accordingly, we hold that the Commission did not err by failing to find that plaintiff suffered a permanent total disability.

[2] Plaintiff next contends that the Commission erred in finding that she suffered a 45 percent permanent partial disability to her back. Of course, findings of fact made by the Commission which are non-jurisdictional are binding on appeal if they are supported by any competent evidence, even though there is

evidence that would have supported a contrary finding. *Hales v. Construction Co.*, 5 N.C. App. 564, 169 S.E. 2d 24 (1969).

The medical testimony showed that plaintiff, prior to her injury, suffered from cervical spondylosis, a change that occurs in the bones of the cervical spine. The condition is caused by "the wear and tear of everyday life on the neck" and is "almost a natural aging process." When she fell, plaintiff landed in a sitting position on her coccyx at the base of her backbone. The jolt to her spine, combined with her cervical spondylosis, resulted in a myelopathy. Due to the myelopathy, plaintiff suffered a weakness in some of her extremities. It is apparent that the injury was caused by the impact to plaintiff's backbone, which in turn aggravated the pre-existing condition in her neck. Even though the injury resulted in weakness in other areas of plaintiff's body, the evidence was sufficient for the Commission to find, as it did, that the injury was to plaintiff's back and that she suffered a 45 percent disability therefrom.

Moreover, we fail to see how G.S. 97-29, upon which plaintiff relies, is pertinent to this case. That statute applies when " . . . total and permanent disability results from paralysis resulting from an injury to the brain or spinal cord . . . ". According to plaintiff's own doctor's testimony, she suffered from "weakness, *not paralysis.*" Thus, in the case *sub judice*, there was neither permanent and total disability nor paralysis, and the Commission properly avoided reliance upon G.S. 97-29.

[3] Plaintiff lastly contends that the Commission erred in finding that her average weekly wage was $62.40 per week. She argues that the Commission should have considered evidence which showed that her weekly salary was $65.15, and that she received additional amounts in the form of retirement and insurance benefits. However, the record includes an "Agreement for Compensation for Disability," signed by plaintiff, in which she stipulated "[t]hat the actual average weekly wage of the employee at the time of said injury, *including overtime and all allowances*, was $62.40." This finding, supported by the stipulation, is conclusive on appeal, *Hales v. Construction Co., supra*, and plaintiff may not now be heard to complain.

Affirmed.

Judges PARKER and CLARK concur.

CHARLES L. EDMONDSON v. STATE OF NORTH CAROLINA

No. 7711SC188

(Filed 3 August 1977)

1. **Criminal Law §§ 23.1, 181— guilty plea — adjudication by trial court of voluntariness — collateral attack**

An adjudication by a trial judge that a plea of guilty was voluntarily made does not bar a criminal defendant from collaterally attacking that plea in a post conviction proceeding.

2. **Criminal Law § 181.2— post conviction proceeding — summary judgment**

Summary judgment procedure is not a practically appropriate procedure for use in this State in a post conviction proceeding to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence.

ON *certiorari* from *Godwin, Judge.* Order entered 15 December 1976 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 30 June 1977.

Petitioner was charged by indictments in proper form with two counts of breaking and entering and larceny and with one count of possession of burglary tools. On 6 June 1975, petitioner entered a negotiated plea of guilty to the two counts of breaking and entering. The transcript of the negotiated plea was as follows:

"The defendant, being first duly sworn, makes the following answers to the questions asked by the Presiding Judge:

1. Are you able to hear and understand my statements and questions? Answer Yes

2. Are you now under the influence of any alcohol, drugs, narcotics, medicines, or other pills? Answer No

3. Do you understand that you are charged with the (felony) ~~(misdemeanor)~~ of Breaking & Entering (2 counts)? Answer Yes

4. Has the charge been explained to you? Answer Yes

5. Do you understand that upon your plea of (guilty) ~~(nolo contendere)~~ you could be imprisoned for as much as 20 ~~(months)~~ (years)? Answer Yes

6. Do you understand that you have the right to plead not guilty and to be tried by a Jury? Answer Yes

7. Have you had time to talk and confer with and have you conferred with your lawyer about this case and are you satisfied with his services? Answer Yes

8. I now inquire of the district attorney and of the prisoner and his counsel whether or not there have been plea negotiations. Before permitting you to respond, I advise you that the courts have specifically approved plea bargaining and have said that it is an essential component of the administration of justice to be encouraged. You should, therefore, advise me truthfully of any plea negotiations wihout the slightest fear of incurring disapproval of the court. Now therefore, have you agreed to plead (guilty) (nolo contendere) upon conditions? Answer Yes

9. Are these the conditions and all of them? That upon two pleas of guilty (felonious B/E 2 counts) maximum sentences, if any, not to exceed 10 years. Feloniously larceny (2 counts) and possession of burglary tools and escape to be nolle prossed. District Attorney agrees not to make any recommendation as to punishment. Answer Yes

10. Except for the promises set out above (paragraph 9), have any promises or threats been made to you to induce you to plead (guilty) (nolo contendere) upon these conditions? Answer No

11. Do you now freely, voluntarily and understandingly authorize and instruct your lawyer to enter on your behalf a plea of (guilty) (nolo contendere) upon the conditions above set out? Answer Yes

12. Do you have any questions or any statement to make at this time about what I have just said to you? Answer No

I have read or heard read all of the questions and answers on the reverse hereof and understand them, and the answers shown are the ones I gave in open Court, and they are true and correct, and the basis for the negotiated plea of (guilty) (nolo contendere) as stated on the reverse hereof

is accurate and is the basis upon which I entered this plea of (guilty) ~~(nolo contendere)~~.

s/ CHARLES L. EDMONDSON
Defendant"

The State subsequently dismissed the charges as to larceny and possession of burglary tools. Hall, Judge, accepted the pleas and sentenced petitioner to imprisonment for a term of seven to ten years. On 12 July 1976, petitioner petitioned for post conviction relief pursuant to G.S. 15-217 *et seq.*, alleging that his guilty pleas " . . . were involuntary, not intelligently made and were entered under duress, and while under the influence of Narcotics." The State responded by denying that any of petitioner's constitutional rights had been violated, and a hearing on the matter was ordered.

At the hearing, petitioner testified, *inter alia,* that at the time of his negotiated plea, he had been represented by Theodore H. Kissinger, Jr., a member of the Virginia Bar. Defendant paid Kissinger over $8,000 in money and property in exchange for his services. Kissinger told defendant that he had "worked it out" so that defendant would be accepted for treatment at a drug rehabilitation institute in Virginia in return for pleading guilty. Kissinger wrote in the answers to the questions on the transcript of the guilty plea and instructed defendant to answer them before the judge according to the written answers. At no time did Kissinger mention anything concerning the possibility of an active prison sentence for petitioner. Petitioner answered the questions on the transcript to the judge as Kissinger had marked them and pleaded guilty on his attorney's assurance that he would be released to go to Virginia to enter a drug treatment program.

On 15 December 1976, Judge Godwin entered an order in which he found facts and concluded " . . . that there was a substantial denial of the petitioner's right under the Constitution of the United States and of the State of North Carolina in that petitioner's pleas were not freely, voluntarily and intentionally entered." The order then vacated petitioner's guilty pleas and granted petitioner a new trial on all original charges. The State seeks redress from that order.

Attorney General Edmisten, by Associate Attorney Joan H. Byers, for the State.

Knox V. Jenkins, Jr., for defendant appellee.

MORRIS, Judge.

[1] In its only assignment of error, the State contends that the judge at the post conviction hearing erred in overturning the trial judge's finding that petitioner's pleas of guilty were voluntarily given. The State bases this contention on the theory that once a guilty plea has been found by the trial judge to have been voluntarily given, it should not be subject to collateral attack. Thus, the sole question for consideration on this appeal is whether an adjudication by a trial judge that a plea of guilty is voluntarily made bars a criminal defendant from collaterally attacking that plea in a post conviction hearing.

This question has been effectively resolved by the recent case of *Blackledge v. Allison*, ____ U.S. ____, 52 L.Ed. 2d 136, 97 S.Ct. 1621 (1977). In that case, arising from North Carolina, the respondent was an inmate serving a 17 to 21 year sentence which had been imposed upon his plea of guilty to a charge of attempted bank robbery. He sought federal habeas corpus relief, alleging that his plea had been induced by a promise from his attorney that he would receive only a 10 year sentence in exchange for a guilty plea. He further alleged that his attorney instructed him to deny the existence of any promises to the trial court upon formal questioning at arraignment. The District Court dismissed the petition for habeas corpus, but the Fourth Circuit Court of Appeals reversed and held that respondent was entitled to an evidentiary hearing on the allegations. *Allison v. Blackledge*, 533 F. 2d 894 (4th Cir. 1976). On certiorari, the U. S. Supreme Court affirmed respondent's right to an evidentiary hearing on the grounds that " . . . a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ [of habeas corpus] in challenging the constitutionality of his custody." ____ U.S. at ____, 52 L.Ed. 2d at 146, 97 S.Ct. at 1628.

Although *Blackledge* involved federal post conviction proceedings for state prisoners pursuant to 28 U.S.C. §§ 2241-2254, we believe that the same constitutional principles apply to the present case, brought under G.S. 15-217 *et seq.* Accordingly, we hold that petitioner's plea of guilty did not preclude him from

subsequently asserting his claim at his post conviction hearing. Moreover, we believe the findings in the order of 15 December 1976 are amply supported in the record by competent evidence. The order is affirmed.

[2] We deem it appropriate to comment upon a facet of *Blackledge* not directly applicable to the case before us for decision. The majority opinion in *Blackledge* noted that it was not the intent of the Court to hold that "every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing." ..... U.S. at ....., 52 L.Ed. 2d at 136, 97 S.Ct. at 1632. It was suggested that summary judgment procedure could be used "to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence." *Id.* It is not our purpose to discuss here the pros and cons of such a procedure, but we do desire to point out that in our opinion it is not a practically appropriate procedure for use in this State in the post conviction procedure.

Affirmed.

Chief Judge BROCK and Judge BRITT concur.

SARA ACKER AND FAY ACKER v. O. KENNETH BARNES AND WIFE, ELLEN SPIELMAN BARNES

No. 7618DC930

(Filed 3 August 1977)

Infants § 6.7— custody of minors by parents— visitation rights

Where the natural mother of minor children and her present husband, who legally adopted the children, have lawful custody of the children, the courts will not compel the parents to allow visitation of the children by their paternal grandmother and natural aunt, since parents in lawful custody of their minor children have the prerogative to determine with whom their children shall associate.

APPEAL by plaintiffs from *Clark, Judge*. Order entered 29 September 1976 in District Court, GUILFORD County. Heard in the Court of Appeals 8 June 1977.

Plaintiffs, the paternal grandmother and a natural aunt of two minor children, brought this action seeking an order granting them visitation rights with the children.

The feme defendant, Ellen Spielman Barnes, was formerly married to Irwin Acker. Two children, who are the subjects of this action, were born of that marriage. That marriage was terminated by divorce. Thereafter, the feme defendant married O. Kenneth Barnes, who legally adopted the two children. Irwin Acker, the natural father of the children, consented to the adoption. The plaintiffs are the mother and sister, respectively, of Irwin Acker.

In their complaint, plaintiffs alleged the foregoing facts and in addition alleged:

> "V. That since the time of the final order of the adoption the defendants have denied the Plaintiffs the opportunity to have reasonable visitation with the said minor children; that the adoption hereinbefore referred to did not destroy the relationship existing between the said children and their natural grandmother and natural aunt, the Plaintiffs in this action; but that the Defendants have failed and refused, and still fail and refuse to permit the Plaintiffs to have any reasonable visitation with the said minor children."

Plaintiffs prayed for an order granting them "some reasonable visitation with the said minor children so as to permit them to continue the relationship of natural grandparent and natural aunt . . . "

Defendants moved pursuant to G.S. 1A-1, Rule 12(b)(6), to dismiss plaintiffs' action for failure of the complaint to state a claim upon which relief can be granted. The court allowed the motion, and plaintiffs appealed.

G. S. Crihfield and James W. Lung for plaintiff appellants.

Forman & Zuckerman, P.A., by William Zuckerman for defendant appellees.

PARKER, Judge.

By the express provisions of G.S. 48-23, every final order of adoption results in establishing the relationship of parent and child between the adoptive parents and the child, and from and after the entry of the final order of adoption, the natural parents "shall be divested of all rights" with respect to such child. By adoption, the adopted child becomes legally the child

of the adoptive parents and becomes legally a stranger to the bloodline of his natural parents. *See Rhodes v. Henderson,* 14 N.C. App. 404, 188 S.E. 2d 565 (1972).

In the present case, the mother of the children and her present husband, who by the adoption has become in legal effect their father, have lawful custody of the children. So long as parents retain lawful custody of their minor children, they retain the prerogative to determine with whom their children shall associate. Where, as here, the parents firmly resist any move by others seeking authority to visit the children, the courts will not compel the parents to allow such visitation. Annot., 98 A.L.R. 2d 325 (1964). What was said in *Jackson v. Fitzgerald,* 185 A. 2d 724, 726 (Mun. Ct. App. D.C. 1962), 98 A.L.R. 2d 322, 325, is pertinent here:

> "Courts are not insensitive to the yearning of grandparents and other relatives for the company of children in their families. But such cannot be translated into a legal right without a showing that it is dictated by the needs and welfare of the child. In the absence of such a showing, custodial control goes along with custodial responsibility."

G.S. 50-13.1, cited by plaintiffs as authority for their right to maintain this action, is not here applicable. That statute deals with an action or proceeding to obtain custody of a minor child. Plaintiffs do not seek custody. They seek only the right of visitation, which is a very different matter. Even under the liberal approach of notification pleading embodied in G.S. 1A-1, Rule 8, plaintiffs' complaint fails to contain any statement sufficiently particular to give the court and the defendants notice of any transactions or occurrences intended to be proved showing that the plaintiffs are entitled to any relief.

The order dismissing plaintiffs' action is

Affirmed.

Judges MORRIS and CLARK concur.

STATE OF NORTH CAROLINA v. ROBERT SPURGEON WHITLEY

No. 7719SC192

(Filed 3 August 1977)

Searches and Seizures § 1— items in plain view in vehicle — warrantless seizure proper

In a prosecution for felonious breaking and entering and larceny, the trial court did not err in admitting items seized from defendant's car without a warrant where officers seized the items after simply looking into the car, shining a flashlight on the back seat, and observing the items in plain view.

APPEAL by defendant from *Long, Judge.* Judgment entered 28 October 1976 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 28 June 1977.

Defendant was charged by indictment in proper form with two counts of felonious breaking and entering and one count of felonious larceny. He entered pleas of not guilty and was convicted by a jury on all charges. Judgment was entered thereon sentencing defendant to imprisonment for consecutive terms of 5 years on the larceny charge and 10 years on each breaking and entering charge.

Other relevant facts are set out in the opinion below.

Attorney General Edmisten, by Associate Attorney Elisha H. Bunting, Jr., for the State.

Smith, Casper & Smith, by Archie L. Smith, for defendant appellant.

MORRIS, Judge.

Prior to trial, defendant moved to suppress evidence with respect to certain items which had been located in the rear seat of his automobile. On voir dire, the State introduced evidence which tended to show: On 29 April 1976 at approximately 7:30 p.m. Raymond Hoover returned to his mobile home to find that its inside lights were on and a car was parked in front. Hoover inspected the trailer and discovered that the front and back doors had been pried loose. While Hoover was standing approximately 15 feet from the trailer, a light inside was turned on, enabling Hoover to see defendant. Hoover went inside to get his gun, whereupon defendant fled through the back door. Hoover

ran out the front door, "captured" defendant and detained him until the police arrived.

Inside the trailer, all the drawers had been taken out. The sliding doors on the bedroom closet were torn down, and the contents were strewn on the bed. The stereo equipment had been disassembled and was sitting beside the door. Thinking that some of his property might be therein, Hoover opened the door of the car parked beside his trailer. He saw nothing belonging to him inside but did observe a rifle, a jewelry box and a woman's pocketbook on the back seat.

When investigating officers arrived, they shined a light in defendant's vehicle and also saw the rifle, jewelry box and pocketbook. However, they did not remove the items from the vehicle then because they had no report at that time that the goods were stolen. Defendant was taken into custody, and his car was towed to a gas station.

Subsequently that evening, the investigating officers learned of another break-in which had occurred at the trailer of Odell Lambert, who lived approximately four miles from Hoover. Lambert reported that a rifle, jewelry box and pocketbook had been stolen. Officers then returned to the gas station where they looked in defendant's car's rear window and again saw items matching the description of Lambert's property. They seized the property, and Lambert subsequently identified the items as his.

At the close of the evidence, the trial court found that the items seized from defendant's car were in plain view of the officers at the time they were observed, and that when the seizure occurred, the officers had probable cause to believe that the items were stolen. The court then denied the motion to suppress. The State repeated its evidence before the jury, and the rifle, jewelry box and pocketbook were admitted into evidence.

In his sole argument on appeal, defendant contends that the trial court erred in admitting the items seized from his car and in denying his motion to dismiss the charges related thereto. We disagree.

"The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and hand." *State v. Crews*, 286 N.C. 41, 45, 209 S.E.

2d 462, 465 (1974), *cert. den.*, 421 U.S. 987, 44 L.Ed. 2d 477, 95 S.Ct. 1990 (1975). Here, the property seized was visible to the officers standing outside defendant's car. Thus, the items were in "plain view." *State v. Wolfe*, 26 N.C. App. 464, 216 S.E. 2d 470, *cert. den.*, 288 N.C. 252, 217 S.E. 2d 677 (1975). Moreover, we find no merit in defendant's contention that the items were not in plain view because a flashlight was used to see them. *See State v. Craddock*, 272 N.C. 160, 158 S.E. 2d 25 (1967). As the property discovered in defendant's car was in plain view, no warrant was necessary for its seizure. These assignments are overruled.

Defendant received a fair trial free from prejudicial error.

No error.

Judges PARKER and CLARK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 JULY 1977

STATE v. BAILEY No. 7726SC196	Mecklenburg (76CR50684)	No Error
STATE v. BOONE No. 776SC168	Northampton (76CR1848)	New Trial
STATE v. FREEMAN No. 7713SC116	Columbus (76CR387)	No Error
STATE v. HALL No. 7713SC46	Columbus (76CR2104)	No Error
STATE v. HALL No. 776SC225	Hertford (75CR5065) (75CR5067)	No Error
STATE v. HERENCIA No. 7712SC230	Cumberland (75CR15550) (75CR15551)	No Error
STATE v. HYATT No. 7612SC845	Cumberland (76CR12477) (76CR12479) (76CR11769) (76CR11770)	Affirmed
STATE v. LASSITER No. 776SC165	Hertford (76CR3181)	No Error
STATE v. McKINNEY No. 7723SC224	Wilkes (76CRS6814)	No Error
STATE v. MURCHISON No. 7713SC34	Bladen (75CR5209)	No Error
STATE v. NUNNERY No. 774SC56	Duplin (76CR4223) (76CR4224) (76CR4225) (76CR4334) (76CR4335) (76CR4336)	 No Error No Error Error and Remanded No Error Error and Remanded No Error
STATE v. PORTER No. 7629SC858	McDowell (75CR6441)	No Error
STATE v. WILSON No. 7723SC222	Wilkes (76CR4550) (76CR4551)	No Error

FILED 3 AUGUST 1977

STATE v. FRAZIER No. 7726SC217	Mecklenburg (76CR12734)	No Error
STATE v. RANDOLPH No. 7720SC228	Richmond (77CR0065)	No Error
STATE v. ROGERS No. 7710SC172	Wake (76CR32977-D) (76CR32978-F)	No Error
STATE v. SMITH No. 7712SC184	Cumberland (76CRS17505)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

TOPICS COVERED IN THIS INDEX

Titles and section numbers in this index correspond with titles and section numbers in the N. C. Index 3d (Abandonment of Property —Judges) and N. C. Index 2d (Judgments—Witnesses).

ANIMALS

§ 7. Criminal Sanctions for Cruelty to Animals

A presentment alleging that defendant violated the game laws by taking and possessing a game animal during closed season did not charge the offense of possessing a dead game animal. *S. v. Cole,* 48.

APPEAL AND ERROR

§ 6.2. Premature Appeals

Though an order appealed from which restrained defendants and their agents from removing plaintiff's outdoor advertising sign pending determination of the action on its merits was an interlocutory order, defendants' appeal was not premature. *Freeland v. Greene,* 537.

§ 7. Parties Who May Appeal; Party Aggrieved

A person injured when a gun in insured's truck discharged was not a real party in interest and entitled to appeal a declaratory judgment determining whether insured's automobile liability policy and homeowner's policy provided coverage for such injury. *Insurance Co. v. Walker,* 15.

Where decedent's husband dissented from her will prior to his own death, the husband's executor was an aggrieved party who could appeal from a judgment determining that devises which lapsed as a result of the dissent should be first used to satisfy the husband's intestate share. *In re Etheridge,* 585.

§ 16. Powers of Trial Court After Appeal

An appeal from an order concerning the appraisal provisions of a consent divorce order did not deprive the trial court of jurisdiction to hear a motion for reduction of support payments called for by the consent order. *Cox v. Cox,* 73.

Where defendant's motion for summary judgment was directed only to plaintiff's principal action, appeal from an order allowing defendant's motion for summary judgment did not deprive the court of jurisdiction to enter default judgments on defendant's counterclaims. *Trust Co. v. Morgan-Schultheiss,* 406.

§ 30.3. Exceptions and Assignments of Error Relating to Motions to Strike

Although a question objected to may have been incompetent, appellant is in no position to complain about testimony elicited by the question where appellant failed to make a motion to strike the answer and answers to subsequent questions in the same vein. *Mays v. Butcher,* 81.

§ 39.1. Time for Docketing Appeal

Appeal is dismissed for failure to present record to clerk for certification after it was settled and to file record within 150 days after notice of appeal. *Indian Trace Co. v. Sanders,* 386.

§ 44.1. Effect of Failure to File Brief

Appeal is dismissed for failure to file a brief or bring forward any exception by assignment of error. *Insurance Co. v. Walker,* 15.

ARMY AND NAVY

§ 1. Generally

Trial court did not err in denying defendant's motion for a stay or continuance made pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940 because defendant husband was in the Philippines. *Booker v. Everhart*, 1.

ARREST AND BAIL

§ 3.9. Legality of Arrest for Breach of the Peace

An officer did not have probable cause to arrest defendant without a warrant for disorderly conduct in a bus station. *In re Jacobs*, 195.

§ 3.11. Duty of Officer After Arrest Without Warrant

Police officers who arrested defendant without a warrant violated G.S. 15A-501(4) by taking defendant to Cary for a show-up after they had first prepared to take him before a magistrate in Apex, and G.S. 15A-501(2) by failing to take defendant before a magistrate without unnecessary delay. *S. v. Sanders*, 284.

§ 6. Resisting Arrest

Respondent committed no offense when he resisted an illegal arrest. *In re Jacobs*, 195.

Officer's warrantless arrest of defendant for disorderly conduct was lawful and defendant had no right to resist arrest. *S. v. Raynor*, 698.

§ 6.2. Jury Instructions

Trial court erred in charging that resisting arrest was a lesser included offense of assault on a police officer. *S. v. Hardy*, 722.

Defendant was not prejudiced by the State's failure to elect between the duplicate charges of assault upon a law officer in the performance of his duties and resisting arrest. *Ibid.*

ASSAULT AND BATTERY

§ 8. Defense of Self

Trial court in a prosecution for assault with a deadly weapon with intent to kill should have instructed on self-defense even in the absence of a request by defendant therefor. *S. v. Taylor*, 70.

§ 15.2. Instruction on Assault With a Deadly Weapon With Intent to Kill

Trial court's charge on assault was sufficient in a prosecution for felonious assault. *S. v. Springs*, 61.

§ 15.3. Definition of "Serious Injury"

Where the evidence in a felonious assault case as to injuries was uncontradicted and the injuries could not be considered less than serious, the court could instruct the jury that the injuries were serious as a matter of law. *S. v. Springs*, 61.

Trial court properly instructed that a fractured skull is a serious injury. *S. v. Davis*, 262.

ASSAULT AND BATTERY — Continued

§ 15.4. Instructions on Assault on a Law Enforcement Officer

Trial court erred in charging that resisting arrest was a lesser included offense of assault on a police officer. *S. v. Hardy*, 722.

Defendant was not prejudiced by the State's failure to elect between the duplicate charges of assault upon a law officer in the performance of his duties and resisting arrest. *Ibid.*

§ 16.1. Submission of Lesser Degrees of the Offense Not Required

Trial court did not err in failing to submit lesser offenses to the jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries. *S. v. Springs*, 61.

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injuries, court did not err in failing to instruct on the lesser offense of assault with a deadly weapon. *S. v. Davis*, 262.

ATTORNEYS AT LAW

§ 6. Withdrawal of Attorney

The court did not err in conducting a summary judgment hearing without the presence or withdrawal of appellants' counsel where there was no "counsel of record" within the meaning of Superior and District Court Rule 16. *Trust Co. v. Morgan-Schultheiss*, 406.

§ 7.5. Allowance of Fees as Part of Costs

Trial court properly found there was no unwarranted refusal by defendant insurer to pay plaintiff's claim under the medical payments provision of an automobile policy, and properly refused to award attorney's fees to plaintiff. *DeBerry v. Insurance Co.*, 639.

AUTOMOBILES

§ 2.9. Proceedings Under Habitual Offender Statute

Permanent revocation of defendant's driver's license by the Division of Motor Vehicles was not a judgment which could preclude the superior court from acting on a petition to have defendant declared an habitual offender of the traffic laws. *In re Woods*, 86.

§ 66.2. Identity of Driver from Circumstantial Evidence

Evidence in a wrongful death action was sufficient to show that defendant was operating his automobile at the time of the accident. *Johnson v. Gladden*, 191.

§ 114. Instructions on Assault and Homicide

In a prosecution for involuntary manslaughter where the State's evidence tended to show that defendant was intoxicated at the time his vehicle hit the deceased pedestrian, trial court erred in failing to submit as a possible verdict that of the statutory crime of death by vehicle. *S. v. Baum*, 633.

§ 126. Competency and Relevancy of Evidence in Drunk Driving Cases

Patrolman's testimony was competent to show the reason he stopped defendant for drunken driving although such testimony tended to show other violations for which defendant was not charged. *S. v. Lloyd*, 370.

CARRIERS — Continued

the franchise for a period of 30 consecutive days, other evidence was sufficient to rebut the prima facie showing and to support refusal of the Utilities Commission to find that the franchise was dormant. *Utilities Comm. v. Express Lines*, 174.

§ 3. Transfer of Operating Authority

The Utilities Commission properly authorized transfer of a trucking company's common carrier irregular route authority after the company's merger with another company holding a similar authority. *Utilities Comm. v. Express Lines*, 99.

§ 10. Loss of or Injury to Goods in Transit

Defendant common carrier failed to establish that plaintiff was required, as a condition precedent to recovery for injury to plaintiff's property while it was being transported by defendant, to file its claim within nine months after delivery of the property. *Tool Corp. v. Freight Carriers, Inc.*, 241.

CLERKS OF COURT

§ 1. Jurisdiction and Authority

Clerk of superior court was without jurisdiction to enter an order directing disbursement of restitution funds which defendant in a criminal proceeding had paid into court as the result of a plea bargain. *S. v. McIntyre*, 557.

CONSPIRACY

§ 6. Sufficiency of Evidence

Evidence was sufficient to support conviction of defendant for conspiracy to commit armed robbery of a doctor's wife. *S. v. Hewitt*, 168.

CONSTITUTIONAL LAW

§ 17. Personal and Civil Rights

Sheriff's eviction of plaintiffs from a municipal housing project pursuant to an order of ejectment did not constitute a violation of plaintiffs' Fourth Amendment rights so as to subject the sheriff to a claim for damages under 42 U.S.C. § 1983. *McDowell v. Davis*, 529.

§ 28. Due Process and Equal Protection in Criminal Proceedings

Statutes providing for a defendant's first appearance before a magistrate or judge do not describe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. *S. v. Burgess*, 76.

§ 43. Right to Counsel—What is Critical Stage

Since defendants had not been formally charged with a crime at the time of two show-ups, it was not error to fail to provide defendant with counsel at the show-ups. *S. v. Sanders*, 284.

CONSTITUTIONAL LAW — Continued

§ 45. Right to Appear Pro Se

Trial court in its discretion may permit the defendant to conduct his own defense and at the same time be furnished with the advice of a court-appointed attorney. *S. v. Moorefield,* 37.

§ 49. Waiver of Counsel

Where defendant had counsel appointed for him but at the preliminary hearing voluntarily and understandingly waived counsel, he was not thereafter entitled to withdraw his waiver of counsel at any time and have counsel appointed to represent him. *S. v. Clark,* 628.

Defendant waived his constitutional right to effective assistance of counsel where he employed local counsel, moved for continuance in order to obtain counsel from out of town, then proceeded without counsel rather than with his local counsel when the court denied his motion. *S. v. Montgomery,* 693.

§ 51. Delays in and Between Arrest, Issuing Warrant, Securing Indictment, and Arraignment

Defendant was not denied his right to a speedy trial by delay of six months between commission of the offense and arrest. *S. v. Herring,* 382.

There was no atypical delay in securing an indictment against defendant and defendant was not denied his right to a speedy trial. *S. v. Davis,* 487.

§ 52. Requirement that Delay be Prejudicial

Defendant's contention that he was prejudiced by the 22 month delay of his trial for the reason that an allegedly crucial witness became unavailable is without merit. *S. v. McKoy,* 304.

§ 58. Number of Jurors

Defendant was not convicted by eleven jurors instead of the required twelve because one of the jurors fell asleep during the trial. *S. v. Williams,* 397.

§ 66. Presence of Defendant at Proceedings

Defendant was not prejudiced by his removal from the courtroom and continuation of the trial in his absence where defendant behaved in an unruly manner. *S. v. Rowe,* 611.

Trial court did not err in proceeding with trial in the absence of defendant where defendant participated in the jury selection and passed the jury but chose not to return following a recess which the court ordered prior to impaneling the jury. *S. v. Montgomery,* 693.

§ 68. Continuances

Defendant was denied the opportunity to prepare his defense by the denial of his motion for continuance made because of the absence of his sole alibi witness. *S. v. Davis,* 736.

§ 81. Consecutive Sentences

Where defendants were involved in an earlier trial and given sentences to run concurrently with any other sentences they were serving, but defendants appealed and were awarded a new trial, trial court upon retrial erred in imposing sentences to run consecutively to any sentences they were then serving. *S. v. Foster,* 145.

CONTRACTS

§ 17. Duration of Agreement

Defendant's contention that its contract with plaintiff was terminable at will was without merit. *Hoover v. Kleer-Pak,* 661.

§ 27.1. Existence of Contract

Evidence supported court's finding that defendant entered a contract to lend plaintiffs $1,162,500 for permanent financing of a motel construction project. *Pipkin v. Thomas & Hill, Inc.,* 710.

§ 29. Measure of Damages

Plaintiffs were entitled to recover as damages for breach of a contract to provide permanent financing for a motel construction project (1) the present cash value of the difference between interest at the contract rate and the rate generally available to borrowers on the date of the breach; (2) the cost of additional title insurance and other fees; and (3) the interest plaintiffs had to pay on the interim loan since defendant's breach. *Pipkin v. Thomas & Hill, Inc.,* 710.

CORPORATIONS

§ 3.1. Dispute Over Election of Officers

Since G.S. 55-71 applies only to contested corporate elections after the fact but the petition in this case sought to restrain the holding of a stockholders' meeting for the election of directors, no proper proceeding under the statute was before the trial court. *Swenson v. Assurance Co.,* 458.

CRIMINAL LAW

§ 7. Entrapment

In a prosecution for felonious possession and sale of heroin, the evidence did not reveal entrapment as a matter of law. *S. v. Rowe,* 611.

§ 7.1. Illustrative Case of Entrapment

Evidence of entrapment was insufficient in a prosecution for possession of marijuana. *S. v. Booker,* 223.

§ 9.4. Instructions on Aiders and Abettors

Trial court in a prosecution for felonious breaking and entering and larceny erred in failing to instruct on the law applicable to one who aids and abets. *S. v. Robinette,* 42.

§ 13. Jurisdiction in General

Where a judgment ordering payment of restitution into the court failed to specify to whom the funds should ultimately be disbursed, a civil action among the various claimants to the funds was the proper method by which the distribution of the restitution funds should be adjudicated. *S. v. McIntyre,* 557.

§ 16.1. Jurisdiction of Superior Court

A misdemeanor for which defendants were tried for the first time in superior court was a different offense than that charged in a presentment and was not "initiated by presentment" within the statutory exception giving the superior court original jurisdiction of such misdemeanor charges. *S. v. Cole,* 48.

CRIMINAL LAW — Continued

§ 18.2. Offenses Within Jurisdiction of Superior Court

Although a district court judgment finding defendant guilty of misdemeanor possession of marijuana after no probable cause was found as to felonious possession did not show on its face that defendant received a trial on the misdemeanor charge, it could be inferred from the entire record that a trial on the misdemeanor charge was held in district court and that superior court thus had derivative jurisdiction of the misdemeanor. *S. v. Joyner*, 361.

§ 21. Preliminary Proceedings

Statutes providing for a defendant's first appearance before a magistrate or judge do not describe mandatory procedures affecting the validity of the trial in the absence of a showing that defendant was prejudiced thereby. *S. v. Burgess*, 76.

§ 23. Plea of Guilty

Payment of restitution by a criminal defendant to the victims of his crime may be a valid condition for acceptance of a plea bargain. *S. v. McIntyre*, 557.

§ 23.1. Acceptance of Guilty Plea

An adjudication by a trial judge that a plea of guilty was voluntarily made does not bar a criminal defendant from collaterally attacking that plea in a post conviction proceeding. *Edmondson v. State*, 746.

§ 24. Plea of Not Guilty

Defendant is entitled to be resentenced where the record indicates that the court imposed a greater sentence because defendant refused to accept a plea bargain offered by the State. *S. v. Boone*, 378.

§ 26.2. Attachment of Jeopardy

Trial court properly denied defendant's motion to dismiss charges of felonious breaking and entering and felonious larceny on the ground he had been indicted for murder committed in the perpetration of those felonies. *S. v. Robinette*, 42.

§ 26.5. Double Jeopardy—Same Acts Violating Different Statutes

Defendant who was convicted of both resisting arrest and assault on an officer in the performance of his duties on the same evidence was twice convicted and sentenced for the same criminal offense. *S. v. Raynor*, 698.

§ 33.2. Evidence as to Knowledge or Intent

Testimony that a witness and a second person from whom defendant bought a stolen stereo committed a break-in and stole cash and other items and that defendant saw the stolen property displayed in the second person's apartment was admissible to show knowledge on defendant's part that the person from whom he bought the stereo dealt in stolen goods. *S. v. Dailey*, 551.

§ 34.4. Admissibility of Evidence of Other Offenses

Trial court did not err in allowing one of the State's witnesses to testify that he was a probation officer since the tendency of such testimony

CRIMINAL LAW — Continued

to show defendant had previously committed a crime was slight. *S. v. Staton*, 270.

Trial court in a robbery case did not err in permitting the victim to testify that defendant offered to sell him heroin. *S. v. Falk*, 268.

Patrolman's testimony was competent to show the reason he stopped defendant for drunken driving although such testimony tended to show other violations for which defendant was not charged. *S. v. Lloyd*, 370.

§ 35. Evidence That Offense was Committed by Another

Trial court properly excluded evidence that the crime in question was committed by three others where the evidence did not show that defendant was not involved in the crime. *S. v. Foster*, 145.

§ 40.2. Defendant's Motion for Transcript

Defendant was not prejudiced by denial of his motion for a free transcript of evidence at his first trial which ended in a mistrial. *S. v. McNeill*, 317.

§ 43.2. Authentication and Verification of Photographs

Photographs of obscene writings on walls and mirrors of a home were properly admitted to illustrate an officer's testimony. *S. v. Travis*, 330.

§ 53.1. Medical Expert Testimony as to Cause and Circumstance of Death

Court properly permitted a medical examiner to explain discrepancy between his testimony and his medical report as to which side of defendant's neck the fatal bullet entered. *S. v. Mosley*, 337.

§ 58. Evidence in Regard to Handwriting

Court properly permitted a handwriting expert to use photographs of obscene writings on the walls and mirrors of a home for the purpose of comparing the handwriting shown thereon with samples of defendant's handwriting. *S. v. Travis*, 330.

Trial court properly permitted a handwriting expert to give his opinion that defendant wrote the questioned writings without giving the facts upon which his opinion was grounded. *Ibid.*

§ 60.5. Competency and Sufficiency of Fingerprint Evidence

In a prosecution for breaking and entering an apartment and larceny of a TV, trial court properly allowed into evidence testimony concerning defendant's fingerprint on a car in the apartment parking lot. *S. v. Bost*, 673.

§ 66. Evidence of Identity by Sight

Trial court in an armed robbery prosecution did not err in denying defendant's motion that the jury be allowed to see defendant and an eyewitness in close proximity to each other. *S. v. Williams*, 344.

§ 66.1. Opportunity for Observation

Evidence was sufficient to support a trial court's determination that a witness had ample opportunity to observe defendants at the crime scene. *S. v. Smith*, 511.

CRIMINAL LAW — Continued

§ 66.2. Effect of Uncertainty of Witness

In a prosecution for breaking and entering and larceny, trial court did not err in allowing an eyewitness to testify that she saw a man she imagined was around five feet tall. *S. v. Bost*, 673.

§ 66.5. Right to Counsel at Lineup

Defendant was not denied his right to counsel at a lineup because of poor quality of a police photograph of the lineup. *S. v. Davis*, 736.

§ 66.6. Suggestiveness of Lineup

Evidence supported the court's findings that a pretrial lineup was not impermissibly suggestive and that the victim's in-court identification was of independent origin. *S. v. Davis*, 736.

§ 66.9. Suggestiveness of Photographic Procedure

A photographic identification procedure was not impermissibly suggestive and in-court identification was of independent origin and not tainted by the photographic identification. *S. v. Williams*, 397.

A photographic identification procedure was not impermissibly suggestive because the photograph of defendant had a yellow tinged border which resulted from the photographic development process and made it distinctive from other photographs. *S. v. Conyers*, 654.

Robbery victim's in-court identification was of independent origin and not tainted by an out of court photographic identification. *S. v. Conyers*, 654; *S. v. Simmons*, 705.

§ 66.10. Confrontation at Police Station or Jail

Trial court properly allowed an armed robbery victim's in-court identification of defendant where the court determined that it was not tainted by a one-on-one confrontation between the victim and defendant at the sheriff's office. *S. v. Vawter*, 131.

Trial court properly admitted testimony concerning show-ups involving defendant, a robbery victim, and a witness to the robbery. *S. v. Sanders*, 284.

Though a one-on-one jailhouse confrontation between defendant and a robbery victim was unquestionably suggestive, it did not lead unfairly to mistaken identification, and the court properly allowed the victim to make an in-court identification of defendant. *S. v. Tuttle*, 465.

Trial court properly determined that witnesses' in-court identifications were based on their observations at the crime scene and were not tainted by a show up. *S. v. Simmons*, 705.

§ 66.18. When Voir Dire Required

Trial court did not err in accepting determination of the admissibility of in-court identification made at a prior trial and refusing to hold another voir dire hearing. *S. v. Williams*, 397.

§ 73.1. Admission of Hearsay Statement as Harmless Error

Defendant was not prejudiced by the court's failure to strike hearsay testimony by a police officer that defendant lived at the address at which narcotics were found. *S. v. Joyner*, 361.

CRIMINAL LAW — Continued

§ 73.3. Statements Showing State of Mind

Testimony that a person who sold a stereo to defendant twice stated in the presence of defendant and a witness that the stereos in his possession had been stolen was not hearsay and was competent to show defendant's guilty knowledge. *S. v. Dailey*, 551.

§ 75.2. Effect of Promises of Officer on Confessions

Defendant's confession was incompetent as a matter of law where defendant confessed only after the investigating officer told defendant that he would tell the court, the judge and the jury that defendant was cooperative. *S. v. Williams*, 624.

Officer's statement to defendant that he would tell the solicitor if defendant cooperated did not render defendant's confession involuntary. *S. v. Young*, 689.

§ 75.7. Requirement that Defendant be Warned of Constitutional Rights

Where five to ten minutes elapsed between giving the Miranda warnings and the beginning of questioning, officers were not required to repeat the warnings. *S. v. Atkinson*, 247.

§ 75.11. Waiver of Constitutional Rights

Defendant affirmatively waived his right to counsel at his in-custody interrogation where defendant asked the officer whether he needed a lawyer and then stated he would talk to the officer without a lawyer. *S. v. Young*, 689.

§ 75.12. Use of a Confession Obtained in Violation of Constitutional Rights; Absence of Prejudice

Defendant was not prejudiced by the trial court's error in failing to instruct the jury that defendant's recorded statement to police, made without an express waiver of right to counsel, was admissible only for the purpose of impeachment. *S. v. Gillespie*, 684.

§ 76.5. Voir Dire Hearing; Necessity for Findings

Uncontroverted voir dire testimony concerning a juvenile's statements to police was sufficient to support trial court's admission of the statements into evidence though the court failed to make specific findings as to the voluntariness of the statements. *In re Berry*, 356.

§ 76.6. Voir Dire Hearing; Sufficiency of Findings

Evidence supported the court's determination that there was no merit in defendant's contention that he confessed only because officers promised his bail would be reduced and that he would be placed on probation in return for his testimony against an accomplice. *S. v. Conyers*, 654.

§ 76.10. Review of Trial Court's Determination

Defendant could properly raise admissibility of his confession on appeal even though he had entered a plea of guilty to the charge and never denied guilt. *S. v. Montgomery*, 225.

§ 84. Evidence Obtained by Unlawful Means

A passenger in a car may not object to incriminating evidence seized pursuant to a warrantless search where the owner or person having possession and control of the car consented to the search. *S. v. Foster*, 145.

CRIMINAL LAW — Continued

§ 85.1. Character Evidence—What Questions and Evidence are Admissible

Trial court properly excluded a question asked a character witness as to whether he knew defendant's general reputation in the community "as a result of your daily meeting" with defendant. *S. v. Dixon*, 78.

§ 86.5. Impeachment of Defendant by Questions as to Specific Acts

Court properly permitted impeachment of defendant on cross-examination by questions eliciting evidence of bad conduct committed by defendant when he was a juvenile. *S. v. Travis*, 330.

§ 86.8. Credibility of State's Witnesses

In a prosecution of defendant for embezzlement from his employer where the employer testified as to defendant's guilt, trial court erred in excluding defendant's evidence which tended to show bias on the part of the employer. *S. v. Perry*, 618.

Trial court erred in excluding testimony by a defendant that he had previously rejected a homosexual proposition by the robbery victim. *S. v. Becraft*, 709.

§ 87.2. Leading Questions

Questions which sought to aid a witness's recollection or refresh her memory were not leading questions and were permissible in the discretion of the court. *S. v. Mosley*, 337.

§ 88.3. Cross-examination as to Collateral Matters

Rebuttal testimony in a prosecution for receiving a stolen stereo was not offered to contradict defendant's testimony on a collateral matter but was competent to show a suspect relationship between defendant and the stereo seller. *S. v. Dailey*, 551.

§ 89.10. Witness's Prior Convictions

Trial court properly allowed defendant to be cross-examined about prior convictions. *S. v. Tuttle*, 465.

§ 90. Rule That Party is Bound by and May Not Discredit His Own Witness

Court erred in permitting the prosecutor to impeach two State's witnesses by asking questions about prior inconsistent statements made at a preliminary hearing. *S. v. Woods*, 252.

§ 91. Nature and Time of Trial

Oral requests for the setting of a trial date made by defendant's counsel to the district attorney were not sufficient to entitle defendant to a dismissal under the provisions of G.S. 15-10.2(a). *S. v. McKoy*, 304.

Where a criminal defendant is tried within the period prescribed by the Interstate Agreement on Detainers and such trial results in a mistrial, he is not subsequently entitled to have the charges dismissed even though the second trial occurs after the prescribed time limits. *S. v. Williams*, 344.

§ 91.1. Continuance

Where defendant alleged that he learned of the State's withdrawal of its motion to consolidate on the day of the trial, trial court did not err in denying defendant's motion for continuance. *S. v. Minshew*, 593.

CRIMINAL LAW — Continued

§ 91.6. Continuance for Additional Time to Prepare

Defendant's motion for continuance made on the ground that he needed more time to confer with counsel was properly denied. *S. v. Herring*, 382.

§ 91.7. Continuance on Ground of Absence of Witness

Trial court did not err in denying defendant's motion for continuance made on the ground that one of his witnesses was unavailable to testify. *S. v. Williams*, 344.

Defendant was denied the opportunity to prepare his defense by the denial of his motion for continuance made because of the absence of his sole alibi witness. *S. v. Davis*, 736.

§ 92.1. Consolidation Held Proper; Same Offense

Defendant was not prejudiced by consolidated trial with a codefendant because one of his witnesses was the attorney who appeared in the case representing the codefendant. *S. v. Travis*, 330.

§ 95.1. Evidence Admitted for Restricted Purpose—Request for Limiting Instruction

Trial court did not err in failing to instruct the jury that evidence objected to was being admitted only as corroborative evidence. *S. v. Edwards*, 265.

§ 98.1. Misconduct of Witness

Misconduct of the prosecuting witness in a rape prosecution did not prejudice defendant. *S. v. Sorrels*, 374.

§ 98.3. Removal of Defendant During Trial

Defendant was not prejudiced by his removal from the courtroom and continuation of the trial in his absence where defendant behaved in an unruly manner. *S. v. Rowe*, 611.

§ 101. Conduct or Misconduct Affecting Jurors

Defendant was not prejudiced by a conversation between one of the jurors and defendant's accomplice's mother during a trial recess. *S. v. Selph*, 157.

Trial court did not err in failing to declare a mistrial when the court observed that one juror had fallen asleep. *S. v. Williams*, 397.

§ 102.9. Solicitor's Comment on Defendant's Character and Credibility

Trial court properly overruled defendant's objection when the district attorney pointed his finger at defendant during jury argument and asked the jury to observe the size and build of defendant and to recall the size and age of the State's 15 year old witness. *S. v. Greene*, 228.

§ 102.12. Counsel's Comment on Sentence or Punishment

Defendant in a murder prosecution is entitled to a new trial where the court refused to allow defense counsel to read to the jury statutes including punishment provisions. *S. v. Walters*, 521.

§ 112.1. Instructions on Reasonable Doubt

The court's use of the phrase "possibility of innocence" as synonymous with "reasonable doubt," while disapproved, did not result in prejudice to defendant. *S. v. Conyers*, 654.

CRIMINAL LAW — Continued

§ 113.7. Charge as to Acting in Concert or Aiding and Abetting

Trial court in an armed robbery case properly instructed the jury on acting in concert and was not required to instruct on aiding and abetting. *S. v. Conyers*, 654.

§ 114.2. No Expression of Opinion in Statement of Evidence

Trial court's use of the phrase "the evidence further shows," in instructing the jury did not violate G.S. 1-180. *S. v. Head*, 494.

§ 116.1. Charge on Failure of Defendant to Testify

Defendant was not prejudiced by the court's instruction that the jury "should not" consider defendant's failure to testify as evidence against him. *S. v. Boone*, 378.

§ 119. Request for Instructions

Trial court did not err in failing to instruct the jury that the indictment did not constitute evidence against defendant, absent a request by defendant for such instruction. *S. v. Springs*, 61.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

Trial court did not coerce a verdict in sending the jury back for further deliberations after the jury announced that a verdict had not been reached where the court instructed the jurors not to surrender their conscientious convictions. *S. v. Ellis*, 667.

§ 128.2. Mistrial for Particular Grounds

Trial court properly denied defendant's motion for mistrial made when a witness testified she told defendant to get rid of three foil packets because she "knew he had a record" where the court struck the testimony. *S. v. Gaines*, 66.

Trial court properly denied defendant's motion for mistrial made on the ground that the State failed to include in its list of witnesses the name of a witness who testified that he recognized two of the jurors. *S. v. Falk*, 268.

Court did not err in refusing to declare a mistrial in an embezzlement case when the prosecutor used the word "embezzle" during his cross-examination of defendant. *S. v. Ellis*, 667.

§ 138.11. Different Punishment on New or Second Trial

Where defendants were involved in an earlier trial and given sentences to run concurrently with any other sentences they were serving, but defendants appealed and were awarded a new trial, trial court upon retrial erred in imposing sentences to run consecutively to any sentences they were then serving. *S. v. Foster*, 145.

§ 145. Costs

Defendant's counsel is taxed with the costs of printing the jury instructions in the record where no error was assigned to the instructions. *S. v. Spruill*, 731.

§ 149.1. Appeal by State not Permitted

The State had no right to appeal to superior court from a general verdict of not guilty entered in district court although the trial judge also

CRIMINAL LAW — Continued

found the ordinance under which defendant was charged is invalid. *S. v. Bell*, 273.

§ 155.1. Docketing of Transcript of Record

Defendant's appeal is dismissed for failure to file the record on appeal in apt time. *S. v. Lesley*, 237.

Defendants' appeal is dismissed for failure to comply with App. R. 12(a) requiring that the record on appeal be filed within 10 days after certification. *White v. Lawrence*, 631.

§ 157. Necessary and Proper Parts of Record

Appeal is dismissed for failure to comply with Appellate Rules where judgment was not included in the record on appeal and the record was not settled before certification by the clerk. *S. v. Gilliam*, 490.

§ 157.1. Matters Not Necessary or Proper Parts of Record

Counsel is taxed with the cost of printing unnecessary material in the record on appeal. *S. v. Minshew*, 593.

§ 159. Form and Requisites of Record

Appeal is dismissed for failure to comply with the Rules of Appellate Procedure concerning necessary items in the record on appeal and contents of the brief. *S. v. Musumeci*, 88.

§ 161.3. Numbering and Grouping Exceptions; References in Briefs

Defendants' appeal is dismissed for failure to comply with App. R. 28(b)(3) requiring that, following each question presented in the brief, reference to assignments of error and exceptions pertinent to the questions should be made. *White v. Lawrence*, 631.

§ 162.2. Time for Objection

Trial court did not err in denying defendant's motion to strike a responsive answer of a State's witness which constituted hearsay where defense counsel made no objection to the question itself. *S. v. Bost*, 673.

§ 162.6. General Objection

Defendant's general objection to admission of a transcript was insufficient to exclude the transcript where parts of it were properly admissible in evidence. *S. v. Fleming*, 216.

§ 163.1. Form of Exceptions and Assignments of Error to the Charge

Exceptions to the court's instructions were insufficient where they did not identify the portions in question by brackets or by any other clear means. *S. v. Gilliam*, 490.

§ 166. The Brief

A question must be presented and argued in the brief in order to obtain appellate review of it. *S. v. Brothers*, 233.

§ 178. Law of the Case

Trial court properly accepted determination of the admissibility of in-court identification made at a prior trial. *S. v. Williams*, 397.

CRIMINAL LAW — Continued

§ 181.2. Post Conviction Hearings

Summary judgment procedure is not a practically appropriate procedure for use in this State in a post conviction proceeding to test whether facially adequate allegations have sufficient basis in fact to warrant plenary presentation of evidence. *Edmondson v. State*, 746.

DAMAGES

§ 3.4. Compensatory Damages for Mental Anguish

Plaintiffs showed no right to damages because of negligence of defendants in the execution of an ejectment order where there was no evidence of any physical injury but only evidence relating to humiliation, embarrassment and emotional distress. *McDowell v. Davis*, 529.

DEEDS

§ 22. Covenant of Seisin

A deed conveying land subject to certain restrictive covenants did not convey an easement for the use of a nearby lake. *Mason v. Andersen*, 568.

DIVORCE AND ALIMONY

§ 4. Condonation

Evidence of the husband's condonation of the wife's adultery was sufficient for the jury. *Malloy v. Malloy*, 56.

§ 16. Alimony Without Divorce

The mere delay by the dependent spouse in seeking maintenance from the supporting spouse does not bar the dependent spouse's action to enforce the right to support. *Streeter v. Streeter*, 679.

§ 18.3. Alimony Pendente Lite Pleadings

Plaintiff's complaint seeking alimony pendente lite was sufficient, and defendant's motion for a more definite statement was properly denied. *Ross v. Ross*, 447.

§ 18.9. Sufficiency of Evidence in Action for Alimony Pendente Lite

Trial court properly denied defendant's motion to set aside an alimony pendente lite order on the ground he had no opportunity to present evidence of his living expenses. *Sweat v. Sweat*, 230.

Plaintiff failed to introduce evidence from which the court could properly conclude that she was the dependent spouse and was without sufficient means to subsist during the pendency of the action, and the court erred in awarding plaintiff alimony pendente lite. *Ross v. Ross*, 447.

§ 21. Enforcement of Alimony Award, Generally

Evidence supported court's determination that defendant employed an appraiser only to make an appraisal for her private use and not to act as a member of a three-man appraisal team provided for in a consent divorce order, and the appraisal of the three men was not binding on defendant. *Cox v. Cox*, 73.

DIVORCE AND ALIMONY—Continued

§ 24.4. Enforcement of Child Support Order

Jurisdiction over the person or property of the obligor is not necessary for registration of a foreign support order. *Pinner v. Pinner*, 204.

§ 24.7. Where Evidence of Changed Circumstances is Sufficient

It was not necessary for plaintiff mother to present evidence as to the needs of a child when separation agreement was signed in order for the court to enter a pendente lite order requiring defendant father to make support payments larger than those provided in the separation agreement. *Perry v. Perry*, 139.

A mother's serious illness which caused permanent disability and a reduction in her income constituted a sufficient change in conditions to support an order directing the father to make child support payments larger than those provided in a separation agreement. *Ibid.*

EJECTMENT

§ 5. Damages in Summary Ejectment

Sheriff's eviction of plaintiffs from a municipal housing project pursuant to an order of ejectment did not constitute a violation of plaintiffs' Fourth Amendment rights so as to subject the sheriff to a claim for damages under 42 U.S.C. § 1983. *McDowell v. Davis*, 529.

EMBEZZLEMENT

§ 5. Evidence in Prosecution for Embezzlement

Trial court in an embezzlement case did not err in admitting a witness's testimony concerning transactions on dates which were not particularly listed in the indictment. *S. v. Ellis*, 667.

§ 6. Sufficiency of Evidence, Nonsuit, and Directed Verdict

State's evidence was insufficient for the jury in a prosecution of the director of a county Department of Social Services for embezzlement by failure to repay advances for travel expenses. *S. v. Agnew*, 496.

State's evidence was also insufficient in a prosecution of the director for wilful and corrupt misapplication of county funds. *Ibid.*

There was no fatal variance in an indictment placing ownership of embezzled funds in "The Provident Finance Company" and evidence placing ownership of the funds in the "Provident Finance Company of Henderson, Inc." *S. v. Ellis*, 667.

There was no fatal variance between indictment alleging that defendant did "embezzle and convert to his own use" funds of a finance company and the State's proof that defendant fraudulently misapplied the funds. *Ibid.*

§ 6.1. Instructions; Harmless Error

Trial court in an embezzlement case properly refused to instruct the jury that evidence of defendant's financial condition and the absence of any large expenditures by him should be considered in determining guilt or innocence. *S. v. Ellis*, 667.

EVIDENCE

§ 11.7. Testimony Barred by Dead Man's Statute

Testimony by defendant that he saw plaintiffs' predecessor in title, who is now deceased, sign an agreement fixing the dividing line between the tracts in question violated the dead man's statute. *Waters v. Humphrey*, 185.

§ 14. Communications Between Physician and Patient

Trial court in a wrongful death action did not err in refusing to allow into evidence hospital emergency room records. *Maness v. Bullins*, 208.

§ 22. Evidence at Former Trial of Same Case

Where the original plaintiff and one of plaintiffs' witnesses died before retrial, trial court properly refused to allow into evidence their testimony at a previous trial in narrative form but properly allowed introduction of their testimony in question and answer form. *Maness v. Bullins*, 208.

§ 29. Documents and Records

In an action to recover for goods allegedly sold and delivered to defendant corporation and the corporation's sole shareholder, trial court properly determined that certain invoices did not show indebtedness by defendants to plaintiffs. *Kight v. Harris*, 200.

FALSE PRETENSE

§ 3.1. Nonsuit

State's evidence was insufficient for the jury in a prosecution of the director of a county Department of Social Services for obtaining money from the county by false pretense for the repayment of travel expenses. *S. v. Agnew*, 496.

FIXTURES

§ 2. Trade Fixtures

An agreement that plaintiff would install gasoline pumps and storage tanks on store premises for distribution of plaintiff's gasoline products and that plaintiff could remove such equipment if the store owner stopped purchasing gasoline from plaintiff created a mere bailment of the equipment, and plaintiff was entitled to remove the equipment after defendants purchased the store without notice of the agreement after the store owner's death. *Oil Co. v. Cleary*, 212.

GAS

§ 1. Regulation

The Utilities Commission erred in finding and concluding that defendant was served or benefited from its gas supplier's purchase of emergency gas and in requiring that defendant pay a surcharge to cover the increased cost of the emergency gas. *Utilities Comm. v. Farmers Chemical Assoc.*, 433.

GUARANTY

§ 1. Generally

Defendant was not released from its guaranty of payment of the principal debtor's account with plaintiff by plaintiff's acceptance of the principal debtor's note for the amount due some 18 months after defendant breached its contract with plaintiff by denying it had guaranteed the account and refusing to pay plaintiff after the account became past due. *Construction Co. v. Ervin Co.*, 472.

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions Against Advertisements Along Highways

Plaintiff was not entitled to maintain this action to enjoin defendants from removing his outdoor advertising sign since plaintiff did not first exhaust administrative remedies provided him. *Freeland v. Greene*, 537.

§ 9.3. Interpretation of "Extra Work"

In an action to recover for work performed in excess of that specified under the terms of a written contract between the parties for the building of a road, trial court properly granted defendant's motion for judgment n.o.v. *Brokers, Inc. v. Board of Education*, 24.

HOMICIDE

§ 21.1. Sufficiency of Evidence to Overrule Nonsuit

Evidence was sufficient for the jury where it tended to show that defendant killed decedent with a broken bottle. *S. v. Robinson*, 394.

Evidence was sufficient for the jury where it tended to show that defendant killed his wife. *S. v. Lockett*, 401.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

Evidence was sufficient for the jury on the issue of defendant's guilt of second degree murder. *S. v. Mosley*, 337.

§ 24.2. Instructions on Defendant's Burden of Overcoming Presumption of Malice

Trial court's instructions placing the burden on defendant to show the absence of malice and to prove self-defense were improper. *S. v. McLaurin*, 589.

§ 27.1. Instructions on Voluntary Manslaughter

Court's instructions on voluntary manslaughter which followed suggested instructions in the N. C. Pattern Jury Instructions for Criminal Cases were confusing. *S. v. Woods*, 252.

§ 28. Instruction on Self-Defense

Trial court properly gave additional instructions on manslaughter without again instructing on self-defense. *S. v. Dixon*, 78.

HUSBAND AND WIFE

§ 8. Crime Committed by Wife in Presence of Husband

Where it is shown that a married woman commits a crime in the presence of her husband, she should no longer be entitled to a presumption in her favor that she was compelled to so act. *S. v. Smith*, 511.

HUSBAND AND WIFE — Continued

§ 15. Nature and Incidents of Estate by the Entirety

The husband is entitled to the rents, profits, and income from entirety property. *Rauchfuss v. Rauchfuss,* 108.

INDICTMENT AND WARRANT

§ 9. Charging the Offense Generally

Respondent's motion to quash a juvenile petition which did not allege the caption of the city code provision allegedly violated should have been allowed. *In re Jacobs,* 195.

§ 17.2. Variance in Time Between Averment and Proof

Defendant in a larceny case was not prejudiced by the variance between the date of the crime alleged in the bill of indictment and the date shown by the State's evidence. *S. v. Locklear,* 647.

INFANTS

§ 6.7. Award of Visitation Rights

The court will not compel the natural mother and adoptive father, who have custody of minor children, to allow visitation of the children by their paternal grandmother and natural aunt. *Acker v. Barnes,* 750.

§ 10. Purpose and Construction of Juvenile Court Statutes

Respondent's motion to quash a juvenile petition which did not allege the caption of the city code provision allegedly violated should have been allowed. *In re Jacobs,* 195.

In a juvenile delinquency proceeding where respondents allegedly damaged vacant houses, trial court erred in requiring restitution for the damages as a condition for probation without making proper findings of fact. *In re Berry,* 356.

INSURANCE

§ 68.6. "Struck by Automobile" Provision in Automobile Personal Injury Policy

Recovery under medical payments provision of an automobile liability policy providing coverage for accidental injury caused by being "struck by an automobile" does not require physical contact between the automobile and the body of the insured. *DeBerry v. Insurance Co.,* 639.

§ 68.7. Provisions as to Medical Payments

The limit of an insurance company's liability under the medical payments provision of an automobile liability policy covering two cars for injury to the insured when she was "struck by an automobile" was the amount on each insured car, not the total amount on both cars. *DeBerry v. Insurance Co.,* 639.

§ 87. Drivers Insured

At the time of the collision in question the driver of a truck was not in lawful possession of the vehicle pursuant to G.S. 20-279.21(b)(2) and therefore was not covered under the truck owner's liability insurance policy. *Ford Marketing Corp. v. Insurance Co.,* 297.

INSURANCE — Continued

§ 90. Limitations on Use of Vehicle

An injury to a person standing outside insured's truck when a rifle on a permanently mounted gun rack inside the cab discharged arose out of the use of the truck within the meaning of an automobile liability policy. *Insurance Co. v. Walker*, 15.

JUDGES

§ 5. Disqualification of Judges

The trial judge did not err in denial of defendant's motion that he disqualify himself from an action to obtain increased child support payments on the ground the judge had presided at a criminal trial of defendant for failure to provide adequate child support and had made certain remarks about the income of defendant's present wife. *Perry v. Perry*, 139.

JUDGMENTS

§ 2. Time and Place of Rendition

Trial court had no authority to enter an order of dismissal outside the county where the action was pending. *Furniture Corp. v. Scronce*, 365.

§ 14. Authority to Enter Default

The court erred in entry of default judgment on a purported counterclaim for failure to answer where the purported counterclaim amounted to no more than a denial of allegations in plaintiff's complaint and thus required no answer. *Trust Co. v. Morgan-Schultheiss*, 406.

JURY

§ 5.1. Selection Generally

Defendant was not prejudiced in the selection of the jury because of the State's failure to include in its list of witnesses the name of a witness who testified on cross-examination that he recognized two of the jurors. *S. v. Faulk*, 268.

KIDNAPPING

§ 1. Definitions; Elements of the Offense

There was no merger of armed robbery and kidnapping though the offenses were committed at the same time. *S. v. Vawter*, 131.

The statute making it a crime unlawfully to confine, restrain or remove a person from one place to another for the purpose of holding such other person as a "hostage" is not void for vagueness. *S. v. Lee*, 162.

§ 1.2. Sufficiency of Evidence

Evidence was sufficient for the jury where it tended to show that defendants enticed the victims to a named place and held them at bay while friends assaulted them and tied them up. *S. v. Hoots*, 258.

State's evidence was sufficient for the jury in a prosecution for kidnapping the supervisor of defendant's wife after defendant shot the wife. *S. v. Vawter*, 131.

MASTER AND SERVANT — Continued

Evidence was sufficient to support the Industrial Commission's finding that an injury was to plaintiff's back and that plaintiff did not suffer a permanent disability. *Little v. Food Service*, 742.

§ 74. Disfigurement

An employee who received compensation for permanent partial disability of his left hand was entitled to additional compensation for disfigurement because of surgical scars on his left forearm. *Thompson v. Ix and Sons*, 350.

§ 90. Notice to Employer of Accident

Evidence supported the Industrial Commission's determination that an employee was reasonably excused from giving written notice to his employer within 30 days after the accident and that the employer was not prejudiced by the absence of written notice. *Key v. Woodcraft, Inc.*, 310.

§ 94. Findings of Commission

Findings of fact were insufficient to support the order of the Industrial Commission that plaintiff's hearing loss did not result from use of a jackhammer on a construction job, and hence did not arise out of and in the course of employment. *Gaines v. Swain & Son, Inc.*, 575.

MONEY RECEIVED

§ 2. Particular Situations and Applications

Plaintiffs were entitled to recover fees paid to a municipality for garbage collection pursuant to an unconstitutional ordinance. *Big Bear v. City of High Point*, 563.

MORTGAGES AND DEEDS OF TRUST

§ 1. Mortgages and Equitable Liens

There was a genuine issue of material fact as to whether a warranty deed and separate agreement giving the grantor the option to repurchase constituted a sale or mortgage. *Trust Co. v. Morgan-Schultheiss*, 406.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

A resolution of notice of intent to consider annexation is not required to be written. *Kritzer v. Town of Southern Pines*, 152.

An oral resolution of notice of intent to consider annexation of "these areas" adequately described the lands under consideration for annexation. *Ibid.*

An annexation study stating that construction of sewer lines would begin within 12 months of the effective date of annexation set forth a sufficient timetable for such construction. *Ibid.*

§ 30. Zoning Ordinances

In attempting to make its zoning ordinance applicable to property outside the city limits, defendant failed to comply with applicable enabling statutes. *Sellers v. City of Asheville*, 544.

MUNICIPAL CORPORATIONS — Continued

§ 37. Regulations Relating to Health

Plaintiffs were entitled to recover fees paid to a municipality for garbage collection pursuant to an unconstitutional ordinance. *Big Bear v. City of High Point*, 563.

NARCOTICS

§ 3. Competency and Relevancy of Evidence

Court properly admitted evidence of marijuana found growing in flower pots in defendant's front yard 32 feet from defendant's residence and behind a TV antenna connected to defendant's residence, but court erred in admitting marijuana found growing in a flower bed 55 feet behind defendant's residence and in a cornfield. *S. v. Wiggins*, 291.

Defendant charged with possession of narcotics was not prejudiced by the admission of an officer's testimony that defendant drove a new Lincoln Continental automobile. *S. v. Joyner*, 361.

Court properly allowed an expert to testify that officers seized smoking apparatus usually used in smoking marijuana. *S. v. Singleton*, 390.

In a prosecution for possession and manufacture of heroin, trial court did not err in allowing a narcotics agent's testimony and demonstration regarding the process of cutting, bagging and mixing heroin. *S. v. Bell*, 607.

Defendant was not prejudiced by testimony of a narcotics agent concerning the value of heroin, since G.S. 90-95 makes it unlawful to possess any amount of heroin regardless of value. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit

Evidence that defendant possessed heroin with the intent to sell or deliver the same was sufficient for the jury. *S. v. Brown*, 84.

Evidence of defendant's constructive possession of heroin and drug paraphernalia was sufficient to be submitted to the jury. *S. v. Atkinson*, 247.

Evidence of defendant's possession of 215.5 grams of marijuana, without more, was insufficient to show intent to sell and distribute. *S. v. Wiggins*, 291.

State's evidence was sufficient for the jury in a prosecution for manufacture of marijuana found growing in defendant's yard and next to a TV antenna connected to defendant's residence. *Ibid.*

Evidence was sufficient for the jury in a prosecution for possession and manufacture of heroin. *S. v. Bell*, 607.

Evidence was sufficient for the jury in a prosecution for possession of heroin. *S. v. Washington*, 614.

§ 4.5. Instructions

Trial court committed prejudicial error in failing to instruct the jury that defendant must have possessed more than 100 ethchlorvynol tablets in order to be guilty of felonious possession of the drug. *S. v. Reese*, 89.

Trial court's instruction which allowed the jury to find that an automobile passenger possessed heroin based on his proximity to the drug was overbroad and erroneous. *S. v. Washington*, 614.

NEGLIGENCE

§ 30. Nonsuit in Negligence Action

In an action to recover for an injury sustained in a building, there was a genuine issue as to the material facts of the relationship between the defendants where some of the evidence showed it to be that of landlord and tenant and other evidence showed it to be a partnership. *Harris v. Carter*, 179.

§ 35. Contributory Negligence

In an action to recover damages sustained by plaintiff when she fell through a hole in the floor of a packhouse, evidence raised a genuine issue of material fact on the question of whether she was contributorily negligent. *Harris v. Carter*, 179.

§ 44. Verdict and Judgment

A jury verdict was not inconsistent in finding that defendant driver's negligence was not the proximate cause of feme plaintiff's personal injuries and that it was the proximate cause of damage to the male plaintiff's vehicle which the feme plaintiff was driving. *Frye v. Wiles*, 581.

PARENT AND CHILD

§ 10. Uniform Reciprocal Enforcement of Support Act

Jurisdiction over the person or property of the obligor is not necessary for registration of a foreign support order. *Pinner v. Pinner*, 204.

PRINCIPAL AND AGENT

§ 3. Termination or Revocation of Agency

Where plaintiffs were given a one-third interest in the note sued upon as well as authority to collect the note, their agency was coupled with an interest and was therefore irrevocable. *Booker v. Everhart*, 1.

§ 5. Scope of Authority

Defendant mortgage broker's agent had apparent authority to bind defendant to a contract to make a permanent loan to plaintiffs for a motel construction project. *Pipkin v. Thomas & Hill, Inc.*, 710.

PRINCIPAL AND SURETY

§ 1. Nature and Construction of Surety Contract

Trial court erred in granting a directed verdict for defendant on the ground that a suretyship agreement executed by defendant was not supported by a valuable consideration. *Leasing Assoc., Inc. v. Lambert*, 621.

RAPE

§ 5. Sufficiency of Evidence

Evidence that defendant was the perpetrator of the crime charged was sufficient for the jury. *S. v. Staton*, 270.

State's evidence was sufficient for the jury on the issue of defendant's guilt of rape of a 17 year old girl after he had kidnapped her from her aunt's home. *S. v. Nichols*, 702.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for feloniously receiving a stolen stereo. *S. v. Dailey*, 551.

ROBBERY

§ 3. Competency of Evidence

Trial court in a robbery case did not err in permitting the victim to testify that defendant offered to sell him heroin. *S. v. Falk*, 268.

§ 4. Sufficiency of Evidence

Evidence was sufficient for the jury in a prosecution for accessory before the fact to armed robbery of a doctor's wife. *S. v. Hewitt*, 168.

RULES OF CIVIL PROCEDURE

§ 4. Process

Trial court did not acquire jurisdiction over the person of respondent or the subject matter of the action since no summons was issued. *Swenson v. Assurance Co.*, 458.

§ 8. General Rules of Pleadings

A party who is not permitted to file a responsive pleading may meet the allegations made against him at trial in any manner that would have been proper had a reply been allowed. *Malloy v. Malloy*, 56.

§ 12. Defenses and Objections

So long as a pleading fairly notifies the opposing party of the nature of the claim, a motion for a more definite statement will not be granted. *Ross v. Ross*, 447.

§ 15. Amended Pleadings

Where plaintiffs never objected to defendants' evidence on the specific ground that the evidence offered was not within the issues raised by the pleadings, under G.S. 1A-1, Rule 15(b), the rule of "litigation by consent" applied. *McRae v. Moore*, 116.

§ 19. Necessary Joinder of Parties

The payee of a note was not a necessary party to an action by the holders of the note against the maker and guarantors. *Booker v. Everhart*, 1.

§ 26. Depositions in a Pending Action

Where defendants sought to take a deposition two weeks before trial of one defendant who was stationed with the Navy in the Philippines, trial court properly required defendants to advance plaintiffs' counsel's travel and living expenses to enable his presence at the deposition. *Booker v. Everhart*, 1.

Plaintiffs were not prejudiced because of the court's failure to state separately its conclusions of law. *Waters v. Humphrey*, 185.

§ 52. Findings by the Court

RULES OF CIVIL PROCEDURE — Continued

§ 55. Default

Entry of default against one defendant did not bar the other defendants from asserting all defenses they might have to defeat plaintiff's claim. *Harris v. Carter*, 179.

Determination of whether good cause exists to vacate an entry of default is addressed to the discretion of the trial judge. *Frye v. Wiles*, 581.

§ 56. Summary Judgment

The court did not err in conducting a summary judgment hearing without the presence or withdrawal of appellants' counsel where there was no "counsel of record" within the meaning of Superior and District Court Rule 16. *Trust Co. v. Morgan-Schultheiss*, 406.

§ 59. Amendment of Judgment

Trial court did not abuse its discretion in granting plaintiff's motion to set aside a judgment for defendant pending the hearing of additional testimony. *Hoover v. Kleer-Pak*, 661.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

The Fourth Amendment applies to the seizure of items in plain view, and the warrantless seizure is judged by the standard of reasonableness applied to a warrantless search. *S. v. Bembery*, 31.

The warrantless seizure of allegedly stolen tires which were in plain view for the purpose of taking them to the owner for identification was reasonable and lawful. *Ibid.*

Search warrant was not required for seizure of a tractor which was in plain view of officers who were on adjacent public land. *S. v. Boone*, 378.

Trial court properly admitted evidence obtained from a warrantless inventory search of defendant's vehicle. *S. v. Spruill*, 731.

Trial court properly admitted items seized from defendant's car without a warrant where the items were in plain view. *S. v. Whitley*, 753.

§ 2. Consent to Search Without Necessary Warrant

A passenger in a car may not object to incriminating evidence seized pursuant to a warrantless search where the owner or person having control of the car consented to the search. *S. v. Foster*, 145.

Lessee of an apartment who paid the rent was a person authorized to give consent to a search of the premises, including a bedroom which she shared with defendant. *S. v. McNeill*, 317.

§ 3. Requisites and Validity of Search Warrant

An affidavit was insufficient to support issuance of a search warrant for marijuana allegedly located in defendant's trailer. *S. v. Armstrong*, 52.

In a voir dire hearing to determine validity of a warrant, trial court did not err in refusing to permit defendant to elicit information as to precisely when an informant saw defendant with drugs and what the warrant authorized officers to search. *S. v. Singleton*, 390.

TRUSTS — Continued

§ 14. Constructive Trusts

Where entirety property was conveyed as security for a loan, and the property was reconveyed to the husband individually, the husband held title to a one-half interest in the property in constructive trust for the wife. *Rauchfuss v. Rauchfuss*, 108.

UNIFORM COMMERCIAL CODE

§ 15. Warranties

Defendants were not entitled to an offset for breach of warranty of machinery where the purchase contract excluded any implied warranty of merchantability and fitness and defendants failed to prove breach of express warranty. *Machinery, Inc. v. Hosiery, Inc.*, 482.

§ 78. Enforcement of Security Interest; Default

In an action by the holders of a negotiable promissory note against the maker and guarantors, the maker and guarantors could not raise a claim or defense held by the payee who was not a party to the action. *Booker v. Everhart*, 1.

Testimony that the price paid by the purchaser of collateral was inadequate was insufficient to raise a genuine issue of fact as to whether a foreclosure sale of the collateral was commercially unreasonable. *Bank v. Tectamar, Inc.*, 604.

A creditor violated the U.C.C. by paying off senior liens out of the proceeds of the sale of collateral, and evidence of such violation raised a genuine issue of fact as to the amount of a deficiency judgment. *Ibid.*

VENDOR AND PURCHASER

§ 3. Description and Amount of Land

The contract between the parties for sale of property contained a latent ambiguity and the trial court properly allowed parol evidence to explain the ambiguity. *Emerson v. Carras*, 91.

VENUE

§ 8. Removal for Convenience of Witnesses

Trial court could not entertain a motion for a change of venue to promote the convenience of witnesses prior to the time an answer was filed in the case. *Poteat v. Railway Co.*, 220.

WILLS

§ 33. Rule in Shelley's Case

Where the will of testatrix devised a house and lot to the applicant for her lifetime only and provided further that "at her death it is to go to her estate in fee simple," the Rule in Shelley's Case would apply to convert applicant's life estate and the remainder to her heirs into a fee simple estate. *In re Grady*, 477.

§ 34. Life Estate

Provisions of testator's will gave his wife a life estate in farm machinery. *Lambeth v. Fowler*, 596.

WILLS — Continued

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina