NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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State v. McLean & McFayden	54 N.C. App. 191	Denied, 305 N.C. 305
State v. Maher	54 N.C. App. 639	Allowed, 304 N.C. 731
State v. Moore	54 N.C. App. 365	Denied, 305 N.C. 398
State v. Murrell	54 N.C. App. 342	Denied, 304 N.C. 731
State v. Peck	54 N.C. App. 302	Allowed, 304 N.C. 732
State v. Pennell	54 N.C. App. 252	Denied, 304 N.C. 732 Appeal Dismissed
State v. Revell	54 N.C. App. 694	Denied, 305 N.C. 155
State v. Rotenberry	54 N.C. App. 504	Denied, 305 N.C. 306
State v. Samuels	54 N.C. App. 493	Denied, 305 N.C. 155
State v. Smith	54 N.C. App. 493	Denied, 304 N.C. 732 Appeal Dismissed
State v. Snipes	54 N.C. App. 192	Denied, 304 N.C. 733
State v. Summers	54 N.C. App. 493	Denied, 305 N.C. 155
State v. Thompson	54 N.C. App. 192	Denied, 304 N.C. 733
Teachy v. Coble Dairies, Inc.	54 N.C. App. 688	Allowed, 305 N.C. 307
Thomas v. Poole	54 N.C. App. 238	Denied, 304 N.C. 733
Town of Hudson v. Martin-Kahill Ford	54 N.C. App. 272	Denied, 304 N.C. 733
Wachovia Bank v. Livengood	54 N.C. App. 198	Allowed, 305 N.C. 307
Walters v. Walters	54 N.C. App. 545	Allowed, 305 N.C. ---

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. DEREK HARRISON METTRICK AND CLAUDE DALTON VICKERS

No. 8023SC1151

(Filed 6 October 1981)

1. **Constitutional Law § 32; Criminal Law § 101.4— right to impartial jury—contact with State's witnesses**

Where the State's two principal witnesses, a sheriff and deputy sheriff, had been transporting the jury on bus trips from one county to another county which took approximately an hour and forty-five minutes, prejudice to the defendant was conclusively presumed and the conduct of the trial violated the defendant's Fourteenth Amendment right to trial by a fair and impartial jury.

2. **Criminal Law § 66.14— pretrial identification procedure suggestive—no basis for independent in-court identification**

Where a pretrial identification procedure, a one-on-one confrontation, was considered inherently suggestive, and there was no basis in the record to find the in-court identification was of independent origin, the trial court erred in so finding.

3. **Conspiracy § 5.1; Criminal Law § 73— hearsay—conspiracy over**

A witness's testimony that one defendant identified the other defendant as a participant in a conspiracy was hearsay in its classic form as the codefendant made the statement after he was arrested and once the conspiracy was over.

4. **Searches and Seizures § 15— standing to object to search of airplane**

Defendant could not object to the admission of evidence taken as a result of searches conducted in and around an airplane where the record showed neither that defendant was present when the airplane was searched nor that he had any protected interest in the airplane.

5. **Conspiracy § 5.1; Criminal Law § 74.2— extrajudicial statements of codefendant—inadmissibility against defendant—failure to give limiting instruction—error**

Extrajudicial statements of a testifying codefendant made to officers once he was arrested and after the conspiracy was completed should not have been admitted into evidence as against the other defendant and defendant was entitled to an instruction that codefendant's statements were admissible only against codefendant and could not be considered against defendant.

6. **Narcotics § 4— conspiracy to possess and sell marijuana—sufficiency of the evidence**

Testimony about codefendant's delivery of marijuana to Ashe County Airport coupled with identification testimony that defendant was at the airplane when the marijuana was unloaded is sufficient to overrule defendant's motion for nonsuit on the drug conspiracy charge.

7. **Narcotics § 4— nonsuit—sufficiency of the evidence to overrule motion**

Where there is evidence from which the jury could find that defendant flew his airplane to South America and picked up 5,000 to 10,000 pounds of marijuana, that he later flew to Ashe County Airport where he ordered his crew to open the cargo door so that the marijuana could be unloaded into waiting trucks, and that he then vacuumed the airplane to remove evidence of marijuana, this is sufficient to uphold the denial of defendant's motion for nonsuit on charges of felonious conspiracy to possess and sell marijuana and felonious possession and delivery of marijuana.

8. **Searches and Seizures § 13— search and seizure by consent**

Where defendant consented to the search of his aircraft and during the search contraband was found in plain view, seizure of the contraband was not unconstitutional.

Judge MARTIN (Robert M.) dissenting.

APPEAL by defendants from *Washington, Judge.* Judgment entered 30 May 1980, ASHE County Superior Court. Heard in the Court of Appeals 3 April 1981.

On 16 January 1980, a DC-6 airplane piloted by the defendant, Derek Harrison Mettrick, and crewed by James Cannin and James Kent, landed at the Ashe County Airport. The plane's cargo was unloaded into two trucks which immediately departed the airport. On 17 January 1980, defendant Mettrick and his crew were arrested. Subsequently, the defendant, Claude Dalton Vickers and his brother Hubert Garley Vickers were also arrested. A total of less than five grams of marijuana seeds, stems, and other fragments were found by law enforcement officers in or about the airplane. The only evidence as to the nature and con-

tent of the airplane's cargo were the statements made by Mettrick to law enforcement officers in the absence of Claude Vickers that the airplane was loaded with 5,000 to 10,000 pounds of marijuana.

Mettrick was indicted and convicted of conspiracy to feloniously sell or deliver marijuana, conspiracy to feloniously possess marijuana, felonious possession of marijuana, and felonious delivery of marijuana.[1] Claude Vickers was indicted and convicted of conspiracy to feloniously sell or deliver marijuana, conspiracy to feloniously possess marijuana, and felonious possession of marijuana.

Hubert Vickers was also indicted on conspiracy charges, but the State elected to try him along with Mettrick and Claude Vickers for being an accessory after the fact to felonious delivery and possession of marijuana. Hubert Vickers' charges were dismissed at the close of the State's evidence.

Prior to trial, the court ordered that a special venire of jurors be drawn from another county for these cases which had been consolidated for trial over the objections of the defendants. Two of the State's principal witnesses, Sheriff Richard Waddell and Deputy Sheriff J. D. Parsons, were responsible for transporting the jurors during the first two days of trial. The first issue raised by defendants is whether the trial court should have granted a mistrial on the basis of the jurors' contact with these two State's witnesses. Numerous other issues are raised on appeal[2] dealing primarily with evidentiary rulings by the court, including the court's admission of in-court identifications by various State witnesses, the admission of statements by Mettrick, and the admissibility of the seized marijuana seeds. A number of issues are also raised concerning the court's charge to the jury. Because we hold, on the facts of this case, that it was inherently prejudicial for two principal State's witnesses to transport the jury, we address only the issues that are likely to be raised at the new trial.

1. The members of Mettrick's crew were charged with the same offenses but those charges were subsequently dismissed by the State.

2. In his 112-page brief, Vickers brings forward 25 assignments of error; Mettrick brings forward 11 assignments of error in his separate brief.

Vannoy & Reeves, by Wade E. Vannoy, Jr., for defendant-appellant Mettrick.

Moore & Willardson, by Larry S. Moore and John S. Willardson, for defendant-appellant Vickers.

Attorney General Edmisten, by Associate Attorney Steven F. Bryant and Assistant Attorney General Henry T. Rosser, for the State.

BECTON, Judge.

METTRICK AND VICKERS' FIRST ASSIGNMENT OF ERROR

I

[1] Because of pre-trial publicity, the trial court ordered a special venire of jurors drawn from Caldwell County for defendants' trial in Ashe County. Sheriff Waddell and Deputy Sheriff Parsons transported the prospective jurors in two activity buses from Caldwell County to Ashe County on 19 May 1980, the opening day of trial. Parsons also transported the jurors to lunch that day. After the jury was selected on the afternoon of 19 May 1980, Parsons drove one of the buses that made the return trip to Caldwell County. On 20 May 1980, Sheriff Waddell transported eleven of the fourteen chosen jurors and alternates from Caldwell County to Ashe County. No one was present on any of the bus trips, which take approximately an hour and forty-five minutes, except the jurors and the named officers.

Shortly after the opening of court on 20 May 1980, the court learned for the first time that these two principal state witnesses had been transporting the jury. Each of the defendants made timely motions for a mistrial, whereupon the court re-opened voir dire. Each juror stated that neither the sheriff nor his deputy mentioned the case and that the fact that the sheriff and his deputy would be testifying would not influence his or her ability to render an impartial decision.

In arguing that the trial court committed prejudicial error, the defendants rely on *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 2d 424, 85 S.Ct. 546 (1965). We believe the *Turner* case is dispositive of this issue. In *Turner*, the United States Supreme Court reversed the defendant's conviction of murder when the un-

controverted evidence showed that during the trial, two deputy sheriffs, who were the two principal prosecution witnesses, were in continual and intimate association with the jurors during the entire trial. The Supreme Court held that the conduct of the trial violated the defendant's Fourteenth Amendment right to trial by a fair and impartial jury. The Supreme Court further recognized that jurors do not shed their natural inclinations and predilections once they enter the courthouse; that jurors are a part of all that they have met; and that jurors are likely to give greater credence to those who have been their custodians than to other witnesses. Specifically, the Court stated:

> "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Frank v. Mangum*, 237 U.S. 309 at 349, 59 L.Ed. 969 at 980, 35 S.Ct. 582 (Holmes, J., dissenting). . . .
>
> . . . [T]he credibility which the jury attached to the testimony of these two key witnesses must inevitably have determined whether [defendant] was to be sent to his death. . . . [T]he potentialities of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality. [Citation omitted.]
>
> It is true that at the time they testified in open court Rispone and Simmons told the trial judge that they had not talked to the jurors about the case itself. But there is nothing to show what the two deputies discussed in their conversations with the jurors thereafter. And even if it could be assumed that the deputies never did discuss the case directly with any member of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution. . . .
>
> . . . [T]he role that Simmons and Rispone played as deputies made the association even more prejudicial. For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial.

379 U.S. at 472-74, 13 L.Ed. 2d at 429-30, 85 S.Ct. at 549-50.

The North Carolina Supreme Court's decision in *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970) also supports the conclusion we reach. In *Macon*, our Supreme Court said:

> We are in full accord with the sound principles of constitutional law enunciated in the *Turner* case. The facts in the case before us, however, do not invoke their application. . . . Here, the deputies were not in the presence of the jurors outside the courtroom, had no communication at any time with them, and had no custodial authority over them. The exposure of the jury to these bailiffs was brief, incidental, and without legal significance. . . .
>
> Since the State's witnesses here had no custodial authority over the jury, *Turner* does not apply. Even so, trial judges should not overlook the significance of that decision. Simply stated, it holds that a State's witness is disqualified to act as *custodian* or *officer in charge* of the jury in a criminal case. We said as much in *State v. Taylor* [226 N.C. 286, 37 S.E. 2d 901 (1946)]. Under such circumstances, prejudice is conclusively presumed.

276 N.C. at 473, 173 S.E. 2d at 290.

In this case, Sheriff Waddell was the most frequently called as well as the most crucial State's witness. He testified on eleven separate occasions, five times in the presence of the jury. He was alone with the jurors in a bus, with him driving, for not less than three and one-half hours. The same can be said of Deputy Parsons, another principal witness, who testified three times in the presence of the jury. The jurors were in these law enforcement officials' custody and keeping outside the courtroom for substantial periods of time. The jurors' lives, safety and comfort were in these officers' hands. Assuming that the case was not discussed or even mentioned during the whole time, one would have to be blind to human nature to believe that the jurors' intimate association with Sheriff Waddell and Deputy Parsons did not enhance these witnesses' credibility.

> However circumspect the officer and jurors may be when placed in such a situation, the occurrences always, as here, tend to bring the trial into disrepute and produce suspicion and criticism to which good men should not be subjected.

State v. Taylor, 226 N.C. at 290, 37 S.E. 2d at 903.

Because prejudice is *inherent* under *Turner* and *conclusively presumed* under *Macon,* we do not reach defendants' argument that the trial court erred in denying their motions to sequester the jury during the special voir dire. Suffice to say, both defendants are entitled to a new trial for the reasons set forth above.

VICKERS' REMAINING ASSIGNMENTS OF ERROR

II

Vickers next assigns as error the court's admission of identification testimony by three witnesses without conducting voir dire examinations to ascertain whether the in-court identifications were tainted by out-of-court proceedings. Vickers lodged a general objection and did not specifically request a voir dire hearing. While the "better procedure dictates that the trial judge, even upon a general objection only, should conduct a voir dire in the absence of the jury, find facts, and thereupon determine the admissibility of in-court identification testimony," *State v. Stepney,* 280 N.C. 306, 314, 185 S.E. 2d 844, 850 (1972), we need not reach the merits of this issue since Vickers can request a voir dire at the re-trial, and the court can make the proper findings.

III

[2] Vickers also contends that the identification procedures employed to get the fourth identification witness, Onley Burgess, to identify him were inherently suggestive, conducive to mistaken identification and violative of his constitutional rights to due process.

A voir dire examination *was* conducted by the court to determine the competency of Onley Burgess' in-court identification of Vickers. On voir dire, Onley Burgess testified (1) that, except for seeing Vickers in court, he had seen Vickers on only two prior occasions—once at the Ashe County Airport on 16 May 1980 and once at Vickers' place of business in Wilkes County on 18 or 19 May, 1980; (2) that Sheriff Waddell drove him from Ashe County to Vickers' place of business in Wilkes County and asked him (Burgess) "to see if [he] could identify the man that drove the black truck away [from the airport];" (3) that "the main purpose of [the sheriff] taking me down there was to identify the

defendants," and (4) that he, Burgess, was in Vickers' store for fifteen to twenty seconds and that a large individual, whom he later identified as Claude Vickers, was reading a newspaper which, during part of the time Burgess was in the store, covered Vickers' face. Sheriff Waddell gave similar testimony: "I asked Burgess 'if he would care to go into a business known as 421 Produce and buy an apple or a drink and see if he could see anyone he recognized as being at the airport.'" Sheriff Waddell also testified that the only other person in the store other than Burgess was a lady.

On the basis of this testimony, the trial court found facts and concluded that the pre-trial identification procedure "was not so unnecessarily suggestive and conducive to irreparably mistaken identification as to violate" Vickers' rights to due process of law.

"[A] one-on-one confrontation generally is thought to present greater risk of mistaken identification than a line-up." [Citations omitted.] *Moore v. Illinois*, 434 U.S. 220, 229, 54 L.Ed. 2d 424, 434, 98 S.Ct. 458, 465 (1977). Consistent with that observation by the United States Supreme Court, "[o]ur courts have widely condemned the practice of showing suspects singly to persons for the purpose of identification." [Citations omitted.] *State v. Yancey*, 291 N.C. 656, 661, 231 S.E. 2d 637, 640 (1976). We hold that the one-on-one confrontation in this case was inherently suggestive. We have not completed our inquiry, however, because Burgess sought to give in-court identification testimony to which Vickers objected.

> The overwhelming weight of authority is that the in-court identification of a witness who took part in an illegal pretrial confrontation must be excluded unless it is first determined by the trial judge on clear and convincing evidence that the in-court identification is of independent origin and thus not tainted by the illegal pretrial identification procedure. [Citations omitted.]

291 N.C. at 660, 231 S.E. 2d at 640. We must determine if there was clear and convincing evidence from which the trial court could have concluded that Burgess' purported in-court identification of Vickers was of independent origin.

In *State v. Yancey*, our Supreme Court said "[t]he United States Supreme Court case of *Neil v. Biggers*, 409 U.S. 188, 34

L.Ed. 2d 401, 93 S.Ct. 375 [1972], reconfirmed earlier holdings that even if a pre-trial confrontation is suggestive, due process is not violated by the admission of identification evidence when the total circumstances show the identification to be reliable." 291 N.C. at 661, 231 S.E. 2d at 641. Since "reliability is the linchpin in determining the admissibility of identification testimony. . .," *Manson v. Braithwaite*, 432 U.S. 98, 114, 53 L.Ed. 2d 140, 154, 97 S.Ct. 2243, 2253 (1977), we consider the factors set out in *Biggers* in determining the reliability of Burgess' testimony. The factors set forth in *Biggers* include "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." 409 U.S. at 199, 34 L.Ed. 2d at 411, 93 S.Ct. at 382.

We do not find the factors of reliability present in this case. The record is devoid of evidence to support the court's finding that Burgess observed Vickers "within a distance of one hundred feet." Moreover, Burgess never answered the specific question: "Is your identification here in court today based" on what you saw at the scene or on what happened at the pre-trial show-up? Burgess first testified that Claude Vickers weighed 300 pounds, that his main purpose for going to Vickers' store was to see if he could recognize Vickers, and that he recognized Vickers "by his size" since "he was reading a paper as I entered and I caught a view of his face." Then the following transpired:

> Q. Is your identification here in court today based on the fact that you saw him there at what you have described as his place of business or as being the man at the airport—or because you are positive that you saw him at the airport?
>
> Q. Do you understand my question; was it clear?
>
> A. Very very little doubt but it was the one and the same.
>
> MR. ASHBURN: All right, that is all of the questions I have.
>
> CROSS EXAMINATION By Mr. Moore on Voir Dire:

> The last answer that I gave to the district attorney was that there was very little doubt as to the identification of this man. You change the location and him sitting down and him standing up at the airport, there is some but very little doubt. You can always have some doubt in different dress and so forth.

Again, Burgess never gave the basis for his in-court testimony. Accordingly, we conclude that the findings and conclusions and order of the trial court following the voir dire examination are not supported by clear and convincing evidence so as to render the in-court identification testimony admissible.

IV

[3] Vickers next assigns as error the trial court's admission of testimony concerning a pre-trial show-up by police captain Gene Goss. Goss was allowed to testify that Mettrick, at one time, identified Vickers as a participant in the conspiracy. Vickers contends (1) that the pre-trial identification procedure, whereby Captain Goss allowed Mettrick to view Vickers through a one-way mirror, was inherently suggestive—a Fourteenth Amendment claim; (2) that a voir dire examination should have been conducted to determine if Vickers' Sixth Amendment right to counsel had been violated; and (3) that the State's failure to obtain a non-testimonial identification order under G.S. 15A-273, *et seq.* required the exclusion of Goss' testimony. First, Vickers did not request a voir dire hearing on this issue. Second, it is not necessary to reach the merits of Vickers' Sixth and Fourteenth Amendment claims nor is it necessary to reach Vickers' claims under G.S. 15A-273 because Mettrick did not himself make an in-court identification. Because Goss was testifying about what Mettrick said, Vickers' objection is misplaced.

The testimony of Goss, nevertheless, should have been excluded. This Court notes, *sua sponte*, that the conspiracy was over, Mettrick having already been placed under arrest, at the time Mettrick identified Vickers as the man at the airport. The conspiracy being over, and the testimony of Goss not fitting into any of the exceptions to the hearsay rule, we conclude that Goss' testimony about what Mettrick said was hearsay, in its classic form, and was inadmissible.

V

[4] Vickers also objects to the admission of evidence taken as a result of searches conducted in and around the airplane. He contends that the searches were conducted without search warrants and without the consent of the defendant, Mettrick. To contest a search and seizure alleged to have been conducted in violation of the Fourth Amendment, Vickers must show that he had an expectation of privacy in the area searched because the right is personal and cannot be asserted by others. *Rawlings v. Kentucky*, 448 U.S. 98, 65 L.Ed. 2d 633, 100 S.Ct. 2556 (1980); *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421, *reh. denied* 439 U.S. 1122, 59 L.Ed. 2d 83, 99 S.Ct. 1035 (1978); *Brown v. United States*, 411 U.S. 223, 36 L.Ed. 2d 208, 93 S.Ct. 1565 (1973); *State v. Cooke*, 54 N.C. App. 33 (1981); *State v. Jordan*, 40 N.C. App. 412, 252 S.E. 2d 857 (1979).

Specifically, in *Brown v. United States*, the Supreme Court stated:

> [I]t is sufficient to hold that there is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

411 U.S. at 229, 36 L.Ed. 2d at 214, 93 S.Ct. at 1569. The record does not show that Vickers was present when the airplane was searched nor does it show that he had any protected interest in the airplane. Moreover, the test set forth in *Brown v. United States* has been applied in *State v. Ervin*, 38 N.C. App. 261, 248 S.E. 2d 91 (1978), which held that a passenger in an automobile has no standing to contest a search of an automobile in which marijuana was being transported, and in *State v. Jordan*, which held that a driver had no reasonable expectation of privacy in the pocketbook of a passenger in his car and therefore had no standing to object to the search.

VI

Vickers next assigns as error the trial court's admission of the extra-judicial statement of his co-defendant, Mettrick, and the trial court's failure to instruct the jury that Mettrick's extra-judicial statements could be considered against Mettrick but could not be considered as evidence against Vickers. Over objections, the trial court admitted testimony from law enforcement officers as to statements made to them by Mettrick. Indeed, the only evidence in the record as to the nature and content of the airplane's cargo were the statements made by Mettrick to these law enforcement officials. Vickers was not present at any time when Mettrick made the various statements to law enforcement officials.

The general rule, set forth in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), and approved by our court in *State v. Slate*, 38 N.C. App. 209, 212, 247 S.E. 2d 430, 432-33 (1978), was stated as follows:

> When two defendants are jointly tried, the extra-judicial confession of one may be received in evidence over the objection of the other *only when* the trial court instructs the jury that the confession is admitted as evidence against the defendant who made it but is not evidence and may not be considered by the jury in any way in determining the charges against his codefendant. *State v. Lynch*, 266 N.C. 584, 146 S.E. 2d 677 (1966); *State v. Bennett*, 237 N.C. 749, 76 S.E. 2d 42 (1953); 2 Stansbury's N.C. Evidence, § 188 (Brandis rev. 1973). Failure to give the required instruction will necessitate a new trial in Slate's case. . . .

We are not unmindful of the fact that Mettrick testified in his own defense and did not in any way implicate Vickers. Consequently, Vickers' rights under the confrontation clause of the Sixth Amendment to the Constitution were not violated. The admission against Vickers, however,

> remained a violation of long established principles of law controlling in this jurisdiction. As to [Vickers], the extra-judicial statement of [Mettrick] was inadmissible hearsay. The extra-judicial statement of [Mettrick] did not become exceptionally admissible as corroborative evidence solely by virtue of the fact that [Mettrick] took the stand and testified.

38 N.C. App. at 212, 247 S.E. 2d at 432.

We are also cognizant that the rules regarding admissibility of statements made by co-conspirators vary from rules regarding statements of co-defendants in non-conspiracy cases.

> According to the general rule, when the State has introduced *prima facie* evidence of a conspiracy, the acts and declarations of each party to it in furtherance of its objectives are admissible against the other members *regardless* of their presence or absence at the time the acts and declarations were done or uttered. [Citations omitted.]

State v. Tilley, 292 N.C. 132, 138, 232 S.E. 2d 433, 438 (1977). The ordinary rules relating to conspiracy cases do not apply in this case because the conspiracy was over at the time Mettrick made his extra-judicial statements. Success or failure or abandonment terminates a conspiracy. *Krulewitch v. United States*, 336 U.S. 440, 93 L.Ed. 790, 69 S.Ct. 716 (1949). Here, the cargo had been delivered, the airplane had been locked, Mettrick had been in Ashe County a day and had been questioned by law enforcement officers.

> Before the acts or declarations of one conspirator can be considered as evidence against his co-conspirators, there must be a showing that "(1) a conspiracy existed; (2) the acts or declarations were made by a party to it and in pursuance of its objectives; and (3) *while it was active*, that is, after it was formed and before it ended." [Citation omitted.]

292 N.C. at 138, 232 S.E. 2d at 438. (Emphasis added.)

On the facts of this case, the ordinary rules governing hearsay evidence control, and Vickers was entitled to an instruction that Mettrick's statements were admissible only against Mettrick and could not be considered against Vickers.

VII

[6] Vickers also argues that his motion for nonsuit should have been allowed. In ruling on Vickers' motion for nonsuit, all the evidence, direct and circumstantial, is considered in the light most favorable to the State. Moreover, the State is entitled to have all contradictions in testimony resolved, and all reasonable inferences made in its favor, in determining whether there is

substantial evidence of the elements of the offense charged. *State v. Jones*, 47 N.C. App. 554, 268 S.E. 2d 6 (1980); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976), 4 Strong, N.C. Index 3d, Criminal Law, § 104, p. 541. Testimony about Mettrick's delivery of marijuana to Ashe County Airport coupled with identification testimony that Vickers was at the airplane when the marijuana was unloaded is sufficient to submit this drug conspiracy case to the jury.

VIII

We have carefully reviewed Vickers' several remaining procedural and evidentiary assignments of error and find no prejudicial error. Moreover, as Vickers' ten additional assignments of error relate to the court's charge to the jury, we do not reach the issues presented therein.

METTRICK'S REMAINING ASSIGNMENTS OF ERROR

IX

[7] Mettrick contends that all of his statements[3] are exculpatory or establish a complete defense entitling him to a nonsuit. We do not agree.

There is evidence from which the jury could find that Mettrick flew his airplane to South America and picked up 5,000 to 10,000 pounds of marijuana, that he later flew to Ashe County Airport where he ordered his crew to open the cargo door so that the marijuana could be unloaded into waiting trucks, and that he then vacuumed the airplane to remove evidence of marijuana. This evidence and all the reasonable inferences therefrom, when considered in the light most favorable to the State, is sufficient to uphold the denial of Mettrick's motion for nonsuit.

Additionally, Mettrick's testimony, corroborated by Florida law enforcement officials, concerning the purpose of transporting

3. Mettrick first said there was no marijuana on the airplane and that he had flown vegetables to Wisconsin; next, he said the presence of marijuana seeds in the airplane could be explained by the fact that it had been purchased in the recent past from a foreign company; and next he said he was working for and transporting marijuana for Florida law enforcement officers who had arranged to apprehend members of a drug ring in Alabama, his original destination. Mettrick also said that he was forced to fly to Ashe County by a hijacker.

the marijuana is no defense to possession and delivery of marijuana in North Carolina.

X

[8] Mettrick next contends the court erred in "admitting testimony of searches and in allowing the products of these searches into evidence." From the record we find evidence that Sheriff Waddell entered the aircraft on the morning of 17 January 1980 with the consent of Mettrick; that upon entry into the cargo compartment, Sheriff Waddell smelled marijuana and then saw several marijuana seeds on the floor. Since the Sheriff was lawfully in the aircraft, seizure without a warrant of contraband in plain view was not unconstitutional. *State v. Legette*, 292 N.C. 44, 55, 231 S.E. 2d 896, 902 (1977). There is also evidence that the vacuuming of the airplane on 18 January 1980 was with Mettrick's consent. The trial court's findings and conclusions on the matters raised by this assignment of error are supported by competent and substantial evidence of record. When supported by evidence, the findings and conclusions of the trial judge on voir dire are binding on the appellate courts. *State v. Phillips*, 37 N.C. App. 202, 204, 245 S.E. 2d 587, 588 (1978).

XI

We have carefully reviewed Mettrick's remaining procedural and evidentiary assignments of error and find no prejudicial error. We find it unnecessary to reach Mettrick's assignments of error relating to the court's charge to the jury.

XII

Having determined that it was inherently prejudicial for the two principal prosecution witnesses to transport the jurors in this case and having addressed the issues that are likely to be raised at the new trial, we reverse the convictions and order a new trial not inconsistent with this opinion.

New trial.

Judge WHICHARD concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.), dissenting.

The majority has determined that it was inherently prejudicial for the two principal prosecution witnesses to transport the jurors in this case and ordered a new trial. They state that *Turner v. Louisiana*, 379 U.S. 466, 13 L.Ed. 424, 85 S.Ct. 546 (1965) is dispositive of the issue and that *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970), supports the conclusion they reach.

In *Macon* the Court acknowledged they were in full accord with the sound principles of constitutional law enunciated in the *Turner* case. However, they found the facts in the *Macon* case did not invoke their application.

In distinguishing *Turner v. Louisiana, supra*, the Court stated:

> "We are in full accord with the sound principles of constitutional law enunciated in the *Turner* case. The facts in the case before us, however, do not invoke their application. In *Turner* the jury was sequestered—not so here. There, the deputies involved were 'in actual charge of the jury.' Here, they were only court officers or bailiffs. There the deputies were in continuous and intimate association with the jurors, eating with them, conversing with them, and doing errands for them throughout a three-day trial. Here, the deputies were not in the presence of the jurors outside the courtroom, had no communication at any time with them, and had no custodial authority over them. The exposure of the jury to these bailiffs was brief, incidental, and without legal significance. Hence, defendant not only fails to show *actual prejudice*—he fails to show circumstances affording any reasonable ground upon which to attack the fairness of the trial or the integrity of the verdict."

State v. Macon, supra at 473, 173 S.E. 2d 290.

In the record in the case *sub judice* it was stipulated that thirty-eight jurors were called from Caldwell County. Sheriff Waddell, of Ashe County, was informed that drivers from the school system were unavailable to drive the activity buses. After finding that Lt. J. D. Parsons and himself were the only qualified drivers in his department, Waddell and Parsons drove the two buses with the prospective jurors from Caldwell County to Ashe

County on May 19, 1980. Parsons also drove the jurors to lunch that day. After the jury was selected, Parsons drove one of the buses that made the return trip to Caldwell County. On May 20, 1980, Sheriff Waddell transported the jurors back to Ashe County. The trip between Caldwell County and Ashe County was one hour and forty-five minutes. The District Attorney had announced that Waddell and Parsons would be called as witnesses for the state. These facts were made known to the trial court on the morning of May 20, 1980.

The defendants moved for a mistrial and the trial court reopened *voir dire* on May 20, 1980; this being after the jury had been empaneled but before the presentation of any evidence.

At the special *voir dire* hearing, the jurors were questioned by the District Attorney, counsel for the defendants, and the trial court. The jurors all agreed that neither the Sheriff nor his deputies mentioned the case nor would the fact that Waddell and Parsons testifying influence their ability to render an impartial decision.

On 20 May 1981 the trial court made findings of fact which included that the motions for a mistrial were made before any evidence was presented, that none of the jurors had previously known the sheriff or his deputies, that many of the jurors did not hear anything that was said by the officers, that Sheriff Waddell was attempting to provide transportation in the fulfillment of his duties, and that the empaneled jurors had previously been instructed not to discuss the case with anyone. Based on these findings the trial court concluded that the defendants had not been prejudiced and the motions for mistrial were denied. It should be noted that from 20 May 1981 until the conclusion of the trial on 30 May 1981, there is no evidence of any out-of-court contact between these officers and members of the jury panel.

In *State v. Hart*, 226 N.C. 200, 203, 37 S.E. 2d 487, 489 (1946), the Court held:

> "The decisions by the various courts have not been in accord, but we are now of the opinion that the weight of authority is to the effect that an officer is not necessarily disqualified from acting as custodian of a jury in a criminal case because he happens to be a witness in the case. It is our opinion, and

we so hold, that actual prejudice must be shown before the result of the trial can be, as a matter of right, disturbed. . . . [T]he findings of the trial judge upon the evidence and facts are conclusive and not reviewable."

In my opinion, this case does not present circumstances in which prejudice will be conclusively presumed under the principles of *Turner v. Louisiana, supra,* but rather in which prejudice must be shown under the principles of *State v. Hart, supra.*

JANICE G. SHREVE, TONY WILLIAM SHREVE v. W. T. COMBS, JR., SARAH S. COMBS, AND ANTHONY R. COMBS

No. 8017SC644

(Filed 6 October 1981)

1. Fraud § 1— elements of fraud

The elements which must be established to prove actual fraud are: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

2. Fraud § 12— fraud in sale of property—misrepresentation as to encumbrances—sufficiency of evidence

Plaintiffs' evidence was sufficient for the jury on the issue of fraud by defendant attorney in the sale of property to plaintiffs where it tended to show that defendant told plaintiffs it would be no problem to get a clear, free title to the property when he knew that the property was heavily encumbered; defendant conveyed the property to plaintiffs while the property was heavily encumbered; defendant knew or had reason to believe that plaintiffs intended to construct a house on the property and that they would have difficulty securing construction financing because of the encumbrances; plaintiffs began construction of a house on the property but were unable to acquire a construction loan to complete the house because of the encumbrances and were unable to resume construction until a later time; the items originally constructed by plaintiffs had to be reconstructed at additional expense; and the house ultimately cost plaintiffs considerably more, due to the rise in building costs, than it would have cost had plaintiffs been able to secure construction financing upon their initial attempt.

3. Trial §§ 51, 53— motion to set aside verdict—contrary to evidence—contrary to law

The trial court did not abuse its discretion in refusing to set aside a verdict on the ground that it was contrary to the greater weight of the evidence; nor did the court err in refusing to set aside the verdict on the ground it was

contrary to the law where the motion did not specify the error of law on which it was grounded.

4. Fraud § 11— failure to employ other attorney for title search—relevancy

In an action to recover for fraud by defendant attorney in the sale of property to plaintiffs by misrepresentations about or concealment of encumbrances on the property, testimony by plaintiffs that they did not employ any other attorney to search the title because the price was supposed to include a survey, deed and title search was relevant to establish the reasonableness of plaintiffs' reliance on defendant attorney's representations or concealment.

5. Fraud § 11— fraud in sale of land—encumbrances—evidence relevant on issue of damages

In an action to recover for fraud by defendant attorney in the sale of property to plaintiffs by misrepresentations about or concealment of encumbrances on the property, evidence relating to (1) the difference in cost of construction resulting from the delay in securing financing occasioned by existence of the encumbrances, (2) the deterioration during the delay of the work performed prior to plaintiffs' attempts to secure financing, (3) plaintiffs' efforts to secure financing, and (4) the necessity of plaintiffs' securing financing *is held* relevant and proper on the issue of the damages plaintiffs sustained as a result of defendant's fraud.

6. Fraud § 13; Trial § 40— action for fraud—sufficiency of issue

An issue as to fraud submitted to the jury was sufficient, when considered in the light of the court's instructions to the jury, even though it failed to set forth all of the elements of fraud.

7. Fraud § 13; Damages § 11.1— action for fraud—punitive damages

Submission of an issue as to punitive damages was proper in an action to recover for fraud by defendant in the sale of property to plaintiffs.

8. Damages § 17.7; Fraud § 13— punitive damages for fraud—instructions on wanton conduct

In an action to recover for fraud of defendant attorney in the sale of property to plaintiffs by misrepresenting that the property was unencumbered or concealing the encumbrances, the trial court did not err in instructing the jury that, in determining whether defendant's conduct was wanton and thus supported an award of punitive damages, it could consider evidence that the female plaintiff made weekly requests of defendant for a deed to the property and that defendant laughed at her when she threatened legal action and on one occasion hung up the phone when she called.

9. Fraud § 13; Trial § 38.1— reasonableness of reliance on representation—requested instruction given in substance

The trial court in a fraud case did not err in failing to give an instruction requested by defendant relating to the reasonableness of reliance on a representation and the duty of a representee to use due diligence to ascertain the facts where instructions given by the court contained the substance of that requested.

10. Trial § 45— denial of plaintiffs' motion to reduce verdict in their favor

The trial court in an action for fraud did not abuse its discretion in refusing to reduce a verdict for plaintiffs in the sum of $25,000 for actual damages when plaintiffs' attorney stated that the figure returned "may exceed the evidence by about a thousand" and moved "that that amount be reduced to comply with the actual figures."

11. Fraud § 12— insufficient evidence of fraud

In an action against an attorney, his wife and his son to recover for fraud in the sale of property to plaintiffs by misrepresenting that the property was unencumbered, plaintiffs' evidence was insufficient for the jury on the issue of fraud by the son where it tended to show that the attorney and his wife conveyed the property to the son for no consideration in order to defeat judgment creditors and that the son executed a warranty deed to plaintiffs which represented the property to be free and clear of encumbrances when he knew it was encumbered, but there was no evidence that the son executed the deed to plaintiffs pursuant to a calculation and an intent to deceive plaintiffs. Nor was the evidence sufficient for the jury on the issue of fraud by the wife where it failed to show any false representation made by her to plaintiffs or any calculation or intent by her to deceive plaintiffs.

APPEAL by plaintiffs and defendant W. T. Combs, Jr., from *Cornelius, Judge.* Judgment entered 8 February 1980 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 9 February 1981.

Plaintiffs alleged that defendants, with intent to defraud, conspired to execute and deliver to or on behalf of plaintiffs a deed to real property, containing a warranty against encumbrances, in exchange for the sum of $15,000; that the property was in fact subject to several encumbrances; and that plaintiffs relied on defendants' false representations and warranty to their detriment. They further alleged that defendant W. T. Combs, Jr., acted as their attorney in the transaction.

Defendants' answer denied the essential allegations of the complaint. Defendants each failed to answer requests for admission served by plaintiffs. Plaintiffs offered evidence. Defendants did not.

Plaintiffs appeal from directed verdicts in favor of defendants Sarah S. Combs and Anthony R. Combs at the close of plaintiffs' evidence. Defendant W. T. Combs, Jr., appeals from a judgment entered on a verdict finding that he defrauded plaintiffs and granting plaintiffs $25,000 actual damages and $100,000 punitive damages.

Harrington, Stultz and Maddrey, by Thomas S. Harrington, for plaintiffs.

McElwee, Hall, McElwee and Cannon, by John E. Hall, for defendants.

WHICHARD, Judge.

APPEAL OF DEFENDANT W. T. COMBS, JR.

I. Denial of Motions for Directed Verdict and Judgment Notwithstanding the Verdict

[1] Defendant W. T. Combs, Jr., assigns error to the denial of his motion for directed verdict at the close of plaintiffs' evidence and of his motion for judgment notwithstanding the verdict. The motions present the question whether the evidence, in the light most favorable to plaintiffs, constituted " 'any evidence more than a scintilla' to support plaintiff[s'] prima facie case in all its constituent elements." *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 638, 640, 272 S.E. 2d 357, 360 (1980), and authorities cited. The claim alleged is for fraud. The "constituent elements" which must be established to prove actual fraud are: (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1981).

The pertinent evidence, in the light most favorable to plaintiffs, including stipulations, testimony, and unanswered requests for admissions, which are deemed admitted by G.S. 1A-1, Rule 36, was as follows:

Plaintiff Janice Shreve contacted defendant W. T. (Bill) Combs, Jr., regarding real property she wished to purchase. Defendant W. T. Combs, Jr., indicated the property was his and was for sale. The parties agreed on a purchase price of $15,000, which would include the survey and title papers. Plaintiffs understood title papers to mean "[p]apers certifying that the land was clear." Plaintiffs did not employ an attorney to search the title, because they knew defendant W. T. Combs, Jr., was an attorney and "he was suppose[d] to run the title search and include that in the price of the land." Plaintiff Tony Shreve, husband of

plaintiff Janice Shreve, had asked defendant W. T. Combs, Jr., "if he could get a clear, free title to [the property]"; and defendant W. T. Combs, Jr., had said, "Sure, no problem."

Plaintiff Janice Shreve's father paid defendant W. T. Combs, Jr., the agreed purchase price with the understanding that plaintiffs would repay him when able. Plaintiffs considered the money advanced a loan. After the purchase price was paid, plaintiff Janice Shreve contacted defendant W. T. Combs, Jr., on numerous occasions to request delivery of the deed. On one occasion he laughed at her when she threatened to file suit if he did not give her the deed. On another occasion he hung up on her when she called. After several months during which she "just kept going up there daily and threatening to take out some kind of process," defendant W. T. Combs, Jr., finally delivered to her a deed conveying the property, executed by his son, defendant Anthony R. Combs. Plaintiffs dealt solely with defendant W. T. Combs, Jr., in purchasing the property, and the check for the purchase price went to defendant W. T. Combs, Jr. Defendant W. T. Combs, Jr., was at all times during negotiations for the sale, the real owner of the property and was the only one who took part in any negotiations or transactions for the sale. Defendant W. T. Combs, Jr., prepared the deed conveying the property to plaintiffs.

Defendant W. T. Combs, Jr., did not at any time mention the existence of any encumbrances against the property. The deed which he prepared conveying the property to plaintiffs was a "warranty deed." In fact, however, the property was at the time heavily encumbered. Defendant W. T. Combs, Jr., knew of the encumbrances when the deed was executed. He also knew at that time that plaintiff Janice Shreve intended to construct a residence on the land, and that the encumbrances "ma[d]e it a practical impossibility for the plaintiffs to secure any type of conventional loan for construction."

Plaintiffs were not aware of these encumbrances when the purchase price was paid or when the deed was delivered. They would not have bought the property had they known of the encumbrances. They discovered the encumbrances after commencing construction of a house on the land and expending more than $4,300 of their joint money to grade the driveway and yard and

have basement walls constructed. Because of the encumbrances, plaintiffs were unable to acquire a construction loan to complete the house. They thus were unable to resume construction until a later time. In the interim the basement walls and driveway caved in, necessitating reconstruction at additional expense; and building costs in the area escalated, causing an estimated increase of $19,951 in the cost of building the house.

[2] The evidence recited constituted the requisite "any evidence more than a scintilla to support plaintiff[s'] prima facie case in all its constituent elements." *Hunt*, 49 N.C. App. at 640, 272 S.E. 2d at 360. Both delivery of the warranty deed and defendant W. T. Combs, Jr.'s statement that it would be no problem to get a clear, free title to the property, made with knowledge that the property was heavily encumbered, constituted evidence of false representations of a material fact. Defendant W. T. Combs, Jr.'s knowledge of the encumbrances and failure to disclose them was evidence of concealment of a material fact. The evidence thus established the first element of fraud.

The evidence that defendant W. T. Combs, Jr., knew or had reason to believe that plaintiff Janice Shreve intended to construct a house on the property, that she probably would not purchase the property unless she could build on it, and that she would have difficulty securing construction financing because of the encumbrances, was sufficient to indicate that the representations were reasonably calculated to deceive and made with intent to deceive. The evidence thus established the second and third elements of fraud.

Plaintiffs' commencement, in reliance on the representations or concealment, of construction of a house which they would be unable to complete without borrowed funds, which funds the encumbrances would likely render unobtainable, indicated that the representations or concealment did in fact deceive plaintiffs. The evidence thus established the fourth element of fraud.

Finally, the evidence that (1) the items constructed by plaintiffs with their joint money, prior to their attempt to secure construction financing, had to be reconstructed at additional expense, and (2) the house would ultimately cost plaintiffs considerably more, due to the rise in building costs, than it would have had they been able to secure construction financing upon their initial

attempt, showed that the representations or concealment resulted in damage to plaintiffs. The evidence thus established the fifth element of fraud.

Plaintiffs' evidence was, then, sufficient to establish against defendant W. T. Combs, Jr., all elements of actual fraud. The motions for directed verdict and judgment notwithstanding the verdict thus were properly denied.

II. Denial of Motion to Set Aside the Verdict

[3] The first ground for the motion to set aside the verdict, that it was contrary to the greater weight of the evidence, invoked exercise of the court's discretion. *Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977); G.S. 1A-1, Rule 59. We find no abuse of that discretion in denial of the motion as it related to the weight of the evidence. The second ground for the motion, that the verdict was contrary to the law, "is not a matter of discretion. In such a situation, 'the aggrieved party may appeal, provided the error is specifically designated.' " *Britt*, 291 N.C. at 635, 231 S.E. 2d at 611. The motion here did not specify the error of law on which it was grounded. Moreover, we find no error. The motion thus was properly denied.

III. Evidentiary Rulings

[4] Plaintiff Janice Shreve was asked on direct examination why she had not employed an attorney. She testified, over objection: "Along with the purchase price for the land was to be included my survey and my deed and my title papers and that was also included in the price of the land and so I was getting all of the legal documents that I needed for the property." Plaintiff Tony Shreve also testified over objection that he did not employ any other attorney to search the title, "[b]ecause . . . [defendant W. T. Combs, Jr.] was suppose[d] to run the title search and include that in the price of the land." When asked why he did not talk to defendant W. T. Combs, Jr., any more than he did, plaintiff Tony Shreve responded, over objection, "I never did get a chance, I never could get in touch with him."

Plaintiffs had alleged that defendant W. T. Combs, Jr., was a licensed attorney and was at the time acting as their attorney. No

rule of evidence precluded their offer of proof of this allegation. The evidence was clearly relevant as tending to establish the reasonableness of plaintiffs' reliance on defendant W. T. Combs, Jr.'s representations or concealment. *See* 1 Stansbury's North Carolina Evidence §§ 77-80 (Brandis Rev. 1973).

[5] Defendant W. T. Combs, Jr., also contends, in the portion of his brief relating to jury instructions, that the court erred in various other evidentiary rulings. The manner in which these arguments are presented violates Appellate Rule 28(b)(3), which requires that "[e]ach question shall be separately stated." Further, the arguments are without merit. The evidence in question related to (1) the difference in cost of construction resulting from the delay in securing financing occasioned by existence of the encumbrances, (2) the deterioration during the delay of the work performed prior to plaintiffs' attempts to secure financing, (3) plaintiffs' efforts to secure financing, and (4) the necessity of plaintiffs' securing financing. This evidence was relevant and proper on the issue of the damages plaintiffs sustained as a result of defendant W. T. Combs, Jr.'s alleged fraud.

IV. Exceptions to Issues

A. Fraud

[6] The first issue submitted to the jury was as follows: "Did the defendant, W. T. Combs, Jr., make a false representation, with the intent that it should be acted upon that the . . . land was free and clear of all encumbrances and did the plaintiffs . . . act upon the representation and suffer damages to [sic] their reliance upon the misrepresentation?" Defendant W. T. Combs, Jr., assigns error to the framing of this issue, contending essentially that it failed to set forth all elements of actionable fraud and failed to require that the false representations must be of a past or present fact.

The Rules of Civil Procedure require only that "[i]ssues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues." G.S. 1A-1, Rule 49. No particular form is required. Further, examination of the court's instructions to the jury establishes that the court fully and accurately charged as to all elements of actionable fraud, and charged that the false representations must relate "to some

material past or existing fact." The issue, considered in the light of the jury instructions, was sufficient as framed. The jury could not have been misled thereby to defendant W. T. Combs, Jr.'s prejudice.

B. Punitive Damages

[7] Defendant assigns error to submission of the fifth issue, which was as follows: "In your discretion, what amount of punitive damages, if any, should be awarded to the plaintiffs?" Our Supreme Court has stated:

> In North Carolina, actionable fraud *by its very nature* involves intentional wrongdoing. As defined . . . in *Davis v. Highway Commission*, 271 N.C. 405, 408, 156 S.E. 2d 685, 688 (1967): " 'Fraud is a malfeasance, a positive act resulting from a wilful intent to deceive . . . .' " [Citation omitted.] The punishment of such intentional wrongdoing is well within North Carolina's policy underlying its concept of punitive damages.

Newton v. Insurance Co., 291 N.C. 105, 113, 229 S.E. 2d 297, 302 (1976). The Court of Appeals has stated: "Fraud is a tort for which punitive damages are allowed." *Mesimer v. Stancil*, 45 N.C. App. 533, 534, 263 S.E. 2d 32, 32 (1980). In view of the foregoing authorities and the evidence of fraud presented here, submission of the issue was proper.

V. Jury Instructions

Defendant W. T. Combs, Jr., contends the following instruction to the jury was error: "Evidence has been presented that the plaintiffs purchased the property to build a home and that the defendant knew that this was their intention." He argues that "[t]he record is void of any such evidence."

Defendant W. T. Combs, Jr., by his failure to answer or object to plaintiffs' requests for admission, admitted "[t]hat [he] knew prior to the payment of the purchase price to [him] for the subject property that it was the intention of the plainfiff, Janice G. Shreve, to construct a residence for herself and her family on the subject premises." G.S. 1A-1, Rule 36(a). His knowledge of that intention was thereby conclusively established for purposes

of this action. G.S. 1A-1, Rule 36(b). This contention thus is without merit.

[8] Defendant also contends the court erred in instructing the jury as follows:

> [For punitive damages to be awarded] [t]here must be an element of aggravation accompanied by . . . conduct as causes injury, as when the wrong is done wilfully with actual malice, with circumstances of rudeness, insult, enmity, repression or in a manner which expresses a reckless or wanton disregard of the plaintiffs' rights.
>
> Evidence has been introduced that the plaintiffs made weekly request of the defendant to deliver a deed for several months and when she threatened legal action that the defendant laughed at her and on one occasion hung up the phone when she called. It is for you . . . to determine . . . whether this conduct is wanton.

Although the acts referred to occurred subsequent to defendant W. T. Combs, Jr.'s oral representation that the property was unencumbered, they occurred prior to the misrepresentation made by his delivery to plaintiffs of a warranty deed. Further, "[s]ubsequent acts and conduct are competent on the issue of original intent and purpose." *Early v. Eley*, 243 N.C. 695, 701, 91 S.E. 2d 919, 923 (1956), *citing Braddy v. Elliott*, 146 N.C. 578, 60 S.E. 507 (1908). The contention is without merit.

Defendant W. T. Combs, Jr., further contends the court erred in instructing the jury that (1) he sought to sell the property and (2) plaintiffs purchased the property. He argues that plaintiffs sought to purchase the property rather than his seeking to sell it; and that plaintiff Janice Shreve's father, rather than plaintiffs, purchased the property.

The evidence that defendant W. T. Combs, Jr., met and talked with plaintiffs about the property on numerous occasions, and that he went on the property with them, fully supported the instruction that he sought to sell. While the father of plaintiff Janice Shreve did pay for the property, evidence that plaintiffs considered the money paid a loan fully supported the instruction that plaintiffs purchased the property. The contention is without merit.

[9] Finally, defendant W. T. Combs, Jr., requested the following instruction:

> The Court instructs you as a matter of law that when the parties to a transaction deal at arms length and the purchaser has full opportunity to make inquiry but neglects to do so and the seller resorted to no artifice, trick or sham which was reasonably calculated to induce the purchaser to forego investigation [,] action in fraud and deceit will not lie. The right to rely on representations is inseparably connected with the correlative problem of the duty of a representee to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest.

The court instructed as follows:

> [T]he plaintiffs must have relied upon the representation and acted upon it and the reliance must have been reasonable. The plaintiffs must be diligent with respect to the representations made to them. In other words, the law should suppress fraud but on the other hand the law should not encourage negligence and inattentiveness to one's own interest. If the misrepresentation is of a character to induce action by persons of ordinary prudence under ordinary circumstances and the plaintiffs were reasonable and prudent in relying on the representation this requirement is met [;] however, when the circumstances are such that the plaintiffs should have reasonably known the truth and should not have been deceived they may not recover. When the parties deal at arm's length and the plaintiffs had full opportunity to make inquiry but neglect to do so and the defendant resorts to no trickery calculated to induce the other party to forego investigation, there is no fault.

The instruction given contained the substance of that requested. This is all the law requires. "The court is not required to charge the jury in the precise language requested so long as the substance of the request is included." *Love v. Pressley*, 34 N.C. App. 503, 513, 239 S.E. 2d 574, 581 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). We perceive no prejudice to

defendant W. T. Combs, Jr., in the failure to give the instruction precisely as requested.

VI. Denial of Motion to Reduce Actual Damages

[10] The jury returned a verdict for plaintiffs in the sum of $25,000 on the issue of actual damages. *Plaintiffs'* attorney stated that the figure returned "may exceed the evidence by about a thousand" and moved "that that amount be reduced to comply with the actual figures." *Defendant* assigns error to the denial of *plaintiffs'* motion.

"A court may not, without the assent of the interested party, reduce a verdict." *Brown v. Griffin*, 263 N.C. 61, 65, 138 S.E. 2d 823, 826 (1964). Plaintiffs were the interested parties here, and by making the motion they assented to the reduction. It thus would not have been error to grant the motion.

While it would not have been error, given plaintiffs' assent, to grant the motion, neither was it error to deny it. "[I]n all cases tried by a jury the judgment must be supported by and conform to the verdict in all substantial particulars." *Russell v. Hamlett*, 261 N.C. 603, 605, 135 S.E. 2d 547, 549 (1964). "The judgment should . . . follow the verdict." *Brown*, 263 N.C. at 65, 138 S.E. 2d at 826. Given plaintiffs' assent, the grant or denial of the motion was a matter for the trial court's discretion. *See Goldston v. Chambers*, 272 N.C. 53, 59, 157 S.E. 2d 676, 680 (1967). No abuse is apparent in its exercise of that discretion to deny the motion.

APPEAL OF PLAINTIFFS

I. Grant of Motion for Directed Verdict in Favor of Defendant Anthony R. Combs

[11] Plaintiffs assign error to the grant of defendant Anthony R. Combs' motion for directed verdict at the close of plaintiffs' evidence. The evidence relating to defendant Anthony R. Combs, in the light most favorable to plaintiffs, was as follows:

A. Stipulations. It was stipulated that (1) defendants W. T. Combs, Jr., and wife Sarah S. Combs conveyed property to defendant Anthony R. Combs, (2) defendant Anthony R. Combs by

warranty deed conveyed a portion of that property to plaintiff Janice Shreve, (3) the portion conveyed was heavily encumbered, both when it was conveyed to defendant Anthony R. Combs and when he conveyed it to plaintiff Janice Shreve, and (4) defendant Anthony R. Combs is the son of defendants W. T. Combs, Jr., and wife Sarah S. Combs.

B. Testimonial Evidence. Plaintiff Janice Shreve testified that the deed was from defendant Anthony R. Combs, but that she had never been told that he was the owner of the property, had never had any dealings with him, and had not even seen him. She testified: "I sought out [W. T.] Combs [Jr.] to buy the property, neither [W. T.] Combs [Jr.,] Sarah Combs nor Anthony Combs sought me out." She further testified:

> [The deed] was prepared by Sarah, Bill, and Anthony Combs.
>
> . . . Bill Combs conveyed the property to me. This paper says Anthony R. Combs, but I did not see or talk to Anthony Combs. I deal [sic] with Bill Combs. When I received the deed that is where it said it came from, but I did not purchase the land from [Anthony Combs], I did not see him.
>
> . . . .
>
> As far as I am concerned I purchased the land from Bill Combs, that is who the check went to and who I talked to about the purchase of the property and who told me what the land sold for and as far as I was concerned my dealing was with [Bill] Combs.
>
> This says that I claim it from Anthony R. Combs.

Plaintiff Tony Shreve testified: "I don't know Anthony Combs or Sarah Combs and never talked to them." There was no other testimonial evidence relating to defendant Anthony R. Combs.

C. Admissions. By his failure to answer plaintiffs' requests for admissions, defendant Anthony R. Combs made the following pertinent admissions: (1) there was no consideration for the conveyance from the other defendants to him, (2) he was not the actual owner of the property, (3) the property was placed in his name by defendant W. T. Combs, Jr., or defendants W. T. Combs, Jr., and Sarah S. Combs for the purpose of defeating or attempt-

ing to defeat judgment creditors or potential judgment creditors, (4) he knew when he received the property and when he conveyed it that it was subject to encumbrances, (5) the deed he executed provided the property was free and clear of encumbrances at the time of conveyance, (6) the property was not in fact at that time free and clear of encumbrances, and (7) his execution of the deed representing the property to be unencumbered when in fact it was encumbered was an act which was deliberate, wrongful, and deceptive.

Through the stipulations, testimony, and admissions, plaintiffs presented evidence that defendant Anthony R. Combs made a false representation of a material fact by executing the warranty deed which represented the property to be free and clear of encumbrances when he knew it was not. The evidence set forth above in defendant W. T. Combs, Jr.'s appeal indicated that this misrepresentation deceived plaintiffs and plaintiffs were damaged thereby. Therefore, plaintiffs presented evidence relating to defendant Anthony R. Combs of the first, fourth, and fifth elements of actual fraud. *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E. 2d 674, 677 (1980).

Plaintiffs did not, however, present evidence relating to defendant Anthony R. Combs of the second and third elements, that the misrepresentation was "reasonably calculated to deceive" and "made with intent to deceive." *Id.* Defendant Anthony R. Combs' admission that his parents conveyed the property to him to defeat or attempt to defeat judgment creditors or potential judgment creditors presents no evidence of *his* calculation or intent to deceive *the plaintiffs*. While he admitted that execution of the deed was wrongful and deceptive, he did not admit having knowledge of the wrongful or deceptive nature of his act prior to or contemporaneously with execution of the deed. Thus, these admissions do not contain evidence that defendant Anthony R. Combs executed the deed pursuant to a calculation and with intent to deceive plaintiffs.

Neither the stipulations, the testimony, nor the admissions contain any evidence in any way indicative of defendant Anthony R. Combs' state of mind when he executed the deed to plaintiffs. The evidence thus fails to establish against him the second and third elements of actual fraud, that his representations were

"reasonably calculated to deceive" and "made with intent to deceive." *Id.* The motion for directed verdict in his favor thus was properly granted.

II. Grant of Motion for Directed Verdict in Favor of Defendant Sarah S. Combs

Plaintiffs assign error to the grant of defendant Sarah S. Combs' motion for directed verdict at the close of plaintiffs' evidence. The evidence relating to defendant Sarah S. Combs, in the light most favorable to plaintiffs, was as follows:

A. Stipulations. The stipulations set forth above in relation to defendant Anthony R. Combs are also the pertinent stipulations in relation to defendant Sarah S. Combs.

B. Testimonial Evidence. Plaintiff Janice Shreve testified that (1) when she first called the office of defendant W. T. Combs, Jr., to inquire about the property, defendant Sarah S. Combs answered the phone, (2) she believed that when she went by the office of defendant W. T. Combs, Jr., to pick up the deed, defendant Sarah S. Combs gave it to her, (3) defendant Sarah S. Combs did not tell her not to check the title, (4) defendant Sarah S. Combs did not seek her out to purchase the property, and (5) the deed "was prepared by Sarah, Bill and Anthony Combs." Plaintiff Tony Shreve testified: "I don't know Anthony Combs or Sarah Combs and have never talked to them." The father of plaintiff Janice Shreve testified that he had talked with defendant Sarah S. Combs. He stated: "She said that she did not know what Bill [defendant W. T. Combs, Jr.] was doing. She did not know half the time what he done [sic] and that was all I said to her about it." There was no other testimonial evidence relating to defendant Sarah S. Combs.

C. Admissions. By her failure to answer plaintiffs' requests for admission, defendant Sarah S. Combs made the following pertinent admissions: (1) she executed the deed from herself and defendant W. T. Combs, Jr., to their son, defendant Anthony Combs; (2) she typed that deed; (3) she also typed the deed from defendant Anthony R. Combs to plaintiff Janice Shreve; (4) she knew of no consideration for the deed from herself and defendant W. T. Combs, Jr., to defendant Anthony R. Combs; (5) at the time

of the conveyance from defendant Anthony R. Combs to plaintiff Janice Shreve, defendant Anthony R. Combs was not the real owner of the property; (6) defendant Anthony R. Combs did not receive the purchase price for the property conveyed to plaintiff Janice Shreve; (7) at the time of the conveyance from herself and defendant W. T. Combs, Jr., to defendant Anthony R. Combs, the property conveyed was heavily encumbered; and (8) at the time of execution of the deed from defendant Anthony Combs to plaintiff Janice Shreve, she knew of the existence of these encumbrances.

We held above that the evidence relating to defendant Anthony R. Combs failed to establish against him the second and third elements of actual fraud, and that the motion for directed verdict in his favor thus was properly granted. The evidence relating to defendant Sarah S. Combs did not even establish a false representation made by her to plaintiffs and was even less indicative of the second and third elements of actual fraud than that relating to defendant Anthony R. Combs. It follows that the motion for directed verdict in favor of defendant Sarah S. Combs also was properly granted.

RESULT

In the appeal of defendant W. T. Combs, Jr., no error.

In the appeal of plaintiffs, affirmed.

Chief Judge MORRIS and Judge MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. DONALD DALE COOKE

No. 8026SC1173

(Filed 6 October 1981)

1. Searches and Seizures §§ 10, 13— warrantless search—no probable cause—contents of suitcase properly suppressed

Officers did not have probable cause to search defendant's suitcase without a warrant at an airport where the evidence relied on by the officers was (1) that codefendant was "acting nervous" and agitated while struggling to fit a suitcase into an airport locker; (2) that defendant walked past codefendant at the locker without acknowledging him even though the police had seen

them talking together earlier; (3) the codefendant was carrying, and had an airline baggage claim for, a suitcase with defendant's name on it; (4) that after the police had stopped codefendant, defendant appeared and, when questioned, defendant denied ownership of the suitcase with his name on it; and (5) that codefendant and defendant left the scene to go to the bathroom giving the appearance of flight, since this evidence failed to support a reasonable suspicion that codefendant and defendant were involved in any criminal activity. Further, there were no exigent circumstances to justify the search of the suitcases without first obtaining a warrant as the suitcases were in the possession and control of the police officers and neither defendant nor codefendant gave their consent to the search of both suitcases.

2. Searches and Seizures § 15— warrantless search—denial of ownership of suitcase—no abandonment

Where defendant entrusted the safekeeping of his suitcase with codefendant and codefendant told police he could not consent to the search of defendant's suitcase because it was not codefendant's, defendant had not relinquished his expectations of privacy in the contents of the suitcase through his lack of actual possession. Nor was defendant's disclaimer of ownership an abandonment of his Fourth Amendment rights to privacy in its contents as the threat that an illegal search was about to take place precluded a finding that defendant's denial of ownership was a voluntary abandonment.

Judge MARTIN (Robert M.) dissenting.

APPEAL by the State from *Burroughs, Judge.* Order entered 8 February 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 April 1981.

The defendant was charged with possession with intent to sell and deliver controlled substances, to wit: Lysergic Acid Diethylamid (LSD) and Methaqualone, and was also charged with possession of LSD in violation of the North Carolina Controlled Substances Act, G.S. 90-95. Prior to trial, defendant moved to suppress this evidence which he alleged was taken from his suitcase pursuant to an unlawful, warrantless search and seizure at Douglas Municipal Airport in Charlotte, North Carolina. On 8 February 1980, a suppression hearing was held, and, after hearing testimony presented by the State and the defendant, the trial court ordered the evidence suppressed. The State is before us on appeal from that order.

Attorney General Edmisten, by Special Deputy Attorney General Richard N. League, for the appellant State.

J. Marshall Haywood and James H. Carson, Jr., for the defendant appellee.

BECTON, Judge.

[1] The State's only assignment of error is that the trial judge erred in suppressing the evidence found in defendant's suitcase. The State argues that probable cause and exigent circumstances existed for the law enforcement officers[1] to search Cooke's suitcase without a warrant. In addition, the State contends that defendant Cooke had no legitimate expectation of privacy in the suitcase because of his denial of ownership; and that Cooke, therefore, lacked standing to challenge the legality of the search.

The scope of our review is to determine whether the trial judge's findings of fact are supported by some competent evidence in the record, and whether those findings support the judge's ultimate conclusions of law. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934, 29 L.Ed. 2d 715, 91 S.Ct. 2266 (1971).

I

A. The testimony at the suppression hearing does not support the State's position that probable cause and exigent circumstances existed to justify the warrantless search of Cooke's suitcase. The evidence relied upon by the State to establish probable cause is the testimony (1) that Richard Turney was "acting nervous" and agitated while struggling to fit a suitcase into an airport locker; (2) that Donald Cooke walked past Turney at the locker without acknowledging him even though the police had seen them talking together earlier; (3) that Turney was carrying, and had an airline baggage claim for, a suitcase with Cooke's name on it; (4) that after the police had stopped Turney, Cooke appeared and, when questioned, Cooke denied ownership of the suitcase with his name on it; and (5) that Turney and Cooke left the scene to go to the bathroom giving the appearance of flight.

Probable cause to search and seize requires facts and circumstances within the police officer's knowledge based on reasonable and trustworthy information that a search of a particular area will reveal objects being sought in connection with

1. The search and seizures were made by Charlotte Police Officer, D. R. Harkey, and North Carolina State Bureau of Investigation Agent, J. A. Davis, who were conducting a general narcotics investigation at Douglas Municipal Airport.

criminal activity or objects which will aid the police in apprehending and convicting a criminal offender. *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). Because the police admitted that they had no information implicating either Cooke or Turney in any type of criminal activity,[2] we summarily reject the State's "probable cause" argument which includes as one of its premises the drug agents' reasonable and articulable suspicion that Cooke was engaged in criminal activity.[3]

The United States Supreme Court's decision in *Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980) is dispositive of the "reasonable and articulable suspicion" and the "exigent circumstances" arguments advanced by the State. We set forth fully the Supreme Court's recitation of the facts in *Reid* because they are strikingly similar to the facts in this case.

> The petitioner arrived at the Atlanta Airport on a commercial airline flight from Fort Lauderdale, Fla. [a city known to be a principal place of origin for illegal drugs], in the early morning hours of August 14, 1978. The passengers left the plane in a single file and proceeded through the concourse. The petitioner was observed by an agent of the DEA, who was in the airport for the purpose of uncovering illicit commerce in narcotics. Separated from the petitioner by several persons was another man, who carried a shoulder bag like the one the petitioner carried. As they proceeded through the concourse past the baggage claim area, the petitioner occasionally looked backward in the direction of the second man. When they reached the main lobby of the terminal, the second man caught up with the petitioner and spoke briefly with him. They then left the terminal building together.
>
> The DEA agent approached them outside of the building, identified himself as a federal narcotics agent, and asked them to show him their airline ticket stubs and identification,

2. Officer Harkey testified: "We had received no information about either of them. We had no reason to believe there was heroin, cocaine, marijuana, LSD or MDA in either of the two bags."

3. The State argued that "[t]he officers were dealing with persons who, on the basis of specific actions and objective appearances, looked suspicious, a relevant factor in determining probable cause."

> which they did. The airline tickets had been purchased with the petitioner's credit card, and indicated that the men had stayed in Fort Lauderdale only one day. According to the agent's testimony, the men appeared nervous during the encounter. The agent then asked them if they would agree to return to the terminal and to consent to a search of their persons and their shoulder bags. The agent testified that the petitioner nodded his head affirmatively, and that the other responded, "Yeah, okay." As the three of them entered the terminal, however, the petitioner began to run and before he was apprehended, abandoned his shoulder bag. The bag, when recovered, was found to contain cocaine.

Id. at 439, 65 L.Ed. 2d at 892-93, 100 S.Ct. 2752-53.

The Supreme Court concluded in *Reid* (1) "that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances"; . . . [and (2) that the agent's belief that Reid fit the drug courier profile was] "too slender a reed to support the seizure in this case." *Id.* at 441, 65 L.Ed. 2d at 894, 100 S.Ct. at 2754. The same can be said in the case at bar.

For the police to make an investigatory stop or detention of a person, they must have a reasonable suspicion, based on articulable and objective facts, that the person is involved in criminal activity. *Reid v. Georgia; Brown v. Texas*, 443 U.S. 47, 61 L.Ed. 2d 357, 99 S.Ct. 2637 (1979); *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). Prior to stopping Turney and requesting to search his baggage, the only "suspicious" facts articulated by the officers were (1) that Turney appeared nervous and had difficulty getting a suitcase into an airport locker; (2) that the defendant, Cooke, walked past Turney at the lockers without acknowledging him; and (3) that Turney and the defendant were not dressed as "conservatively" as the "normal business traveler." This "evidence" available to the police prior to the stop of Turney and the questioning of Cooke fails to support, in our opinion, a reasonable suspicion that Turney and Cooke were involved in any criminal activity. If the police are permitted to make investigatory stops and detentions every time an individual looks nervous, wears unusual clothes or struggles with a suitcase, then

"a very large category of presumably innocent travelers . . . would be subject to virtually random seizures. . . ." *Reid v. Georgia*, 448 U.S. at 441, 65 L.Ed. 2d at 894, 100 S.Ct. at 2754.

B. Even if we were to find that the police officers had a reasonable suspicion to stop and detain Turney and, further, had probable cause to search the suitcases he was carrying, the record reveals no exigent circumstances to justify the search without first obtaining a warrant. The United States Supreme Court has long held that all searches made without a valid search warrant are presumptively unreasonable unless the search falls within one of the well-recognized exceptions to the general rule. *Stoner v. California*, 376 U.S. 483, 11 L.Ed. 2d 856, 84 S.Ct. 889 (1964). The exception relied upon by the State in this case permits a search without a warrant if the police can establish probable cause to search plus some exigent circumstances justifying an immediate search without first obtaining a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971); *State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979); *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970).

The State contends that Cooke's and Turney's failure to return immediately from the bathroom and the fact that the search occurred at an airport where escape from the State would be easy, are exigent circumstances justifying the search of the suitcases without a warrant. The record reveals, however, that it was the police who let both Turney and Cooke go to the bathroom unaccompanied; it was the police who left the main terminal area only a few minutes after Turney and Cooke went to the bathroom. Turney testified:

> I went to the bathroom *for a few minutes*. I returned to the place where the officers and my bags had been but they, the officers and the bags, were gone. I looked around the terminal for the officers, my bags and Cooke for about fifteen or twenty minutes but I found no one. [Emphasis added.]

The only testimony from the police officers was that they waited for some "five to eight minutes" and then took the suitcases downstairs. Based on the record, Turney did return to the terminal area where he had left the police, and no evidence appears in the record indicating whether Cooke did or did not return to

the main terminal area before Turney.[4] The police could have stood outside the bathroom door, or could have followed Turney and Cooke in an effort to determine if they were fleeing from the scene. On the facts of this case, the police were not justified in thinking that Cooke and Turney had fled from the airport immediately after the investigatory stop and were not justified in removing the suitcases and conducting the warrantless searches.

In addition, the suitcases were in the possession and control of the police officers, and their contents were in no danger of being hidden, destroyed or removed from the State by the suspects. The United States Supreme Court has held with great clarity that once the police have the object to be searched safely in their possession, no exigent circumstances exist for a warrantless search. *Arkansas v. Sanders*, 442 U.S. 753, 61 L.Ed. 2d 235, 99 S.Ct. 2586 (1979); *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977); *see also State v. Gauldin*, 44 N.C. App. 19, 259 S.E. 2d 779 (1979), *disc. rev. denied*, 299 N.C. 333, 265 S.E. 2d 399 (1980).

The State argues, however, that taking time to get a search warrant would have delayed and possibly frustrated the subsequent arrests of Cooke and Turney. While taking time to get a search warrant might have delayed the arrests of Cooke and Turney, the arrests would still have been possible. The suitcases were tagged with identifications of both Cooke and Turney which would have facilitated a search and arrest of both men. More important, arrests would only have been necessary if a magistrate, based on the evidence presented by the police, found probable cause to issue a search warrant in the first place. Given the facts and circumstances of the case, we find (1) no reasonable suspicion, based on articulable and objective facts, sufficient to stop or detain Turney or Cooke; and (2) no probable cause and no exigent circumstances to justify the warrantless search of Cooke's suitcase.

C. Alternatively, the State argues that Turney gave his consent to the search of both suitcases. The trial judge's conclusion,

4. After the search and seizure, the police officers returned to where they had stopped Turney and found that Turney had returned. Turney was then arrested. Cooke was found an hour and a half later about a mile from the airport and was also arrested.

however, that no consent was given is well supported in the record and is binding on us. Both police officers testified that Turney first granted permission for the search, but then said he could not give permission for the search of Cooke's suitcase (the one containing the LSD). Turney testified that

> the other [suitcase] belonged to a guy traveling with me and I couldn't give permission as to his bag . . . I didn't give them permission to search Cooke's bag because I didn't own it.

Officer Harkey corroborated the lack of consent when he testified, "Turney had told us he was not sure he could consent to the search, *but we searched the bags anyway. . . .*" The facts in this case are significantly different from the facts in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870, *reh. den.* --- U.S. ---, 65 L.Ed. 2d 1138, 100 S.Ct. 3051 (1980), in which the Supreme Court upheld a trial court finding that Mendenhall "was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it." *Id.* at 558, 64 L.Ed. 2d at 512, 100 S.Ct. at 1879.

II

[2] The State's second major argument is that even if the stop and detention and the warrantless search and seizure were conducted in violation of the Fourth Amendment, Cooke had no reasonable expectation of privacy in the contents of the suitcase and therefore has no standing to object to the search. This argument is based on the fact that Cooke, after being questioned by the police, denied ownership of the suitcase and left the scene where Turney had been stopped by the police. We reject this argument.

Standing to complain about police violations of the Fourth Amendment depends on the legitimacy of the defendant's expectation of privacy in the area searched. *United States v. Salvucci*, 448 U.S. 83, 65 L.Ed. 2d 619, 100 S.Ct. 2547 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 65 L.Ed. 2d 633, 100 S.Ct. 2556 (1980); *Rakas v. Illinois*, 439 U.S. 128, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978). In order to invoke the protections of the Fourth Amendment, the defendant can only complain about violations of his own constitutional rights; the privilege to complain is personal only to the individual whose rights have been infringed. *United States v. Payner*, 447 U.S. 727, 65 L.Ed. 2d 468, 100 S.Ct. 2439 (1980); *State*

v. Craddock, 272 N.C. 160, 158 S.E. 2d 25 (1967). As our Supreme Court recently held, "[a]n individual's standing to claim the protection of the Fourth Amendment depends upon whether the place invaded was an area in which such individual 'had a reasonable expectation of freedom from governmental intrusion.' " *State v. Alford*, 298 N.C. 465, 471, 259 S.E. 2d 242, 246 (1979), *quoting Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed. 2d 1154, 88 S.Ct. 2120 (1968).

We analyze, what was formerly called, "standing" and other closely related questions of law, in order to determine whether, on the facts of this case, Cooke had a reasonable expectation of privacy in the illegally searched suitcase. The State's theory in this appeal is that Cooke abandoned the suitcase and in so doing gave up any expectation of privacy he may have had in it. The State relies on well-settled law that a defendant cannot object to the search and seizure of property which he has voluntarily abandoned. *Abel v. United States*, 362 U.S. 217, 240-42, 4 L.Ed. 2d 668, 687, 80 S.Ct. 683, 698 (1960), *reh. denied*, 362 U.S. 984, 4 L.Ed. 2d 1019, 80 S.Ct. 1056 (1960). It is unclear from the record if the State made this "abandonment" argument at the suppression hearing. The State had an opportunity at the suppression hearing to develop this theory fully. The State had an opportunity to submit proposed findings of fact on the issue of abandonment. If the State does not properly raise and preserve issues, it waives them. *See Steagald v. United States*, --- U.S. ---, ---, 68 L.Ed. 2d 38, 44, 101 S.Ct. 1642, 1646 (1981), in which the Supreme Court said: "The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation." Consequently, it is not necessary to remand this case for findings of fact on the issue of abandonment. The trial court specifically found "that the officers proceeded to search both suitcases and found in *defendant Cooke's* suitcase a quantity of lysergic acid diethylamide. . . ." A finding that Cooke did not abandon the suitcase is necessarily subsumed in the specific finding that it was "Cooke's suitcase" that was searched, and consequently, such a finding supports the order "that the motion of the *defendant Cooke* to suppress the evidence . . . is hereby granted." (Emphasis added.)

The fact that Cooke was not in actual possession and control of the suitcase just prior to the time of the illegal search and seizure does not necessarily defeat his reasonable expectation of privacy in the suitcase. *See United States v. Canada*, 527 F. 2d 1374 (9th Cir. 1975), *cert. denied*, 429 U.S. 867, 50 L.Ed. 2d 147, 97 S.Ct. 177 (1976). While the recent United States Supreme Court case of *Rawlings v. Kentucky* and this court's decision in *State v. Jordan*, 40 N.C. App. 412, 252 S.E. 2d 857 (1979) provide insight into this issue, they are not dispositive. In *Rawlings*, the defendant placed a large quantity of illegal drugs in a pocketbook belonging to a friend. A search of the pocketbook made by the police *pursuant to a warrant*, disclosed the drugs and resulted in defendant's arrest. The Kentucky trial court refused to order the suppression of the contraband, holding that the defendant had no standing to challenge the legality of the search. The Supreme Court upheld the court's decision on the grounds that the defendant did not have a reasonable expectation of privacy in the area searched. The friend's pocketbook was subject to access by individuals other than the defendant, and he (the defendant) had no "right to exclude other persons from [such] access. . . ." 448 U.S. at 105, 65 L.Ed. 2d at 642, 100 S.Ct. at 2561. In short, defendant placed personal property in an area without taking precautions to maintain his privacy in that area.

In a similar case, *State v. Jordan*, this Court held that the defendant did not have a reasonable expectation of privacy in the pocketbook of a passenger in his car. Based on a tip from a confidential informer, the police stopped and searched defendant's car. In a passenger's pocketbook, the police found four packages of heroin. At defendant's suppression hearing, the trial court refused to order the evidence suppressed on the grounds that the defendant had no "reasonable expectation that the place searched would remain private" and therefore, had no standing to object to the search. 40 N.C. App. at 415, 252 S.E. 2d at 859. In upholding the ruling, this Court held:

> When one voluntarily puts property under the control of another, he must be viewed as having relinquished any prior legitimate expectation of privacy with regard to that property, as it becomes subject to public exposure upon the whim of the other person.

Id.

The case at bar is distinguishable from both *Rawlings* and *Jordan*. In this case, Cooke did not place the drugs inside a suitcase owned by Turney, and Turney had no right of access to the contents of Cooke's suitcase. Turney told the police that the suitcase and its contents did not belong to him. Although the exterior of the suitcase was subject to public exposure at Turney's whim, the suitcase's contents were not. Turney had no right to open the suitcase and knew he could not give anyone else permission to open it. Cooke took every precaution possible to maintain the privacy of, and protect his interest in, the interior of his suitcase short of holding it in his own arms at all times. Turney was a bailee to whom Cooke entrusted the safe keeping of his suitcase. To hold that this arrangement constitutes the relinquishment by Cooke of his expectations of privacy in the contents of *his own suitcase* would be, in our view, an unwaranted extension of *Rawlings* and *Jordan*. "Notwithstanding *Rawlings*, then, ordinary bailment relationships still deserve to be recognized as establishing a justified expectation of privacy upon which Fourth Amendment standing may be grounded." LaFave, *Search and Seizure*, § 11.3 at 115 (Supp. 1981).

Just as Cooke's lack of actual possession of the suitcase at the time of the search is not fatal to his Fourth Amendment rights, his disclaimer of ownership does not necessarily constitute an abandonment signifying the relinquishment of his privacy interest in the contents of the suitcase. The focus of our inquiry should be on the defendant and whether *his own* Fourth Amendment rights have been infringed by the government. *Rakas v. Illinois*. As one court aptly held:

> [t]he state of mind of the searcher regarding the possession or ownership of the item searched is irrelevant to the issue of standing. Rather, standing to object is predicated on the objector alledging and, if challenged, proving he was the victim of an invasion of privacy.

United States v. Canada, 527 F. 2d at 1378 (footnote omitted).

It is undisputed that Turney told the police that one of the suitcases belonged to his traveling companion. Cooke's name was on the suitcase, and the police checked Cooke's identification and questioned him. Notwithstanding Cooke's denial of ownership at the time of the search, we find the evidence in the record suffi-

cient to support the trial court's finding that the suitcase searched belonged to Cooke.

Even if we were to assume *arguendo* that Cooke abandoned his suitcase, we would still uphold the trial court's decision to suppress the evidence. The lack of probable cause to seize Cooke's suitcase *and the threat that an illegal search was about to take place* preclude a finding in this case that Cooke's denial of ownership was a *voluntary* abandonment extinguishing his reasonable expectation of privacy in the area searched. In fact, the strongest of inferences is that his conduct was a direct result of the illegal stop and seizure by the police.

Defendants who disclaim ownership of property or reflexively discard property in their possession when alarmed by, or suspicious of, illegal police activity do so without necessarily abandoning all expectations of privacy in the property.[5] As one court noted:

> While it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, *see United States v. Colbert*, 474 F. 2d 174, 176 (5th Cir. 1973) (en banc), it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct.

United States v. Beck, 602 F. 2d 726, 729-30 (5th Cir. 1979). *See also United States v. Jackson*, 544 F. 2d 407 (95h Cir. 1976); *Fletcher v. Wainwright*, 399 F. 2d 62 (5th Cir. 1968); *United States v. Coleman*, 450 F. Supp. 433 (E. D. Mich. 1978). When the acts relied upon by the State to establish abandonment are brought about by unlawful police conduct, those acts may not be considered to show voluntary abandonment. *See United States v. Maryland*, 479 F. 2d 566 (5th Cir. 1973) ("a loss of standing to challenge a search cannot be brought about by unlawful police conduct." *Id.* at 568.)

5. *See*, for example, *United States v. Tolbert*, 517 F. Supp. 1081 (E. D. Mich. 1981) in which the court concludes that an air passenger retained a protected privacy interest in her luggage despite her efforts to disavow ownership and to leave the luggage at the airport. The *Tolbert* court felt that any other result would allow the "police intentionally to circumvent the privacy protections of the Fourth Amendment" by approaching suspects and pressuring them to "abandon" their property. *Id.*

The test adopted by many federal courts is that "[i]f there is a 'nexus between . . . lawless [police] conduct and the discovery of the challenged evidence' which has not 'become so attenuated as to dissipate the taint,' then the evidence should be suppressed." 479 F. 2d at 568. *See also United States v. Beck*, 602 F. 2d at 730 and cases cited therein.

In this case, the evidence and findings of the trial court plainly show that Cooke gave his suitcase to his traveling companion, Turney, for safe keeping while he was off somewhere else in the airport; that the police unlawfully stopped and detained Turney; that when Cooke arrived back on the scene, the police were in the process of searching Turney's suitcase; and that Cooke denied ownership in the suitcase with his name on it only after being questioned by the police. Based on these facts, "it would be sheer fiction to presume [that defendant's actions] were caused by anything other than the illegal stop [and search]." *United States v. Beck*, 602 F. 2d at 730. The evidence presented at the suppression hearing, then, is insufficient to establish that Cooke *voluntarily* abandoned his suitcase, thereby intentionally relinquishing his interest and expectation of privacy in the suitcase.

The evidence presented by the State is also insufficient to establish that Turney abandoned the suitcases. Turney told the police he was not feeling well and asked to go to the bathroom. According to his testimony, he was permitted to go to the bathroom unaccompanied and was there only a couple of minutes. When he returned to where he had left the police, the suitcases and the police were gone.

Based on all the facts and circumstances presented at the suppression hearing, we cannot say the State carried its burden and established that Cooke voluntarily abandoned his suitcase and thereby forfeited his expectation of privacy in the suitcase. Cooke had standing to challenge the illegal search and seizure of his suitcase, and in all respects, the trial court's suppression order was correct and supported by the evidence. We therefore

Affirm.

Judge WHICHARD concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

I dissent. The uncontested evidence is that when inquiry was made of defendant about his possible ownership of the bag, he denied ownership and left the scene. This raises an issue as to whether defendant was precluded from claiming a legitimate expectation of privacy in the suitcase sufficient to show a violation of his rights by the search. *See, United States v. Kendall,* 655 F. 2d 199 (9th Cir., 1981). I would remand for findings of fact and conclusions of law concerning defendant's abandonment of the suitcase and his standing to complain of the search of the suitcase. This procedure has been upheld by this Court in *State v. Prevette,* 39 N.C. App. 470, 250 S.E. 2d 682 (1979), *discr. rev. denied,* 297 N.C. 179, 254 S.E. 2d 38 (1979), and is not inconsistent with *Steagald v. United States,* --- U.S. ---, 68 L.Ed. 2d 38, 101 S.Ct. 1642 (1981), which applies to the Rules of Procedure in the federal courts.

DEALERS SPECIALTIES, INC., PLAINTIFF v. NEIGHBORHOOD HOUSING SERVICES, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. LONNIE AUTRY, THIRD PARTY DEFENDANT

No. 805DC1167

(Filed 6 October 1981)

1. Frauds, Statute of § 5.1; Uniform Commercial Code § 8— oral promise to pay for goods sold to another—statute of frauds—summary judgment improper

In this action to recover for goods sold by plaintiff to third party defendant, the trial court properly denied defendant's motion for summary judgment where plaintiff alleged that defendant's agent unconditionally promised to pay plaintiff for materials sold to third party defendant, and plaintiff's allegations and answers to interrogatories showed that there were disputed issues of fact as to whether defendant's oral promise to pay fell within the purview of G.S. 22-1 or G.S. 25-2-201(3)(c).

2. Principal and Agent § 4.2— evidence of extrajudicial statements of agent

In an action against the corporate defendant to recover for building materials sold by plaintiff to a contractor, testimony by plaintiff's president that defendant's assistant director requested that the materials be sold to the contractor and promised that the contractor would be paid with checks made payable to plaintiff and the contractor jointly and that a lien waiver would be required before final payment would be made to the contractor was admissible against defendant where the testimony of defendant's director established the

existence of a principal-agent relationship between defendant and its assistant director and showed that the assistant director had apparent authority to bind defendant to such an agreement.

3. Frauds, Statute of § 5.1— contract to pay for goods sold to another

The Statute of Frauds, G.S. 22-1, did not apply where defendant's agent requested that plaintiff sell building materials to a contractor and promised that the contractor would be paid with checks made payable to plaintiff and the contractor jointly and that a lien waiver would be required before final payment would be made to the contractor, since credit was extended to the contractor and the defendant jointly, and defendant's agent entered into an original obligation to pay plaintiff.

4. Uniform Commercial Code § 8— inapplicability of Statute of Frauds

The Statute of Frauds of G.S. 25-2-201 applies only to executory contracts and is inapplicable to defendant's oral promise to pay for building materials sold by plaintiff to a contractor where the contractor has already accepted the building materials.

Judge BECTON dissenting.

APPEAL by defendant Neighborhood Housing Services, Inc., from *Rice, Judge.* Judgment entered 29 September 1980 in District Court, NEW HANOVER County. Heard in the Court of Appeals 26 May 1981.

Plaintiff Dealers Specialties, Inc., brought this action against defendant seeking to recover $533 plus costs. Plaintiff alleged in its complaint the following:

> 2. On or about September 29, 1978, the defendant, for value received, through its employee, agent, and Assistant Director, Ron Conrad (sic) authorized the plaintiff to sell, on credit, certain building supplies, to Lonnie Autry, a building contractor.
>
> 3. On the aforesaid date the said Ron Conrad (sic), acting within the apparent and actual scope of his authority and in the furtherance of the defendant's business, made the direct and unconditional promise to the plaintiff that the defendant would pay said bill direct to the plaintiff.
>
> 4. The defendant's said agent specifically stated to the plaintiff as follows: "Mr. Autry will be paid in checks with two payees, himself, and your company as material supplier. Mr. Autry will have to show us a signed lien waiver before we will release his final money to him."

5. Said statement constituted, not a guaranty, but a direct and unconditional promise to pay.

6. Thereafter, in consideration of the aforesaid unconditional promise of payment and during the period September 29, 1978, to October 5, 1978, the plaintiff sold and delivered to the said Lonnie Autry goods which were reasonably worth the sum of Five Hundred Thirty Three and 00/100 ($533.00) Dollars, and timely notice thereof was given to the defendant. The plaintiff carries this account on his books as an open account.

7. The defendant has failed and refused and continues to fail and refuse, to pay the plaintiff such sum, or any part thereof, despite demand having been duly made by the plaintiff.

In its answer and amended answer defendant denied these allegations and alleged as defenses the failure of consideration and G.S. 22-1 and 25-2-201. These statutes define certain contracts which are required to be in writing. Defendant also filed a third party complaint against Autry demanding judgment against him for any sums adjudged against defendant.

During discovery plaintiff responded to interrogatories posed by defendant and indicated therein that there was no writing evidencing the agreement at issue but that invoices of the materials sold were sent to both defendant and Autry. Plaintiff further responded that Autry had ordered the materials and signed the sales slip acknowledging their receipt. In response to an interrogatory concerning the basis of Conrady's authority to bind defendant to an unconditional promise to pay for the materials plaintiff wrote:

10. Mr. Ron Conrad (sic) of the Neighborhood Housing Services, Inc. contacted our office on September 26, 1978, and asked us to sell the goods to Mr. Autry on account. Mr. Conrad (sic) stated that the payment for the account would come in the form of a check made payable to Mr. Lonnie Autry and Dealers Specialities (sic), Inc. jointly and that no final payment would be made to Mr. Autry on the contract until all accounts were paid and a lien waiver signed by each creditor.

> Contact with Mr. Ron Conrad (sic) was initially made when he called our office by telephone and stated that he was a representative of Neighborhood Housing Services, Inc. When we later called Neighborhood Housing Services, Inc. and asked to talk to the person in charge of dispersing the funds, we were told that Mr. Ron Conrad (sic) was in charge.

The matter was heard before Judge Charles E. Rice, III, sitting without a jury. After considering testimony of plaintiff's president and defendant's director, Judge Rice ordered that plaintiff have judgment against the defendant for the sum of $533 plus costs. Defendant appeals.

No counsel contra.

Ernest B. Fullwood for defendant-appellant.

ARNOLD, Judge.

Defendant-appellant has brought forward all six of his assignments of error on appeal. Plaintiff-appellee has failed to respond to defendant's brief.

[1] Defendant first assigns error to the trial court's denial of its motion for summary judgment "on the grounds that there was no genuine issue of fact that Plaintiff's claim was upon a promise to answer the debt of another which was not in writing and upon the grounds that plaintiff's claim was based upon the sale of goods for the price of more than $500 which was not evidenced by any writing signed by the party to be charged." A motion for summary judgment must be granted "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 any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The burden is on the moving party to establish the lack of a triable issue of fact, and the motion must be considered in the light most favorable to the party opposing summary judgment. *Baumann v. Smith*, 41 N.C. App. 223, 254 S.E. 2d 627, *rev'd on other grounds*, 298 N.C. 778, 260 S.E. 2d 626 (1979). We conclude that defendant has not met this burden. The bare denial of plaintiff's allegations and the raising of G.S. 25-2-201 and 22-1 do not prove plaintiff's claims to be non-existent or unfounded. Plaintiff clearly alleged that

defendant's agent unconditionally promised to pay plaintiff for materials sold to Autry. Plaintiff's answers to interrogatories also support a promise to pay. The Statute of Frauds, G.S. 22-1, requires that a promise to answer for the debt of another be in writing before any action may be brought against such promissor. Plaintiff's allegations and answers to interrogatories clearly show that there is a disputed issue of fact as to whether defendant's promise to pay falls within the purview of this statute.

There is also a disputed issue of fact as to whether the alleged agreement is unenforceable against defendant pursuant to G.S. 25-2-201. Plaintiff, in its complaint, alleged that in consideration of the unconditional promise to pay made by defendant's agent, the goods were sold and delivered to Autry. This allegation raises the specific issue as to whether the agreement falls under G.S. 25-2-201(3)(c). This section of the statute provides that an oral contract for the sale of goods for $500 or more is enforceable "with respect to goods for which payment has been made and accepted or which have been received and accepted."

The North Carolina courts have consistently held that their duty in hearing a motion for summary judgment is not to decide an issue of fact nor to test the sufficiency of the evidence. The trial court, therefore, properly denied defendant's motion for summary judgment.

[2] Defendant next assigns error to the admission of the testimony of Harry Rimel, president and general manager of plaintiff, on the basis that his testimony constituted hearsay. Rimel testified that in September, 1978, Lonnie Autry came to plaintiff's store and indicated he was working on a job for defendant and requested to buy building materials on account until he was paid for the job. Rimel refused to sell him any materials except on a cash basis. Rimel testified that about two days later he received a call from Mr. Ron Conrady. Following his conversation with Conrady, he later telephoned defendant and asked the woman who answered if he could speak with Conrady. Rimel then asked her if Conrady was "in charge of a job on Perry Street under Mr. Lonnie Autry as a contractor" and she responded that he was. Rimel then spoke with Conrady. On recall, Rimel was allowed to testify as to his initial telephone conversation with Conrady. He testified that several days after he refused to sell

Autry building materials on credit, Conrady telephoned him and identified himself as Assistant Director of Neighborhood Housing Services of Wilmington. Conrady told Rimel that defendant assisted homeowners in building and remodeling. He then asked Rimel to extend credit to Autry because Autry was remodeling a house for one of defendant's clients. Rimel further testified:

> Mr. Conrady told me that he would insure payment; that payment would not be made, that the final draw on the job, Sixth Street, could not be made by Mr. Autry until I had been paid and the check would be issued to me and Mr. Autry jointly; and that the lien waivers would have to be signed. He could (sic) make his final draw until I had been paid. I agreed to let Mr. Autry have the goods. . . .
>
> . . . .
>
> The check would be joint with Mr. Autry. Based on that assurance, I extended the credit.

Defendant contends that this testimony is in direct conflict with the general rule that a declaration or admission of an alleged agent, while competent as against the agent, ordinarily is incompetent as against the principal when the declaration or admission of the agent is not within the scope of the agent's authority. 10 Strong's N.C. Index 3d, Principal and Agent, § 4.2, pp. 336-37. Defendant points out that the director of defendant testified that Conrady had no authority to contract with anyone. Defendant, however, has failed to consider the exceptions to this general rule.

> [O]rdinarily the extra-judicial statement or declaration of the alleged agent may not be given in evidence, unless (1) the fact of agency appears from other evidence, and also unless it be made to appear by other evidence that the making of such statement or declaration was (2) within the authority of the agent or, (3) as to persons dealing with the agent, within the apparent authority of the agent.

Commercial Solvents v. Johnson, 235 N.C. 237, 241, 69 S.E. 2d 716, 719 (1952). In the case *sub judice*, Henry Brown, defendant's director, testified that in September 1978 Conrady was employed by defendant as Assistant Director Rehabilitation Specialist. He further testified that Conrady's duties involved making initial in-

spections on properties to be rehabilitated and dealing with the general contractor and homeowner. Brown stated, "Mr. Conrady would make me aware of any problem and if there was anything that I could do or assist in getting that accomplished and then he and/or I would try to straighten the problem out . . . . When someone calls the office and asks to speak to the person who was in charge of coordinating the job or overseeing the job, I put them in contact with myself or Mr. Conrady." This testimony by defendant's director establishes the existence of a principal-agent relationship between defendant and Conrady. It further supports the trial court's finding that Conrady had apparent authority to bind defendant contractually as alleged. The North Carolina Supreme Court has noted that the apparent scope of an agent's authority

> "is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses; however, the determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon the agent. [Citations omitted.]"

Zimmerman v. Hogg & Allen, 286 N.C. 24, 31, 209 S.E. 2d 795, 799 (1974). Plaintiff, in the case before us, acted reasonably in believing that Conrady as Assistant Director had the authority to contract with it. Since agency was established by other evidence, the declarations of Conrady were admissible. Furthermore, because plaintiff's complaint is based upon an original promise of defendant to pay for materials to be delivered to a contractor, and because such a promise does not come within the provisions of G.S. 22-1, any evidence in support of these allegations and pertinent to the issue was admissible. *See Pegram-West v. Insurance Co.*, 231 N.C. 277, 56 S.E. 2d 607 (1949).

In the second assignment of error defendant further argues that the trial court erroneously allowed Rimel to testify that he telephoned defendant's office and was told by an unknown person that Conrady was defendant's assistant director, and that he was in charge of a job on Perry Street. Again defendant emphasizes that this testimony was inadmissible as hearsay. In light of the

testimony given by defendant's director confirming this alleged hearsay evidence, there was no prejudicial error.

[3] Defendant contends that the trial court erred in denying its motion for dismissal made at the conclusion of plaintiff's evidence, because the evidence failed to show the existence of an original enforceable contract between the parties. Such a motion raises the question of whether any findings could be made from the evidence to support a recovery. The evidence must be viewed in the light most favorable to the plaintiff before ruling on such a motion. *Sanders v. Walker*, 39 N.C. App. 355, 250 S.E. 2d 84 (1979). Both the previously discussed testimony of plaintiff's president and of defendant's director presents evidence which, when viewed in the light most favorable to plaintiff, shows that defendant's agent promised to pay for goods delivered to Autry. Such a promise does not come within the Statute of Frauds.

Having earlier concluded that the testimony of Conrady's declarations to Rimel was admissible and that the relationship of principal and agent existed between defendant and Conrady, we must conclude that the court's findings of fact relative to these issues were based upon competent evidence.

Defendant assigns error to the court's conclusions that defendant contracted with plaintiff to pay for materials supplied to Autry on 29 September 1978, that the contract resulted from a direct promise to pay and was an original undertaking not within the Statute of Frauds, that the provisions of G.S. 25-2-201 do not apply and that defendant is indebted to plaintiff in the amount of $533. Defendant contends that the evidence showed no more than an oral promise by an alleged agent of defendant to answer to Autry's debt. We disagree. The evidence supports the trial court's conclusion that this was an original promise to pay plaintiff. An obligation is original if made at the time or before the debt is created and if credit is given in consideration of the promise made by the promissor. *Peele v. Powell*, 156 N.C. 553, 73 S.E. 234 (1911). In a 1950 Fourth Circuit Court of Appeals case, the Court upheld a District Court Judge's illustration concerning the difference between such an original promise and a collateral promise. *Goldsmith v. Erwin*, 183 F. 2d 432 (4th Cir. 1950). The Court stated that the following illustration was in accordance with decisions of the North Carolina Supreme Court:

> "If a debt has already been made and the party is already bound under it, and a third party comes in and promises to pay it or to assume the responsibility for it, the third party isn't liable there, because the credit wasn't extended on the basis of that, and that is the promise to answer for the debt, default or miscarriage of somebody else, which has to be in writing before it can be enforced. But if the person who goes before the credit is extended and says to another 'If you will give this credit to thus and so I'll see that it is paid', that promise on his part to see that it is paid constitutes an original obligation on the person making the promise that 'If you do extend credit I will see it paid'; and whatever credit is extended by virtue of that becomes binding on him because his promise to see that it is paid makes him responsible for it."

183 F. 2d at 436. The latter situation described in this illustration mirrors the situation here. Plaintiff's evidence showed that the credit was extended to Autry and the defendant jointly. The trial court was correct in concluding that defendant's agent entered into an original obligation to pay plaintiff.

[4] The trial court was also correct in concluding that G.S. 25-2-201 was inapplicable to the facts. The evidence showed that plaintiff delivered the goods to Autry as requested by defendant's agent and in reliance upon the agent's promise to pay for the goods. The invoice shows that Autry accepted the goods as authorized by the terms of the agreement. Pursuant to G.S. 25-2-201(3)(c), this delivery and acceptance of the goods made the agreement between the parties enforceable since the Statute of Frauds applies only to executory and not to executed contracts.

The judgment appealed from is

Affirmed.

Judge VAUGHN concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The majority correctly states that Neighborhood Housing Services, Inc.'s motion to dismiss "raises the question of whether any findings could be made from the evidence to support a recovery." The majority then concludes (1) that Neighborhood Housing Services, Inc. made a direct promise to pay for goods delivered to Autry, taking the transaction outside the Statute of Frauds, G.S. 22-1; and (2) that the Uniform Commercial Code's (U.C.C.) Statute of Frauds, G.S. 25-2-201, does not apply because the contract was executed in that there was a delivery and acceptance of the goods. I disagree; but before setting forth my reasons, I note that the trial court's Finding of Fact Number 10 that the promise was a "direct and unconditional promise to pay for [the] goods furnished" is a conclusion of law even though it is denominated a finding of fact, and it is reviewable by this Court. *Walston v. Burlington Industries*, 49 N.C. App. 301, 307, 271 S.E. 2d 516, 520 (1980); *Moore v. Electric Co.*, 259 N.C. 735, 131 S.E. 2d 356 (1963).

While I agree with the Court's holding that the oral communications between Ron Conrady, acting as agent for Neighborhood Housing Services, Inc., and Harry Rimel, president and general manager of Dealers Specialties, Inc., constituted an original, not a collateral, obligation, I disagree with the Court's holding that that oral agreement is enforceable against Neighborhood Housing Services, Inc. The promise between Neighborhood Housing Services, Inc. and Dealers Specialties, Inc. was a conditional promise, requiring performance by Neighborhood Housing Services, Inc. only upon the occurrence of certain events. Moreover, while I agree that G.S. 25-2-201(3)(c) exempts executed contracts from the Statute of Frauds provision of the U.C.C., I must respectfully disagree with its application to the facts of this case. The contract was executed only as to Lonnie Autry and that provision may be applicable to him. It is not, however, applicable to Neighborhood Housing Services, Inc. Neighborhood Housing Services, Inc. has neither received nor accepted any goods from Dealers Specialties. Lonnie Autry, whom Dealers Specialties does not allege to be an agent of Neighborhood Housing Services, Inc., was the party receiving and accepting the goods.

The agreement between Dealers Specialties and Neighborhood Housing Services, Inc. was that Dealers Specialties would

issue credit to Lonnie Autry in exchange for Neighborhood Housing Services, Inc.'s promise to issue the check for the "final draw on the job, Sixth Street," jointly to Dealers Specialties and Lonnie Autry, such draw only being available to Autry upon completion of the job to the satisfaction of Neighborhood Housing Services, Inc. *and* the homeowner *and* upon a presentation of lien waivers by Autry. Neighborhood Housing Services, Inc.'s promise was a conditional promise and its duty to perform did not arise until the conditions were met. *See Ross v. Perry*, 281 N.C. 570, 189 S.E. 2d 226 (1972); and *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946). *Ross* and *Jones* both involved instances in which performance by the defendant was conditioned upon the actions of third parties. In *Ross* the broker could not receive commissions despite the fact that he had secured a tenant because the defendant's owner's duty to pay was conditioned upon the payment of rents and the continuation of the lease in full force. The taking of the property through condemnation proceedings relieved the defendant owner of the duty to pay because the conditions for performance had not occurred. Likewise, in *Jones*, the broker's receipt of commission for finding a ready, willing and able buyer was dependent upon a sale being closed. Because the potential purchaser was unable to come up with the money, the deal was not closed. Consequently, the defendant owners had no duty to pay the commission since the conditions were not met.

Similarly, in the case *sub judice*, Neighborhood Housing Services, Inc.'s performance was conditioned upon the happening of specified events. Since the specified events did not occur, Neighborhood Housing Services, Inc. is excused from performance. Neighborhood Housing Services, Inc. did not promise payment for the goods upon delivery to Autry. Mr. Rimel's testimony regarding his understanding of the agreement shows that he "did not understand that Neighborhood Housing Services, Inc. would pay [him] if Autry didn't." Further, Mr. Rimel, a merchant accustomed to building practices, testified that he understood that he was selling the goods to Lonnie Autry. Moreover, Rimel testified that he was told "by Conrady that Neighborhood Housing Services, Inc. had a policy of inspecting the jobs, that there has to be a certain percentage of work done in order for the contractor, to draw a percentage of the funds." Consequently, when Mr. Rimel entered into the agreement to deliver the goods, he took the risk

of not receiving his money until the job on Sixth Street had been completed to the satisfaction of Neighborhood Housing Services, Inc. *and* the homeowner, *and* until all lien waivers were presented. He also took the risk that the contractor (Autry) might not complete the job.

Neighborhood Housing Services, Inc. is an organization whose purpose is to assist homeowners in the improvement of their homes by financing and supervising renovations. Loans are made directly to the homeowners. Contractors are paid only upon the approval of the homeowner; the contractors submit bills to the homeowner and the homeowner in turn submits the bills to Neighborhood Housing Services, Inc.

As in this case, a loan could be used to hire more than one contractor. When Autry failed to complete the contract, the money remaining from the loan allocated to the project was used, along with other funds, to complete the project. It is true that Autry was paid for all of the work which he performed on the project through his termination point in November. The last check issued to him, however, did not constitute the final draw on the project, as the project was not completed and funds were left to be expended on it. Dealers Specialties took the risk, by the terms of the agreement, that the final draw would be made by someone other than Autry; it should not be heard to complain now.

Consequently, I believe the judgment appealed from should be

Reversed.

GEORGE MILTON LACKEY v. N. C. DEPARTMENT OF HUMAN RESOURCES, DIVISION OF MEDICAL ASSISTANCE

No. 8110SC90

(Filed 6 October 1981)

1. Social Security and Public Welfare § 1— medical care assistance programs—applicable scope of judicial review

Article 2 of Chapter 108, which contains provisions for programs of public assistance, including medical assistance, gives the superior court judge the op-

tion of proceeding on the record developed at the agency hearing or developing his own factual record. As the judge in this case chose to proceed on the agency record and considering the similar thrust of Chapter 108 and G.S. 150A-51, the review standards of the Administrative Procedure Act, which contains a provision for appeal from the superior court to the appellate division, should be applied in this case.

2. Social Security and Public Welfare § 2— medical assistance programs—burden of showing disability met

In cases concerning medical assistance benefits (Medicaid) claimant has the initial burden of showing disability that would prevent him from engaging in his usual job; however, the burden then shifts to the agency to show that the claimant can work in other employment as defined under the Act. Therefore, where all the evidence showed petitioner to have been totally disabled for twelve consecutive months, and there was no evidence to the contrary, petitioner's claim for medical assistance should have been approved. 42 U.S.C.A. § 1382c(a)(3), 10 N.C. Administrative Code § 32C.0203, and § 20 C.F.R. 416.934.

APPEAL by petitioner from *Farmer, Judge.* Judgment entered in WAKE County Superior Court 20 October 1980. Heard in the Court of Appeals 2 September 1981.

Petitioner initiated this action by applying to the Iredell County Department of Social Services for Medical Care Assistance (Medicaid) benefits. Petitioner's application for forwarded by the County department to the Disability Determination Section of the N. C. Department of Human Resources, respondent herein. The Disability Determination Section recommended to the County Department that the application be denied. Upon denial by the County Department, petitioner appealed to N. C. Department of Human Resources (Department), Division of Medical Assistance (Division). Following a hearing, the Division denied petitioner's claim and petitioner then appealed to Wake County Superior Court. Following a hearing in the Superior Court, Judge Farmer entered an order denying petitioner's claim, and from that order petitioner has appealed to this Court.

Turner, Enochs, Foster, Sparrow & Burnley, P.A., by Wendell H. Ott and B. J. Pearce for petitioner-appellant.

Henry T. Rosser, Assistant Attorney General, for defendant-appellee.

WELLS, Judge.

[1] At the outset, we note that we are confronted with an appeal from a decision of a State Administrative agency in which neither of the parties suggests in their briefs the applicable scope of judicial review. As our Supreme Court has repeatedly emphasized, this is a serious omission and deficiency in the appellate process, and it is essential that the parties present their contention as to the applicable scope of appellate review. *See Brooks v. Grading Co.*, 303 N.C. 573, 281 S.E. 2d 24 (1981); *In re appeal of Savings & Loan League*, 302 N.C. 458, 276 S.E. 2d 404 (1981); *State ex rel. Utilities Commission v. Bird Oil Co.*, 302 N.C. 14, 273 S.E. 2d 232 (1981). We must first, therefore, determine the appropriate scope of judicial review of an order of the Division of Medical Assistance of the N. C. Department of Human Resources. Our Supreme Court discussed the guidelines for determining the appropriate scope of judicial review for appeals from State Administrative Agencies in *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). *See also Brooks*, supra. There, the Court noted that G.S. 150A-43, a part of the N. C. Administrative Procedure Act (APA), provides that a party aggrieved by a final agency decision is entitled to judicial review of the decision under the APA unless adequate procedure for review is provided by some other statute.

Article 2 of Chapter 108 of the General Statutes contains provisions for programs of public assistance, including medical care assistance. G.S. 108-44, entitled Appeals, contains provisions for the right of appeal by an applicant for public assistance from a decision by the county board of Social Services to the Department of Human Resources, and from the Department to the Superior Court. G.S. 108-44, as it was worded at the time of petitioner's appeal, did not, however, contain any provision for appeal from the Superior Court to the appellate division. Effective July 1, 1978, G.S. 108-44 was amended to provide a more detailed appellate process, *see* the 1979 Supplement to Vol. 3A, Part 1 of the General Statutes, including a provision in G.S. 108-44(j), *inter alia*, that the hearings in the Superior Court shall be conducted in accordance with the provisions of the Administrative Procedures Act. The amended version of G.S. 108-44 does not, however, contain any provisions for appeal from the Superior Court to the appellate division. There are significant differences in the provisions

of the Administrative Procedures Act and G.S. 108-44 with respect to the basis of and scope of review by the Superior Court.[1] The Administrative Procedures Act imposes substantial limits on the powers of the Superior Court to expand the evidence and to conduct a *de novo* hearing. *See Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). In *Blackwell v. Dept. of Social Services*, 39 N.C. App. 437, 250 S.E. 2d 695 (1979), this Court held that the scope of review under G.S. 108-44(e) exceeds the scope provided under the Administrative Procedures Act and that the review provisions of the Act are displaced by those under Chapter 108. With modification, we agree. It is clear that the review provisions of Chapter 108, both the present and the former versions, give the Superior Court judge the option of proceeding on the record developed at the agency hearing or developing his own factual record. Judge Farmer chose to proceed on the agency record. Under such circumstances, and considering the similar thrust of the two statutes, we hold the review standards of the Administrative Procedures Act, G.S. 150A-51, should be applied in this case. Such a position is consistent with the present provisions of G.S. 108-44(j). *See Commissioner of Insurance v. Rate Bureau*, supra. Our review, therefore, will determine whether Judge Farmer's order comports with the requirements of G.S. 150A-51.

[2] Under the provisions of G.S. 150A-51, a reviewing court may reverse an agency decision if:

> "[t]he substantial rights of the petitioners may have been prejudiced because the agency findings inferences, conclusions, or decisions are:
>
> * * *

1. The pertinent provisions are contained in G.S. 108-44(e), as follows:

(e) Any appellant or county board of social services who is dissatisfied with the decision of the Secretary may file a petition within 30 days after receipt of written notice of such decision for a hearing in the Superior Court of Wake County or of the county from which the case arose.

. . .

The court may take testimony and examine into the facts of the case to determine whether the appellant is entitled to public assistance under federal and State law, and under the rules and regulations of the Social Services Commission. The court may affirm, reverse or modify the order of the Secretary.

(4) Affected by . . . error of law; or

(5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted. . . .

We hold that the decision of the Department of Human Resources was both affected by errors of law, and was unsupported by substantial evidence in view of the entire record as submitted and should be reversed.

Petitioner's evidence was as follows:

a. Iredell Memorial Hospital, Statesville, North Carolina: clinical summary, patient history, and operative report, all by T. V. Goode, III, M.D., showed that petitioner was admitted through emergency room on 6 May 1978, with a stab wound in the abdomen, and that on 7 May 1978, an exploratory laparotomy disclosed that the stab wound penetrated the liver, causing severe hemorrhage. A penrose drain was inserted in the wound.

b. Baptist Hospital, Winston-Salem, North Carolina: admission history dated 8 May 1978, by W. K. Braswell, M.D., showed diagnosis of stab wound to abdomen with liver laceration, possible diaphragmatic laceration, and a collection of blood in the right pleural cavity (right hemothorax).

c. Baptist Hospital: discharge summary dated 17 May 1978, by James Hutson, M. D., showed clearing of hemothorax, removal of penrose drain, and return of petitioner to care of Dr. Goode.

d. Baptist Hospital: admission history and physical, dated 1 June 1978, by Jon Kolkin, M.D. and Jesse Meredith, M.D. showed petitioner was bleeding from injury to his liver. Also showed two additional surgical operations to address problems associated with liver abcess and bleeding and to remove gallbladder.

. . .

f. Baptist Hospital: discharge summary, dated 21 July 1978, by Dr. Meredith, showed petitioner's in-hospital progress, and showed that petitioner was discharged with a healing biliary curtaneous fistula.

g. Baptist Hospital: discharge summary dated 8 August 1978, by Dr. Meredith, showed petitioner was re-admitted to Baptist on 31

July 1978 with traumatic biliary curtaneous fistula. This summary showed continuing problems with the fistula and that from the time of petitioner's initial admission to Iredell Memorial to the date of this admission, his weight had decreased from 130 lbs. to 95 lbs. At discharge, his weight was 100 lbs. The summary contained the statement that petitioner was admitted "for evaluation of his nutritional and failing status."

h. Baptist Hospital: diagnostic report requested by Iredell County Department of Social Services dated 7 August 1978 by Scott Chatham, M.D. This report showed petitioner continued to experience drainage of bile and pus from a large open wound in the abdomen, showed general atrophy of petitioner's bones, joints, and muscles, and that petitioner continued to require treatment. The prognosis indicated in this report was that it would be very difficult for petitioner to maintain nutrition because of loss of protein through the fistula. Dr. Chatham indicated that petitioner would be incapacitated for work for "probably greater than one year."

i. Summary of out-patient visits and evaluation by Dr. Meredith from 29 July 1978 through 6 March 1979 showed continued drainage of the fistula through 1 March 1979, with a clear drainage on 3 March 1979.

j. A letter from Dr. Meredith dated 22 January 1979, in which he stated that petitioner was totally disabled from 8 May 1978 to 22 January 1979.

k. Another letter from Dr. Meredith dated 6 July 1979, certifying that petitioner was totally disabled from 8 May 1978 to 26 June 1979.

l. A lengthy letter report by Dr. Meredith dated 15 August 1979 indicated that he had followed petitioner's progress on a regular out-patient basis, reviewed petitioner's history since 8 May 1978, and described his continued medical problems. The letter closed with the following comments.

> In evaluating Mr. Lackey's disability, the primary disabling factors relate to the extensive management problems associated with the biliary fistula, and to a generally weakened and under-nourished physical condition produced by poor nutrition, associated with the fistula.

> On January 22, 1979 and again on July 6, 1979, I certified that Mr. Lackey had been totally disabled from May 5, 1978. In retrospect, I see no reason whatsoever to modify that opinion. For all practical purposes, Mr. Lackey has simply been unable to engage in any substantial physical activity.
>
> He is currently doing well, and I consider his prognosis to be good. I do not think this man is permanently disabled, and I estimate that he will be released for light employment in the Fall of 1979.

Petitioner submitted other medical evidence for treatment and hospitalization subsequent to 15 August 1979, the date of Dr. Meredith's summary and evaluation, but we do not find consideration of such other evidence necessary to the resolution of the questions presented in this appeal.

Respondent Department produced no evidence to rebut petitioner's evidence. While the record does contain evaluations of petitioner's evidence by personnel employed in Department's Disability Evaluation Section, such evaluations are not evidence and cannot be used as such by the Department of Human Resources.

The order (Notice of Decision) of the Department denying petitioner's claim contained, *inter alia*, the following conclusions (labeled Reasons For Decision):

> In order to be eligible for Aid to the Disabled Medical Assistance, an individual must be found disabled as determined by the Supplemental Security Income standards set forth in Section 2322 and 2372 of the Eligibility Manual, Part I, for Medical Assistance.
>
> Under the above mentioned sections, disability is defined as a physical or mental impairment which prevents an individual from engaging in substantial gainful activity and which is expected to last for at least 12 months or is expected to result in death. Substantial activity by Social Security standards is defined as $230 or more per month.
>
> Since the medical evidence does not show that your impairment has been or is expected to be of a disabling level of severity for twelve months, the Iredell County Department

of Social Services was correct in denying your request for Medical Assistance.

Judge Farmer's judgment included the following pertinent conclusion of law:

1. The Petitioner had the burden of proving that he had a medically determinable physical or mental impairment which had lasted or could be expected to last for a continuous period of at least twelve (12) months from May 5, 1978, the date of injury and, further, that the impairment prevented him from engaging in any activity during the entire twelve (12) month period which would produce earnings of at least $260 per month.

Petitioner brought his claim pursuant to applicable provisions of State and federal law. The Social Security Act (*see* 42 U.S.C.A. § 301 *et seq.*) provides for funding to the respective States which adopt programs consistent with the pertinent provisions of the Social Security Act to furnish medical assistance to disabled persons whose income or resources are insufficient to meet the cost of necessary medical services. The legislation implementing this program (Medicaid) in North Carolina is codified in Chapter 108 of the General Statutes. Additionally, both federal and state agencies have adopted regulations for the administration of the Medicaid program. Under these laws and regulations, the program in North Carolina is a shared responsibility between the local (county) Board of Social Services and the N. C. Department of Human Resources. The hearing process involves initial consideration at the county level and review at the State level. The key to petitioner's entitlement in this case is whether he was able to establish that he was disabled for a period of twelve consecutive months. The applicable federal definition of disability is housed in 42 U.S.C.A. § 1382c(a)(3) as follows:

"(A) An individual shall be considered to be disabled for purposes of this title if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than twelve months . . .

"(B) For purposes of subparagraph (A), an individual shall be determined to be under a disability only if his physical or

> mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.
>
> "(C) For purposes of this paragraph, a physical or mental impairment is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

The thrust of the Department's order and the clear conclusion of Judge Farmer was that petitioner had the burden of showing not only that his physical impairment prevented him from engaging in his usual employment, but that he had the additional burden of showing that he was prevented from engaging in any employment which would produce earnings of either $230.00 or $260.00 per month.

Pertinent decisions of the federal courts indicate that petitioner's burden is not so heavy as the DHR and the trial court perceived. In *Wilson v. Califano*, 617 F. 2d 1050 (4th Cir. 1980), the 4th Circuit Court held that a claimant in Title II (old-age, survivors, and disability) cases has the initial burden of showing disability that would prevent him from engaging in his usual job. The burden then shifts to the agency to show that the claimant can work in other employment as defined under the Act. (42 U.S.C.A. § 1382c(a)(3), quoted earlier in our opinion). *See also Rossi v. Califano*, 602 F. 2d 55 (3rd Cir. 1979); *Taylor v. Weinberger*, 512 F. 2d 664 (4th Cir. 1975); *McDaniel v. Califano*, 446 F. Supp. 1080 (W.D.N.C. 1978).

Respondent argues that while the "old-age and survivors" program is supported by contributions from employed persons, Medicaid is a "welfare" program, so the burden of establishing

disability under Medicaid should be higher. He further argues that the decisions of the federal courts interpreting the term "disability" in old-age and survivors cases are not pertinent to Medicaid cases. We cannot agree. The section of the Social Security Act defining disability for Medicaid programs (§ 1382c(a)(3)) is identical in wording to the section of the Act defining disability for old-age and survivors benefits (§ 423(d)). The Medicaid program was not adopted as a part of the Act until October, 1972, some forty-two years following the enactment of the old-age and survivors program. During this time, the standard of disability in the Act had been the subject of numerous decisions of the federal courts which dealt with a claimant's burden of proof to show disability under the Social Security Act. These early decisions are consistent with the decisions in the post-1972 cases we have cited previously in this opinion. *See e.g. Celebrezze v. Bolas,* 316 F. 2d 498 (8th Cir. 1963); *Thomas v. Celebrezze,* 331 F. 2d 541 (4th Cir. 1964); *Branham v. Gardner,* 383 F. 2d 614 (6th Cir. 1967). G.S. 108-61 provides in pertinent part that "all of the provisions of the federal Social Security Act providing grants to the State for medical assistance are accepted and adopted, and the provisions of this Part shall be liberally construed in relation to such Act so that the intent to comply with it shall be made effectual." 10 North Carolina Administrative Code 32C.0203 provides, in pertinent part, that in order for an applicant to receive medical assistance, he must be found to be disabled "under Social Security standards". Thus, we find that it is clear that the federal act is controlling on this question; the decisions of the federal courts are binding on this question; and there is no basis whatsoever in the Act, or in federal court decisions interpreting the Act, to lend support to respondent's argument that a more difficult standard of proof should apply in this case.

Petitioner, through his medical evidence, established *prima facie* his disability to engage in any gainful employment. Apparently, both the hearing examiner and Judge Farmer concluded that in addition to medical evidence, petitioner had to meet an earnings test: i.e., that petitioner had to show that his condition prevented him from engaging in gainful activity which would provide earnings of either $230 or $260 per month. Such a conclusion has no basis in law. Under applicable federal regulations, § 20 C.F.R. 416.934, respondent Department could have attempted to

show petitioner's ability to engage in gainful activity, thereby rebutting his evidence of disability, by showing that petitioner did in fact have earnings from such activity averaging more than $260 per month in calendar year 1978 or more than $280 in calendar year 1979.[2] While the same regulations allow a claimant to show no gainful activity by showing earnings from such activity averaging less than $170 per month in 1978 or $180 per month in 1979, this is only one evidentiary approach allowed under the law. Such evidence is pertinent only where it can be shown that petitioner has in fact engaged in such gainful activity. This burden fell on respondent, not petitioner.

Judge Farmer's judgment also included another error of law. His conclusion of law numbered 2. reads as follows:

> 2. Under applicable law and regulations, the Petitioner was required to establish his disability through clinical findings and other objective, probative evidence; and opinions of physicians concerning disability may be considered only to the extent that they are supported by specific and complete clinical findings.

Such a position finds no support in pertinent decisions of the federal courts. *Rossi v. Califano*, supra, is typical of the federal circuit court decisions on this issue. There, the 3rd Circuit Court of Appeals held that the claimant met his initial burden and disability could be "medically determined" for purposes of the Act even though the opinion of claimant's doctor was not supported by objective clinical findings. Also, the trial court's conclusion is in clear conflict with the language of the Act. The Act (quoted supra) defines a physical impairment as one resulting from "physiological abnormalities which are *demonstrable* by medically acceptable clinical and laboratory diagnostic techniques". Petitioner's medical evidence that his disability arose from failure of healing following numerous surgical operations more than meets this test. Dr. Meredith's opinion evidence was more than adequately supported by petitioner's medical history for the period in question.

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2. The $230 per month amount referred to by the hearing examiner is the presumptive amount for the calendar year 1976, a period of time not even remotely at issue under the facts of this case.

We hold that all of the evidence before the Department showed petitioner to have been totally disabled for twelve consecutive months beginning 6 May 1978, that there was no evidence to the contrary, that the order of the Department and the judgment of the trial court were entered under misapprehensions of applicable law, and that the judgment of the trial court must be reversed. This matter is remanded to the Superior Court of Wake County for an appropriate judgment reversing the order of the Department and ordering the Department to approve and allow petitioner's claim.

Reversed and remanded.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. JIMMY MUSSELWHITE

No. 8116SC225

(Filed 6 October 1981)

1. Assault and Battery § 15.7; Weapons and Firearms § 3— discharging firearm into dwelling—insufficient evidence of self-defense

In a prosecution for discharging a firearm into an occupied dwelling, the trial court did not err in failing to submit an issue of self-defense to the jury where the evidence showed that defendant was standing in a yard two houses away from the victims' dwelling when he heard a shot fired from such dwelling toward the house where he was standing, and that defendant then fired at the victims' dwelling, since there was no evidence that defendant was or reasonably believed himself to be in danger of death or great bodily harm.

2. Criminal Law § 113.7— instructions on acting in concert

The trial court properly instructed the jury on the theory on acting in concert in this prosecution for discharging a firearm into an occupied dwelling where there was evidence tending to show that defendant and two companions were standing together at the scene of the incident and all were armed; after a shot was fired from the victims' dwelling, defendant and his companions all fired shots; a witness saw all three men fire shots at the dwelling but could not tell whose shots struck the dwelling; and defendant made conflicting statements as to whether he had fired into the dwelling or had fired only into the air.

Judge BECTON dissenting.

State v. Musselwhite

APPEAL by defendant from *Battle, Judge.* Judgment entered 6 November 1980 in Superior Court, ROBESON County. Heard in the Court of Appeals 4 September 1981.

The defendant was indicted for discharging a firearm into an occupied dwelling in violation of N.C. Gen. Stat. § 14-34.1. He was found guilty in a jury trial and sentenced to three to five years imprisonment.

The evidence indicated that Carey Mae Tilley and members of her family, including Joanne Tilley, the defendant's estranged girl friend, were in their home on the evening of 13 July 1980. On that evening, shots were fired at the occupied dwelling, resulting in damage to the house. The defendant presented conflicting evidence as to whether he shot at the house, but he maintained that the initial gunshot came from the Tilley house.

Attorney General Edmisten, by Associate Attorney Max A. Garner, for the State.

Appellate Defender Adam Stein and James H. Gold, for the defendant-appellant Jimmy Musselwhite.

MARTIN (Robert M.), Judge.

The defendant's first assignment of error concerns the failure of the trial judge to submit to the jury the issue of self-defense. The trial judge is required to charge on self-defense, even without a special request, when there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self-defense. *State v. Goodson*, 235 N.C. 177, 69 S.E. 2d 242 (1952); *State v. Lewis*, 27 N.C. App. 426, 219 S.E. 2d 554 (1975), *cert. denied*, 289 N.C. 141, 220 S.E. 2d 799 (1976). No construction of the evidence in this case supports such a charge.

Here the defendant is charged with discharging a firearm into an occupied dwelling. He was standing in the yard of a house two houses away from the Tilley dwelling. The defendant and his two companions were armed with guns and were drinking. The defendant alleges that the initial shot came from the Tilley house before he began firing his gun. Nowhere did the defendant's evidence indicate that he fired at anyone in order to save himself

from death or bodily harm. In his statement to the police following his arrest, the defendant stated in pertinent part:

> I, Jimmy Musselwhite, fired a shotgun at the residence of Carey Mae Tilley and Joanne Tilley after someone at that residence had fired a shotgun, or what appeared to be pistol shots, in the direction of Richard Bass' residence, located at 155 "E" Avenue. I am not sure who fired the shots in that direction, but I do know that the shots came from the residence of Carey Mae Tilley.

At trial, the following testimony was elicited from the defendant on direct examination:

> Q. All right, sir. Do you recall on the night of July 13th, whether you were fired at while at Richard Bass' house?
>
> A. See, me and Joanne, we had an argument, and we was standing there, she cussed me and I cussed her, and then I must have stepped on some of them's feet, because I heard a pistol go off, and right there, there's a stump in front of the house, and there was a shotgun went off twice, and so when I looked—
>
> COURT: Wait a minute. Did you hear a pistol or a shotgun?
>
> WITNESS: Both of them. So, I reached and grabbed the shotgun and I shot up in the air, and Bimbo and Pete took the shotgun away from me.

We are in full accord with the sound principle of law on self-defense enunciated in *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980) and in *State v. Marsh*, 293 N.C. 353, 237 S.E. 2d 745 (1977). The facts in the case before us, however, do not invoke their application. In *Ferrell* the deceased and the defendant were in close physical proximity, as they were in the same room—not so here. In that case evidence that the deceased had a box cutter in his hand and had struck the first blow was sufficient to permit the jury to reasonably infer that the defendant acted in self-defense. Similarly, *Marsh* involved an exchange of gunfire at close range in which the victim allegedly shot at the defendant twice before the defendant returned fire. In the present case the defendant heard a gunshot, did not see who fired it, but never-

theless opened fire on a house, two houses away from where he was standing. The defendant testified that the initial shot was toward the residence of Richard Bass and that he returned fire, not at any particular person, but at the building itself. There is no evidence that the defendant was or reasonably believed himself to be in danger of death or great bodily harm. A jury could not reasonably infer that the defendant was acting in self-defense. Consequently, this assignment of error is overruled.

[2] The defendant also contends that insufficient evidence of acting in concert existed to support a jury instruction on that theory and furthermore that the instructions as given were erroneous.

Carey Mae Tilley testified that she saw the defendant and the two other men shooting at her house, but she could not tell which shots actually struck the dwelling. The defendant in one statement admitted to shooting into the house, while in court he only admitted to firing a shot into the air. The evidence supports the conclusion that all three men were together at the scene of the incident and that they all fired their guns. Without finding specifically that the shot from defendant's gun hit the house, the jury could find a common purpose to commit a crime and thus find the defendant guilty of acting in concert. Quoting Justice Exum in *State v. Joyner*, 297 N.C. 349, 356-57, 255 S.E. 2d 390, 395 (1979):

> Where the state seeks to convict a defendant using the principle of concerted action, that this defendant did some act forming a part of the crime charged would be strong evidence that he was acting together with another who did other acts leading toward the crimes' commission. That which is essentially evidence of the existence of concerted action should not, however, be elevated to the status of an essential element of the principle. Evidence of the existence of concerted action may come from other facts. It is not, therefore, necessary for a defendant to do any particular act constituting at least part of a crime in order to be convicted of that crime under the concerted action principle so long as he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime.

In *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968), two men, Dixon and Lovelace, were convicted of the felonious possession of implements of housebreaking. The tools were seen in the actual possession of Dixon only. Both men, however were observed at the entrance to a restaurant at 1:45 a.m. on a Sunday morning. The front door to the restaurant showed evidence of tool marks around the lock. This Court held that even if only Dixon had actual possession of the tools at the time the men were apprehended, "if the men were acting together in the attempt to use them to force entry into the restaurant, both in law would be equally guilty of the unlawful possession." *Id.* at 498, 158 S.E. 2d at 625. Concluding that the evidence was sufficient to find that the two men "were acting together," the Court, on Lovelace's appeal, affirmed his conviction.

In the case before us the evidence indicates that all three of these men were acting together pursuant to a common plan to fire gunshots at the Tilley dwelling. The testimony tended to show that the three men were together and armed immediately before the shooting occurred. Whether the defendant fired his gun into the air or at the house, someone in his group definitely fired the shots which damaged the building. The jury could find from the evidence that all of these men are equally guilty of the crimes committed by any one of them pursuant to their common purpose under the principles approved in *Lovelace* and *Joyner*.

The instructions on acting in concert given by the trial judge follow the instructions upheld in *State v. Joyner, supra.* These instructions were not unfavorable to the defendant. We, therefore, overrule defendant's assignments of error relating to the application of the concerted action theory.

Defendant's final assignment of error concerns the in-court testimony of Officer R. A. Grice. Officer Grice testified that Joanne Tilley had told him that the defendant had threatened to kill her. "It is well settled that with the exception of evidence precluded by statute in furtherance of public policy [which exception does not apply to this case], the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal." 4 Strong's N.C. Index 3d, Criminal Law § 162, p. 825; *State v. Wilkins*, 297 N.C. 237, 254 S.E. 2d 598 (1979).

The defendant raised no objection at trial regarding the admissibility of this testimony and cannot be heard to raise this objection for the first time on appeal. *State v. Phelps*, 18 N.C. App. 603, 197 S.E. 2d 558, *cert. denied*, 283 N.C. 757, 198 S.E. 2d 727 (1973); *State v. Harrell*, 16 N.C. App. 620, 192 S.E. 2d 645 (1972); 4 Strong's N.C. Index 3d, Criminal Law § 162.2, p. 828. Consequently this assignment of error is without merit.

No error.

Judge MARTIN (Harry C.) concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

While I hesitate to "adopt a rule of law which more easily justifies the taking of human life," *Commonwealth v. Johnston*, 438 Pa. 485, 493, 263 A. 2d 376, 381 (1970) (Pomeroy, J., dissenting), I dissent from the majority's resolution of defendant's self-defense claim. This is indeed a close case, but I believe the majority has usurped the jury's function. It finds that "there is no evidence that the defendant was or reasonably believed himself to be in danger of death or great bodily harm," *ante*, page 3, and concludes that "no construction of the evidence in this case supports [a self-defense] charge," *ante*, page 2. It may be wise, as a policy matter, to enact gun control legislation to reduce the number of "they shot first and I shot back to stop them from shooting" claims. And while it may be expedient, as a practical matter, for a defendant to run and take cover when "fired upon" from a house, I do not believe it to be the law in this State that before a defendant can "return fire," he has either (1) to flee or take cover; (2) to determine correctly who in a house is shooting at him; or (3) to specifically testify that the shots fired at him put him in fear of death or great bodily harm.[1] My belief is based on an historical analysis of the doctrine of self defense and the retreat rule.

1. *Compare Brown v. United States*, 256 U.S. 335, 65 L.Ed. 961, 41 S.Ct. 501 (1921). When one is feloniously assaulted, he is not required to "pause to consider whether a reasonable man might not think it possible to fly with safety, or to disable his assailant rather than to kill him." *Id.* at 343, 65 L.Ed. at 963, 41 S.Ct. at 502.

The high regard for the value of human life qualified the right, at common law, to defend oneself. Originally, self-defense was not a defense to homicide; it could only be used in hopes of obtaining a pardon. 2 F. Pollock & F. Maitland, The History of the English Law, 479 (1895). Later, in England, an assaulted person was required to retreat (to the wall, fence, or ditch) if any avenue of escape was open, before resorting to deadly force. "[T]he colonies, however, while embracing the doctrine of self-defense, did not unanimously accept [this] retreat rule." Note, *Criminal Law—A Further Erosion of the Retreat Rule in North Carolina*, 12 Wake Forest Law Rev. 1093, 1095 (1976). Indeed, the retreat rule was, more often than not, rejected by Southern and Western states in which a strong code of personal honor developed. As stated by Professor Beale, "[i]n the West and South . . . it is abhorrent to the courts to require one who is assailed to seek dishonor in flight." Beale, *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 567, 577 (1903).

As early as 1839, North Carolina required a defendant who was feloniously assaulted to retreat to the wall before killing in self-defense. *State v. Hill*, 20 N.C. 629, 34 A.D. 396 (1839). By 1876, North Carolina joined the majority of Southern states and held that one attacked with felonious intent was under no obligation to retreat. *State v. Dixon*, 75 N.C. 275 (1876); 12 Wake Forest Law Rev. at 1096. Our courts have created other exceptions to the retreat rule. If one is in his own home, he, in effect, has his back to the wall and is under no duty to retreat from an assault be it felonious or non-felonious. *State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964). This exception was later extended to include both the curtilage of the home as well as one's place of business. *See State v. Pearson*, 288 N.C. 34, 215 S.E. 2d 598 (1975).[2] In 1976, this Court went a step further and held that no duty to retreat from the home exists even if the assailant is another lawful occupant of the premises. *State v. Browning*, 28 N.C. App. 376, 221 S.E. 2d 375 (1976).

2. The Pearson court said: "These retreat rules ordinarily have no application, however, when a person . . . is attacked in his own dwelling, home, place of business, or on his own premises." 288 N.C. at 40, 215 S.E. 2d at 603.

While some question the soundness of our law,[3] our law is, nevertheless, unmistakably clear. The common law doctrine that the right of self defense does not arise until the person assaulted has retreated to the wall has been supplanted in this State by the following doctrine: If a person is assaulted in a place where he has a right to be, he may stand his ground, meet force with force, and if need be, kill his assailant. With this doctrine in mind, let us turn to the particulars of the case *sub judice.*

At page 2 of its opinion, the majority states part of the applicable law relating to self-defense instructions: "The trial judge is required to charge on self-defense, even without a special request, when there is some construction of the evidence from which could be drawn a reasonable inference that the defendant assaulted the victim in self defense." [Citations omitted.] Our courts, however, have said more. In resolving whether a self-defense instruction should be given, the facts are to be interpreted in the light most favorable to the defendant. *State v. Blackmon,* 38 N.C. App. 620, 248 S.E. 2d 456 (1978), *cert. denied,* 296 N.C. 412, 251 S.E. 2d 471 (1979). Further, the credibility of trial testimony is to be evaluated by the jury, *not the court. State v. Evans,* 19 N.C. App. 731, 200 S.E. 2d 213 (1973); *State v. May,* 8 N.C. App. 423, 174 S.E. 2d 633 (1970). Moreover, the reasonableness of a defendant's belief that he had to use self-defense is to be determined by the jury. As stated in *State v. Marsh,* 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977) (emphasis added):

> The right to act in self-defense rests upon necessity, real or *apparent,* and a person may use such force as is necessary or *apparently* necessary to save himself from death or great bodily harm in the lawful exercise of his right of self-defense. A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief. *The reasonableness of his belief is to be determined by the jury from the facts and circumstances as they appeared to the accused at the time.* [Citation omitted.]

3. "North Carolina, by continuing to erode the duty to retreat, fails to encourage resort to legal or other means to settle disputes." Note, *Criminal Law—A Further Erosion of the Retreat Rule in North Carolina,* 12 Wake Forest Law Rev. 1093 at 1100 (1976).

Significantly, the defendant was, and had been, living at a house diagonally across the street from the prosecution's witness' house at the time of the shooting; only one house was between the two houses. The State introduced defendant's post-arrest statement that he fired a shotgun at the prosecution's witness' residence only after gunshots were fired from the house at him. (The defendant, himself, testified that he heard a pistol shot in addition to the shotgun blasts before he returned the fire.) Relevant portions of the defendant's post-arrest statement are set out below:

> I, Jimmy Musselwhite, fired a shotgun at the residence of Carey Mae Tilley and Joanne Tilley *after someone at that residence had fired a shotgun*, or what appeared to be pistol shots, in the direction of Richard Bass' residence, located at 155 "E" Avenue. I am not sure who fired the shots in that direction, but "I do know that the shots came from the residence of Carey Mae Tilley. I had been having trouble with Joanne Tilley for the last few days. On Saturday, July 12, we had a big argument, and I took her car and drove it around the block and parked it in the yard of Richard Bass' house. I told her she could come get the car, but she called the police and told them I had stolen her car. I had been threatened and even shot at by some of the members of Joanne Tilley's family. They have harassed me and tried to make me do something that would send me back to prison. *I did shoot at her house Sunday night, but it was only after they had shot at us* in the yard of Richard Bass' residence. [Emphasis added.]

I am as concerned as the majority that the evidence indicates that defendant "opened fire on a house." The jury is free, however, to infer that defendant was not simply shooting at the structure itself, but rather was returning the fire in self-defense in an effort to stop the Tilleys from shooting at him. Our law seems to give defendant the right to repel a felonious assault in that manner.[4]

4. Whether a defendant who shoots into a home is culpably negligent is another question. It, too, is ordinarily a question for the jury. *State v. Church*, 43 N.C. App. 365, --- 258 S.E. 2d 812 (1979). Additionally, some courts suggest that the reasonableness of retreating or standing one's ground are circumstances which the jury may consider in deciding whether the right of self-defense exists. *State v. Haakenson*, 213 N.W. 2d 394 (N. D. 1973).

If the shooting occurred as the prosecuting witness suggests, there was no element of self-defense. This, however, the defendant denies. He contends that, while sitting under a tree at the place where he was then living, he was fired upon by someone from the prosecuting witness' house. As was said in *State v. Miller*, 223 N.C. 184, 187, 25 S.E. 2d 623, 625 (1943), a case involving both self defense and defense of the home:

> There is nothing in [his] testimony to indicate that [he] used any language calculated or intended to bring on the fight or that [he] otherwise provoked the difficulty. [He was] on [his] own premises. [He was] under no obligation to retreat. [Citations omitted.] If [he was] assaulted in the manner outlined by [him he] has a right to stand [his] ground and return blow for blow or shot for shot in [his] own necessary self-defense.

It is true that the defendant's post-arrest statement was different from his in-court testimony. That fact does not vitiate his self-defense claim, however. Again, the credibility of trial testimony is to be evaluated by the jury, not the court. *See State v. Evans* and *State v. Ferrell*, 300 N.C. 157, 265 S.E. 2d 210 (1980). In *Ferrell*, the State introduced at least three inconsistent statements of the defendant. One of Ferrell's statements suggested that his roommate, the victim, struck the first blow and also had a box-cutter in his hand prior to his death. In the face of three inconsistent statements made by him, Ferrell testified that he was in his room when his roommate was killed by some third person who escaped. The Court in *Ferrell* not only held that there was evidence from which a jury could find that Ferrell acted in the heat of passion upon sudden provocation so as to reduce the crime to voluntary manslaughter, but also held that the evidence was sufficient to permit the jury reasonably to infer that Ferrell acted in self-defense.

So, in view of the evidence (1) that defendant had been threatened by members of the Tilley family, (2) that defendant was on property where he lived when fired upon and had no duty to retreat, and (3) that shots were fired first at defendant from the Tilley residence before defendant returned the fire, the jury could have found, but were not required to have found, that the defendant was exercising his lawful right of self-defense. The trial

judge's failure to instruct on self-defense constituted prejudicial error. In my view, defendant is entitled to a

New trial.

STATE OF NORTH CAROLINA v. ROGER GENE COFFER

STATE OF NORTH CAROLINA v. MARK ALLEN COFFER

No. 8118SC201

(Filed 6 October 1981)

1. **Criminal Law § 26.2— voluntary dismissal—no attachment of double jeopardy**

A voluntary dismissal taken by the State at a probable cause hearing did not preclude the State from instituting a subsequent prosecution for the same offense. G.S. 15A-612(b); G.S. 15A-931.

2. **Criminal Law § 71— instantaneous conclusion of the mind admissible**

A witness's statement: "God help me, I can't forgive you for what you have done" was an "instantaneous conclusion of the mind" and was admissible.

3. **Criminal Law § 89.4— prior inconsistent statement—failure to give limiting instructions**

The trial judge did not abuse his discretion in failing to give a limiting instruction immediately before a witness's prior inconsistent statement was read to the jury where he did caution the jury in his charge that the statement was to be considered, not as substantive evidence, but only in weighing the credibility of the witness's testimony.

4. **Criminal Law § 73— hearsay—statement of codefendant concerning third person**

It was not error for the court to exclude the statement of defendant Roger Coffer that Johnny Staley was with him at the time of the crime charged even though it tended to support defendant Mark Coffer's alibi as it was not a declaration against penal interest and did not fit within an exception to the hearsay rule.

5. **Criminal Law § 33— irrelevant evidence—harmless error**

Evidence concerning the color of defendant's girlfriend's stockings was irrelevant, but defendant failed to show the admission of such evidence affected his rights or the verdict.

6. **Criminal Law § 113.7— acting in concert—instructions not judicial opinion**

By repeatedly referring to "Roger Gene Coffer, acting either by himself or acting together with Mark Allen Coffer" in his instructions on acting in con-

cert, the trial judge did not express a judicial opinion that Mark Coffer was present on the scene at the time of the crime.

7. Assault and Battery § 4; Kidnapping § 1— *kidnapping separate act from assault*

Asportation of the victim is not an inherent or inevitable feature of an assault.

APPEAL by defendants from *Helms, Judge.* Judgments signed 3 October 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 September 1981.

These cases come on appeal from jury verdicts finding defendants, Roger Gene Coffer and Mark Allen Coffer, guilty of kidnapping and assault with a deadly weapon inflicting serious injury.

The evidence tended to show that on 19 March 1980 Carol Coffer was carried away from the porch of her home to a wooded area in her yard. There she was badly beaten by the defendants, Roger Coffer, her husband from whom she was separated, and Mark Coffer, Roger's cousin. At the time of the assault Carol had just returned from spending the evening with a friend, Jerry Bowman. Bowman remained in Carol's car while she went into the house to get his jacket. As she approached the house, she noticed a man running toward her. Although he was wearing a nylon stocking over his face, she was able to identify this individual as Mark Coffer. Mark caught up with her and grabbed her shoulders while Roger held her legs. Once they had removed Carol to the woods, Roger began hitting her in the face. He then disappeared and Mark continued to beat her with his fists and later with a rock and a stick. From the testimony of David Long, Carol's uncle, it seems that Roger had returned to the car to speak with Bowman. David Long had been asleep in the house. He was awakened by a scream and later heard loud voices. When he went outside to investigate, he found Bowman sitting in the car and Roger standing beside it. They appeared to be arguing. Shortly afterwards Carol came staggering out of the woods.

As a result of the beating, Carol suffered a head wound requiring six to eight stitches, her face was bruised and bleeding, her tongue had been cut and several teeth were chipped. It was likely she suffered a skull fracture.

Jerry Bowman testified at trial that Roger did not attack Carol and that someone other than Mark had assaulted her. The state introduced impeachment evidence of a prior inconsistent statement made to an investigating officer, as well as inconsistent testimony given in district court at the preliminary hearing. On those occasions Bowman had essentially corroborated the testimony of the victim.

Mark Coffer offered an alibi defense. His girlfriend testified at trial that he was with her at the time of the incident.

Charges against the two defendants were consolidated for trial.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons, II, for the State.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, for defendant Roger Gene Coffer.

Assistant Public Defendant, Eighteenth Judicial District, E. Randolph Carroll for defendant Mark Coffer.

MARTIN (Harry C.), Judge.

We will deal with each defendant's assignments of error separately.

ROGER GENE COFFER

[1] Defendant Roger Coffer first assigns as error the trial court's denying his motion to dismiss the indictment for felonious assault on grounds of double jeopardy. The defendant was arrested on a warrant charging him with felonious assault with a deadly weapon with intent to kill, resulting in serious injury. The district court judge did not find probable cause as to the felony, but found probable cause as to the misdemeanor of assault inflicting serious bodily injury. The state immediately took a voluntary dismissal. It is defendant's contention that once the district court determined the assault prosecution to be within its jurisdiction, the state should have taken the case directly to the grand jury for indictment, rather than filing a voluntary dismissal. We disagree.

N.C.G.S. 15A-612(b) provides that disposition of a charge on a probable cause hearing does not preclude the state from instituting a subsequent prosecution for the same offense. The of-

ficial commentary to N.C.G.S. 15A-931 provides that a voluntary dismissal of criminal charges by the state "does not itself bar the bringing of new charges." Thus our statutes clearly contemplate the procedure used by the state in the present case.

In *State v. Hice*, 34 N.C. App. 468, 238 S.E. 2d 619 (1977), the Court addressed this question and held that jeopardy does not attach until the time a jury has been empaneled. The defendant had argued, unsuccessfully, that the trial court erred in failing to dismiss a manslaughter charge because jeopardy had attached when he was charged with death by vehicle and driving under the influence, and the prosecutor had taken a voluntary dismissal in district court. Thus, we find that case law, too, supports the state's position on this issue.

[2] We are next asked to consider whether there is merit to defendant's contention that a lay witness was erroneously permitted to give an opinion as to defendant's guilt.

The victim's sister testified to a conversation she had with the defendant sometime after the alleged assault. Defendant objected to any part of the conversation being introduced. The trial court heard arguments on voir dire and instructed the witness on what portion of the conversation would be admissible. Defendant objected to the ruling. The witness then repeated before the jury the admissible portions of the conversation, including her statement to the defendant, "God help me, I can't forgive you for what you have done." The witness had not used these exact words during her voir dire examination.

Defendant failed to object to the witness's statement, made for the first time before the jury. Failure to object at trial normally constitutes waiver of error. 1 Stansbury's N.C. Evidence § 27 (Brandis rev. 1973); *State v. Jordan*, 49 N.C. App. 560, 272 S.E. 2d 405 (1980). We find, moreover, that the witness's statement was not an expression of a theoretical opinion as to defendant's guilt, but rather an "instantaneous conclusion of the mind." Stansbury, *supra*, § 125; *State v. Miller*, 302 N.C. 572, 276 S.E. 2d 417 (1981); *State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975). We find no error in the admission of this testimony.

In light of *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981), defendant withdraws his third assignment of error in

which he contends that the kidnapping charge, depending entirely on testimony of defendant's spouse, should have been dismissed.

[3] Defendant's fourth assignment of error is based on the trial court's refusal to give a limiting instruction immediately before Jerry Bowman's prior inconsistent statement was read. The trial judge did caution the jury in his charge that the statement was to be considered not as substantive evidence, but only in weighing the credibility of the witness's testimony. N.C.G.S. 1-181 allows requests for special instructions to be submitted to the judge before his charge to the jury, thus providing statutory protection in situations such as the one presented by these facts. *State v. Lamb*, 39 N.C. App. 334, 249 S.E. 2d 887, *disc. rev. denied*, 296 N.C. 738 (1979). We note, too, that the trial judge has a duty to regulate the conduct and the course of business during a trial. The exercise of this discretionary function will not be reviewed absent a showing of abuse. *State v. Spaulding, supra.* We find that the judge did not abuse his discretion in postponing his instruction on the use of prior inconsistent statements until his final charge to the jury.

As his fifth assignment of error, defendant Roger Coffer contends that the trial judge incorrectly defined the term *assault* in his charge to the jury. We have carefully examined the judge's instructions and find no error.

In answer to defendant's contention that the court should have instructed on the elements of battery, we find the case of *Ormond v. Crampton*, 16 N.C. App. 88, 191 S.E. 2d 405, *cert. denied*, 282 N.C. 304 (1972), apposite. In *Ormond* the tendered issue in the case was assault, whereas defendant complained that the instruction was based on an issue of battery. The Court found no error in the charge. The trial judge had adequately apprised the jury of its duty to find that the defendant acted intentionally in a series of events which led to plaintiff's injury.

Next, the defendant assigns as error the court's instruction on the principles of acting in concert. Defendant specifically objects to what he considers the unnecessary repetition and emphasis placed on the theory. This assignment of error is totally without merit. As to both defendants the court instructed the jury on the charges of kidnapping and various degrees of assault,

each of which necessitated the repetition of an instruction on acting in concert.

MARK ALLEN COFFER

[4] The defendant Mark Coffer first assigns as error the court's exclusion of a hearsay statement which would tend to support his alibi defense. We find no error in the exclusion of this statement.

Roger Coffer allegedly told officer Keith Meredith that one Johnny Staley was with him during the early morning hours of 19 March 1980. The statement clearly falls within our definition of hearsay. The probative force of the officer's testimony would depend upon the competency and credibility of Roger Coffer, the out-of-court declarant. The statement was offered to prove the truth of the matter asserted—that Johnny Staley (and not Mark Coffer) was with Roger. Stansbury, *supra*, § 138.

The defendant argues that the statement falls within the declaration against penal interest exception to the hearsay rule. We find nothing in the statement which constitutes an admission that the declarant, Roger Coffer, committed the crime for which Mark Coffer was tried. *State v. Haywood*, 295 N.C. 709, 249 S.E. 2d 429 (1978). The statement was innocuous and without damaging potential for at no time did Roger Coffer deny being at the scene of the crime. The court properly ruled the statement as inadmissible hearsay.

[5] Defendant Mark Coffer next contends that the trial court erred in permitting his girlfriend to testify to the color of stockings she wore and to exhibit them to the jury. We agree that this testimony had little relevance; however, ordinarily the reception of irrelevant evidence is considered harmless error. Stansbury, *supra*, § 80. The defendant has failed to show that the admission of this testimony has substantially rather than theoretically affected his rights, or that a different result would have ensued had the evidence been excluded. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979); *State v. White*, 298 N.C. 430, 259 S.E. 2d 281 (1979); *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973).

[6] Mark Coffer also takes exception with the trial court's instructions on acting in concert, arguing that the judge made a tacit assumption that he was present on the scene, thus weakening his alibi defense.

In his charge the judge repeatedly referred to "Roger Gene Coffer, acting either by himself or acting together with Mark Allen Coffer." We do not agree that the instructions were tantamount to a judicial opinion on the evidence.

Essential to the theory of acting in concert is a common plan or purpose between two or more persons to commit a crime. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). In Roger's case it would be necessary for the jury to find that a common plan or purpose existed between Roger and Mark Coffer and that Mark committed acts in furtherance of the crime. Only if the jury determined from the evidence that both these conditions existed, could it then find Roger Coffer guilty under the acting in concert theory. The judge expressed no more of an opinion as to Mark Coffer's guilt or innocence by including his name in these instructions than he did in including his name when instructing on the charges respecting Mark's acting in concert with Roger.[1]

[7] Finally, the defendant Mark Coffer argues that the court erred in determining that the kidnapping of the victim was a separate act from the assault of the victim. Defendant contends that any restraint or asportation of the victim was incidental to and not independent from the assault. N.C. Gen. Stat. § 14-39(a) (Supp. 1979).

In *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E. 2d 338, 351 (1978), the Court wrote that N.C.G.S. 14-39 "was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy."

1. In *State v. Westbrook*, 279 N.C. 18, 44-45, 181 S.E. 2d 572, 587-88 (1971), the following charge was upheld by the Supreme Court of North Carolina:

> "If the State has satisfied you from the evidence and beyond a reasonable doubt, that the defendant Westbrook and Frazier, on June 18, 1970, entered into a common plan and purpose to rob Carla Jean Underwood, and that the defendant Westbrook was present, acting in concert with, or aiding and abetting Frazier, in pursuance of a common plan and purpose to rob Carla Jean Underwood, and that Frazier shot and killed Carla Jean Underwood while committing or attempting to commit the felony of robbery, it would be your duty to return a verdict of guilty of murder in the first degree."

Asportation of the victim is not an inherent or inevitable feature of an assault. The removal of Carol from the front porch of her home to a more secluded wooded area clearly facilitated the commission of the felony of assault. The assignment of error is overruled.

We hold that defendants, Roger Gene and Mark Allen Coffer, received a fair trial free of error.

No error.

Judges MARTIN (Robert M.) and BECTON concur.

STATE OF NORTH CAROLINA v. PAUL EMANUEL DOUGLAS

No. 8120SC57

(Filed 6 October 1981)

1. **Burglary and Unlawful Breakings § 2— breaking or entering a building—mobile home on dealer's lot**

An unoccupied mobile home located on a dealer's lot is a "building" within the meaning of the statute prohibiting the breaking or entering of buildings, G.S. 14-54.

2. **Searches and Seizures § 12— investigatory stop—reasonable suspicion of criminal activity**

An officer had an articulable and reasonable suspicion that defendant was engaged in criminal activity so as to justify an investigatory stop of a car driven by defendant to ascertain defendant's identity and to obtain further information as to defendant's possible involvement in criminal activity where the officer observed at 12:34 a.m. that the car's trunk lid was tied down over a white appliance and that another white appliance was in the rear passage area of the vehicle; the officer was aware of several prior thefts of appliances from a nearby mobile home dealer; upon stopping the car the officer saw a washing machine in the trunk and a dryer, curtains and pillows in the rear seat; defendant did not have a driver's license in his possession, so the officer radioed police headquarters to ascertain whether the defendant actually had a license; and before the officer received any information regarding defendant's driver's license, he received a radio message from another officer informing him that a break-in had occurred at a mobile home on the nearby dealer's lot and there was evidence that an appliance had been taken therefrom.

State v. Douglas

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 4 September 1980 in Superior Court, STANLY County. Heard in the Court of Appeals 6 May 1981.

Defendant was indicted in case No. 80CRS1321 with felonious breaking and entering, larceny and receiving. These charges arose from an incident which occurred on 5 March 1980. The indictment charged that on that date defendant broke into a building occupied by Edgie Nell Broadway located in Albemarle, North Carolina, and took therefrom without permission a washer and dryer and other personal property valued at over $400. This property belonged to Conner Homes Corporation. Defendant pled not guilty to the charges. He was tried and found guilty of felonious breaking and entering and felonious larceny.

The court entered two separate judgments: one imposing a ten-year prison term for breaking and entering and the other imposing a ten-year term for felonious larceny. Both of these sentences were to begin at the expiration of the sentences imposed in case No. 80CRS1322. Judgment in No. 80CRS1322 had been entered previously by Judge Mills on 5 June 1980. In that case defendant had been convicted of charges of breaking and entering and felonious larceny which arose from events closely connected to those giving rise to the conviction in this case. Defendant appealed from the judgments entered against him in case No. 80CRS1321.

Attorney General Edmisten, by Assistant Attorney General Norma S. Harrell, for the State.

Hopkins, Hopkins and Tucker, by Samp C. Hopkins, Jr., for defendant appellant.

MORRIS, Chief Judge.

Immediately prior to trial defendant made an oral motion to quash the indictment against him in case No. 80CRS1321. Defendant alleged in his motion that the warrant failed to charge the proper offense in that the warrant charged defendant under G.S. 14-54 rather than G.S. 14-56. In addition, at the close of all the evidence, defendant made an oral motion requesting the trial court to give the jury special instructions with regard to G.S. 14-56. Defendant assigns error to the trial court's denial of both of these motions.

[1] Defendant was charged and convicted of breaking and entering a mobile home and of larceny therefrom. Defendant contends that the mobile home was not a "building" within the meaning of G.S. 14-54, but instead was a "trailer" within the meaning of G.S. 14-56.

G.S. 14-54 provides in pertinent part:

(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2 . . .

(c) As used in this section, "building" shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property.

In comparison, G.S. 14-56 outlaws the "[b]reaking and entering . . . of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft" with the intent to commit a felony or larceny therein.

The two crimes carry different penalties. The penalty imposed for conviction under G.S. 14-54 is set by G.S. 14-2 which prescribes a maximum of ten years imprisonment. G.S. 14-56 specifies a maximum of five years imprisonment.

In effect, the question presented by this assignment of error is which statute controls when the subject of the breaking and entering is a mobile home. In a recent case, *State v. Douglas*, 51 N.C. App. 594, 277 S.E. 2d 467 (1981), this Court dealt with this issue. That appeal involved the same defendant and effectively the same incident resulting in the charges in this case. The earlier case was an appeal from a conviction for the felonious breaking and entering and larceny of similar personal property from another mobile home on the Conner premises. Obviously, identical issues were presented on both appeals.

In the earlier appeal this Court held that an unoccupied mobile home not affixed to the premises and intended for retail sale was a "building" within the meaning of G.S. 14-54. We adopt that holding here. The factual situation involved in this case dif-

fers, but immaterially. In this instance the unoccupied mobile home was located at the dealership, but it was not for sale, as it had already been sold to Edgie Nell Broadway.

In holding that an unoccupied mobile home falls under the aegis of G.S. 14-54 Judge Wells stated:

> A mobile home is clearly a "structure designed to house or secure within it . . . activity or property." Such a structure that is uninhabited or under construction also is within the statute's language. The mere fact of a mobile home's capability of being transported from place to place on wheels attached to its frame, should not remove it from the ambit of G.S. 14-54. *See, United States v. Lavender*, 602 F. 2d 639 (4th Cir., 1979.)

51 N.C. App. at 598, 277 S.E. 2d at 470. We agree that a mobile home should be classified as a "building" as defined by G.S. 14-54(c). Obviously, under G.S. 14-54 the "building" broken into need not be occupied. The chief distinction between the categories of items enumerated in each statute is the property of permanence. This property can easily be inferred from the nature of the items listed. It seems to have been the legislative intent that this quality be used to determine under which section different items might be placed. The items listed in G.S. 14-54 denote the qualities of permanence and immobility while those listed in G.S. 14-56 are characterized by a high degree of mobility. A mobile home as used in the sense of a residence distinctly differs in terms of mobility from a "trailer" which is used to haul goods and personal property from place to place or for camping or vacation purposes. The chief quality of the latter is its mobility, while the former is normally anchored to a foundation and left stationary. Thus, we think the warrant and indictment charging defendant with violation of G.S. 14-54 were proper, and there was no error in the trial court's denial of the motion to quash.

G.S. 15A-1231 provides for the tendering of special jury instructions by a party involved in a criminal trial. Section (b) of that statute states in part:

> The failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

Defendant contends that the trial court erroneously denied his motion to have the jury instructed with regard to G.S. 14-56. Having previously determined that G.S. 14-56 is not applicable to the crime with which defendant was charged, defendant's case could not have been prejudiced by the trial court's refusal to instruct as to that statute. This assignment of error is overruled.

[2] Defendant made a pretrial motion to suppress evidence seized by the police from the car he was driving on the night of the alleged crimes and the confession he made while in police custody. At trial Judge Rousseau conducted a *voir dire* examination of several witnesses to determine the admissibility of this evidence. At the conclusion of the *voir dire*, Judge Rousseau ruled that the evidence seized from the car and defendant's confession could be introduced before the jury. Defendant assigns this ruling as error. He argues that the seizure of the stolen items from the car he was driving was the result of an unlawful detention and arrest by the police, and that the confession he gave the police following his arrest was the result of his unlawful arrest. Consequently, he argues both the evidence and the confession should have been excluded.

At the close of the *voir dire* the trial court made the following findings of fact to which defendant has not specifically excepted:

> That Officer Galliher was a Police Officer for the Town of Albemarle; that he worked the third shift; that on March 4, 1980, he went to work at 11:00 P.M.; that he was in a uniform and driving a marked patrol car; that about 12:34 a.m., he was going south on North First Street and when he approached an intersection he stopped; that an Oldsmobile was proceeding across the intersection from his left to his right; that as the Oldsmobile went through the intersection, the Officer's headlights were shining directly on the Oldsmobile; that he noticed that the trunk of the automobile was open and that he noticed that a white object appearing to be an appliance was in the trunk; that the trunk lid was tied down; that there was also cloth hanging out of the back of the trunk; that he also observed something white in the back seat; that the Officer knew that in this area of town there were several parking lots and several mobile home lots on

which there had been several breaking and entering and larceny of appliances; that at the place he saw the Oldsmobile, and for several blocks thereafter, it was not well lighted; that the Officer then pursued the vehicle, and in the meantime ran a check of the registration of said vehicle; that he learned that the vehicle was registered to a Cowan of Concord, North Carolina; that while waiting to find a well lighted place to stop the vehicle, and when the vehicle approached a stoplight, a person on the right front seat got out of the car, came to the trunk of the car, and then looked at the patrol car; that as the vehicle proceeded through the intersection, making a right turn, the Officer put on his blue light and siren and stopped the vehicle; that prior thereto, the Oldsmobile had made two or three left and right turns; that after stopping the vehicle, he walked to the vehicle; that he saw cloth in the trunk, an appliance in the trunk, and an appliance in the rear seat; that he also observed curtains and pillows in the rear seat; that as he approached the vehicle to ask the operator for his license and registration, that the operator turned out to be the defendant; that the defendant handed him a registration that belonged to one James Cowan, who was a passenger in the car; that the defendant stated that he did not have his license with him, but attempted to give the Officer the number of his license.

That the Officer then radioed to headquarters to find out if the defendant did have an operator's license; he was advised that the PIN machine had a backlog, and it would be several minutes before he could ascertain the information; that immediately thereafter, he radioed to ascertain if there were any Officers in the immediate area and if so, to check the various mobile home lots in the area; that shortly thereafter, he received a message from another Officer that there had been a break-in at Conner Mobile Homes; and that there had been a snow several days prior thereto, and that there was a print in the snow which the officer thought was made by some appliance being placed on the ground; that he received this notice about the break-in before receiving the information concerning the defendant's license.

> That upon receiving the information of the break-in at Conner Mobile Homes, the Officer then placed the defendant under arrest.

Defendant maintains that these facts fail to show that Officer Galliher could have had a reasonable suspicion that defendant was or had been involved in criminal activity when he stopped defendant's car and detained him. Such suspicion was a necessary prerequisite for the police officer to stop and detain defendant for questioning.

In *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660 (1979), the Supreme Court held that random stops of automobiles and detention of the drivers thereof for license and registration checks were violative of the Fourth Amendment. The Court qualified this rule by making it inapplicable in situations where there is an "articulable and reasonable suspicion" that a motorist is unlicensed, that the automobile is unregistered, or that an occupant or the vehicle is subject to seizure for violation of the law. Likewise, our Courts have held that police may be warranted in making investigatory stops and detaining the occupants of motor vehicles when the facts would justify the police officer's reasonable suspicion that the occupants of that vehicle might be engaged in or connected with some form of criminal activity. *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979); *State v. Tillett* and *State v. Smith*, 50 N.C. App. 520, 274 S.E. 2d 361, *appeal dismissed*, 302 N.C. 633, 280 S.E. 2d 448 (1981); *State v. Greenwood*, 47 N.C. App. 731, 268 S.E. 2d 835 (1980), *reversed on other grounds*, 301 N.C. 237, --- S.E. 2d --- (1981). In so holding in *State v. Thompson*, supra, the Court stated:

> The standard set forth in *Terry* for testing the conduct of law enforcement officers in effecting a warrantless "seizure" of an individual is that "the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21, 88 S.Ct. at 1880, 20 L.Ed. 2d at 906. In *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed. 2d 612, 617 (1972), the Court reaffirmed the principle of *Terry* that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most

> reasonable in light of the facts known to the officer at the time." The standard set forth in *Terry* and reaffirmed in *Adams* clearly falls short of the traditional notion of probable cause, which is required for an arrest. We believe the standard set forth requires only that the officer have a "reasonable" or "founded" suspicion as justification for a limited investigative seizure. *United States v. Constantine*, 567 F. 2d 266 (4th Cir. 1977); *United States v. Solomon*, 528 F. 2d 88 (9th Cir. 1975).

296 N.C. at 706, 252 S.E. 2d at 779.

The facts found by Judge Rousseau and the natural inferences arising therefrom amply show that at the time Officer Galliher stopped defendant he had a "reasonable or founded" suspicion that an occupant of the car which defendant was driving may have been involved in recent criminal activity. In light of this fact, it was reasonable for Officer Galliher to stop and detain defendant briefly to ascertain his identity and to obtain further information as to defendant's possible involvement in criminal activity. The facts show that at the time Officer Galliher first encountered the vehicle which defendant was driving he was aware that in that area of Albemarle there were several mobile home lots in which breaking and enterings and larcenies of appliances from mobile homes had occurred. Officer Galliher was stopped at an intersection when defendant's vehicle drove past. As defendant drove through the intersection Officer Galliher noticed that the trunk of defendant's Oldsmobile was tied down and there was "a white object appearing to be an appliance" in the trunk. Officer Galliher followed the Oldsmobile several blocks to a well-lighted stretch of road before pulling defendant. Upon stopping the car he saw an appliance in the trunk and an appliance in the rear seat. He also observed curtains and pillows in the rear area of the car. Defendant did not have a driver's license in his possession, so Officer Galliher radioed police headquarters to ascertain whether defendant actually had a license. The P.I.N. machine was backlogged so the check took several minutes. In the meantime, Officer Galliher received a message from another officer informing him that he had just discovered a break-in at Conner Mobile Homes, and there was evidence that an appliance had been taken from a mobile home. Officer Galliher received this information before he received any information from police headquarters

regarding defendant's driver's license. He placed defendant under arrest. The totality of the circumstances show that Officer Galliher was justified in stopping defendant's vehicle and detaining him for a license check.

Defendant argues that the police seizure of the appliances, curtains and pillows from the car was illegal, and that this evidence should have been excluded by the trial court.

"In *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), the Supreme Court enunciated four elements of the 'plain view' doctrine as follows: (1) the prior intrusion must be valid; (2) the discovery must be inadvertent; (3) the evidence must be immediately apparent as such; and (4) the evidence must be in plain view." *State v. Wynn*, 45 N.C. App. 267, 268-69, 262 S.E. 2d 689, 691 (1980). Without unnecessarily recapitulating the pertinent evidence, we think that that evidence clearly shows the existence of each of the elements of the plain view doctrine and justifies the seizure of this evidence.

Defendant contends that the first element of the plain view doctrine was not present, because the prior intrusion was invalid in that Officer Galliher had no reasonable suspicion to stop defendant's vehicle and, therefore, the officer was not in a place where he had a right to be. Our previous determination that the investigatory stop and detention was valid answers this contention.

Second, defendant argues that the evidence seized was not "immediately apparent" or incriminating in any way. However, we think there was a definite nexus between the washer and dryer and other evidence seized and the crime charged. This evidence was not seized until after Officer Galliher was informed by Officer Ingold that appliances had just been stolen from a mobile home on the nearby Conner Mobile Home lot. Therefore, under the plain view doctrine, we think the seizure of this evidence was valid, and it was properly admitted at trial.

Finally, defendant argues that the admission of his confession into evidence was erroneous. He bases his argument on the alleged illegality of his detention and arrest by the police. Having already concluded that the investigatory stopping and detention of defendant was valid, and here noting that there was ample

probable cause for his subsequent arrest, we think that defendant's argument is without merit. His statements to the authorities were properly admitted into evidence.

For the reasons stated above, we find that defendant received a fair trial free from error.

No error.

Judges WEBB and WHICHARD concur.

ISABELLE J. DIXON, AND HER SUCCESORS IN INTEREST, WALTER CRANE AND SANDRA ISABELLE HARDEE, AS CO-EXECUTORS OF THE ESTATE OF ISABELLE J. DIXON, AND SANDRA ISABELLE HARDEE, INDIVIDUALLY AND HUSBAND AUGUST M. HARDEE, GEORGE PATRICK DIXON AND WIFE, MRS. GEORGE PATRICK (BARBARA M.) DIXON, AND MICHAEL DENNIS DIXON AND WIFE, DIANNE S. DIXON, DEVISEES UNDER THE WILL OF ISABELLE J. DIXON PLAINTIFFS v. C. WAYNE KINSER, DEFENDANT

C. WAYNE KINSER, PLAINTIFF v. ISABELLE J. DIXON (MRS. GEORGE M. DIXON), AND HER SUCCESSORS IN INTEREST, WALTER CRANE AND SANDRA ISABELLE HARDEE, AS CO-EXECUTORS OF THE ESTATE OF ISABELLE J. DIXON, AND SANDRA ISABELLE HARDEE, INDIVIDUALLY, AND HUSBAND, AUGUST M. HARDEE, GEORGE PATRICK DIXON AND WIFE, MRS. GEORGE PATRICK (BARBARA M.) DIXON, AND MICHAEL DENNIS DIXON AND WIFE, DIANNE S. DIXON, DEVISEES UNDER THE WILL OF ISABELLE J. DIXON, DEFENDANTS

No. 8128SC117

(Filed 6 October 1981)

1. Vendor and Purchaser § 1— construction of contract to convey—offer and acceptance

A letter from defendant which set out in detail the conditions of a purchase and lease of property was an offer even though it used the terms "proposes to purchase," and a letter stating "I accept your proposal as outlined above" was an acceptance and the further wording "I give you the right and option for 120 days from this date to execute the agreement" was not an option but merely a deferral of the time for execution of the agreement.

2. Contracts § 21.3— anticipatory breach of contract to convey—excuses performance of purchaser

A statement by vendor's attorney that vendor did not wish to proceed with an agreement to convey land and would not do so supported a finding of

anticipatory breach on the part of vendor and such breach excused any failure to comply with the terms of the contract on the part of the purchaser.

APPEAL by plaintiffs Dixon, et al. from *Thornburg, Judge.* Order entered 5 September 1980, BUNCOMBE County Superior Court. Heard in the Court of Appeals 2 September 1981.

Plaintiffs, Isabelle J. Dixon, et al., (Dixon) appeal from a judgment in 76CVS943 construing a paper writing as a contract to sell and lease certain real property known as Zealandia and awarding the defendant, C. Wayne Kinser (Kinser) specific performance of the contract and money damages.[1] The paper writing[2] was executed by Dixon and Kinser on 6 October 1975 and produced two lawsuits—one, instituted by Dixon on 4 May 1976 to remove a cloud on her title to Zealandia, alleging the paper writing to be an option to purchase; and the other instituted by Kinser on 11 May 1976 seeking specific performance, alleging the paper writing to be a contract for the purchase, sale and lease of Zealandia.

The two lawsuits were consolidated for trial and tried before Judge Lacy H. Thornburg, sitting without a jury, during the week of 18 February 1980. On 6 March 1980, Judge Thornburg rendered a decision in favor of Kinser and against Dixon in both cases and advised all counsel of his decision. On 13 March 1980, a written judgment was prepared and signed. At the time the judgment was signed, however, neither counsel nor the court was aware that Dixon had died on 7 March 1980.[3] As a result of Dixon's death, the Co-Executors and beneficiaries under her will were substituted as parties, and judgment was again entered on 5 September 1980.

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1. Kinser cross-appealed in 76CVS1003, but we summarily reject his assignments of error in part IV, *infra.*

2. The paper writing consists of a two-page one-sentence letter prepared by Kinser and an attached one-paragraph letter prepared by William C. Moore, an attorney for Dixon.

3. Dixon did not attend the trial, but her deposition testimony was read into evidence.

Morris, Golding, Blue & Phillips, by William C. Morris, Jr. for Isabelle J. Dixon, et al.

Westall & Baley, by J. M. Baley, Jr., for C. Wayne Kinser.

BECTON, Judge.

This appeal presents three questions of law: (1) Is the 6 October 1975 paper writing a contract or an option? (2) If it is an option, did Kinser fully comply with the terms of the 6 October 1975 paper writing? (3) If Kinser did not fully comply with the terms of the 6 October 1975 paper writing, was his non-compliance excused by the anticipatory breach of contract by Dixon?

The scope of appellate review in a case heard by a judge sitting without a jury is clear. The trial court's findings of fact have the force and effect of a verdict by jury and are conclusive on appeal if there is evidence to support them, even though evidence might sustain findings to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968).

I.

[1] With the scope of review in mind, we turn to Dixon's first assignment of error, that the trial court "erred in adjudicating the October 6, 1975 [paper writing] to be a bilateral contract for sale and lease instead of a unilateral option." This assignment of error is based on Dixon's alternative arguments: (1) that the paper writing is an option (and Kinser admits as much in his Answer to Dixon's Complaint); and (2) that the paper writing is a "masterpiece of ambiguity" that, at most, sets forth a proposal "as distinguished from a firm offer." Dixon, therefore, contends that the paper writing should be strictly construed against Kinser, its maker.

The paper writing is set forth in its entirety on the following page:

P. O. Box 6266
Asheville, N. C. 28806
October 6, 1975

Mrs. George M. Dixon
377 Country Club Road
Asheville, N. C.

Dear Mrs. Dixon:

This letter is to set forth the current understanding relative to my (Wayne Kinser) development of the "Zealandia" property.

This property consists basically of two separable tracts, the stable property lying on the easterly side of Vance Gap Road (being designated as Ward 8, Sheet 25, Lot 50 1/4) and the larger house property lying on the westerly side of Vance Gap Road (being designated as Ward 8, Sheet 19, Lot 1).

Mr. Kinser proposes to purchase the stable property for a purchase price of $20,000.00, payable in cash of up to 29%, with the balance of the purchase price payable in two annual installments after the closing and bearing interest on the unpaid balance at 8 1/4 per annum. Mr. Kinser proposes to develop this property as a dinner theater.

Mr. Kinser further proposes a lease of the house property for a term of 20 years commencing on January 1, 1976. Mr. Kinser proposes to develop the existing house into a specialty shopping center, consisting of small shops, the development of necessary parking facilities to be used in common with the dinner theater, possible additional retail facilities and, depending on financial feasibility, the eventual construction of apartments on presently undeveloped portions of the property.

The proposed lease would require Mr. Kinser to maintain the property and pay casualty insurance and property taxes on the property during the entire lease term. There will be no rental payments due for the first three years of the lease term. Thereafter for the remaining seventeen years of the lease term, the annual rental would be an amount equal to 50% of the net income after depreciation from the property or $18,975.00 whichever is greater.

The Lessee would have the right to make improvements upon the property in furtherance of the development plans outlined above. It is agreed that the lease may be assigned as security for such institutional financing as may be required to accomplish the proposed development.

By separate letter agreement, Mr. Kinser would agree to indemnify Mrs. Dixon and hold her harmless from any obligation to Previews Incorporated as the result of entering into this agreement. Mr. Kinser shall at any time during the term of the lease have the right and option to purchase the house property for $230,000.00, which sum would be payable over a 20 year period and bear interest at an annual rate which is one-percent less than the prime rate as then established by the Wachovia Bank and Trust Company at their Winston-Salem, N. C. office.

Very truly yours,
s/WAYNE KINSER
Wayne Kinser

Dear Mr. Kinser:

I accept your proposal as outlined above and for the sum of ten dollars, receipt of which is hereby acknowledged, I give you the right and option for 120 days from this date to execute the agreements.

Isabelle J. Dixon
(Mrs. George M. Dixon)

Date: s/Isabelle J. Dixon
(Mrs. George)

The applicable law can be simply stated as follows:

(1) An option agreement binds the vendor to sell and convey, but does not bind the vendee to purchase. A contract, on the other hand, binds both parties, the vendor to sell and convey and the vendee to purchase. *Douglass v. Brooks*, 242 N.C. 178, 87 S.E. 2d 258 (1955).

(2) The holder of the option is not bound in any way to exercise his rights thereunder and may abandon the option without any liability, losing only what he paid for

the option. *Id.*; *Winders v. Kennan*, 161 N.C. 628, 77 S.E. 687 (1913).

(3) When the holder of the option exercises the option and accepts in full compliance with the terms of the option agreement, a bilateral contract for sale is created. Such a contract for sale may then be enforced through specific performance and money damages by both the buyer and the seller. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976); *Douglas v. Brooks*.

(4) Absent special circumstances, time is of the essence in an option to purchase land but is not of the essence in a contract of sale or purchase. *Douglass v. Brooks; Catawba Athletics v. Newton Car Wash*, 53 N.C. App. 708, 281 S.E. 2d 676 (1981).

In construing the paper writing to determine whether it contains an option or contract to sell, we determine the intentions of the parties from the accepted meaning of the language used in the paper writing. Our examination of the paper writing compels a conclusion that a contract for sale and lease was formed. Kinser in his letter, although using the word "proposed," offered to "purchase the stable property for a purchase price of $20,000.00, payable in cash of up to 29% with the balance of the purchase price payable in two annual installments after the closing and bearing interest on the unpaid balance at 8 1/4% per annum." Kinser also offered to "lease the house property for a term of 20 years commencing on January 1, 1976," and then spelled out in detail the terms of the lease agreement. This detailed offer was then signed by Kinser. Attached to this signed offer is a letter to which Dixon affixed her signature. That letter states, "I accept your proposal as outlined above . . . ." Thus, we have an offer by Kinser and an acceptance by Dixon. Such offer and acceptance, occurring in the same instrument, constitutes a full and complete contract, fully binding on both parties. Dixon's acceptance went on to say, "I give you the right and option for 120 days from this date to execute the agreement." This was not an option but merely a deferral of the time for execution of the agreement. Thus by the terms of the contract, Kinser had 120 days within which he could execute the necessary documents. (We note parenthetically that generally the prospective seller is the one who makes the of-

fer or signs the option agreement. Frequently, the prospective purchaser does not even sign the option agreement and there is no necessity for him to do so since he is not bound at that point in time. Here, Kinser, the prospective purchaser, made the offer to purchase and his offer cannot be construed as an option.)

We uphold the trial court because its determination that the paper writing is a contract rather than an option is fully supported by findings of fact and conclusions of law.

II

Dixon also argues that the trial court erred in its alternative holdings that (1) even if the paper writing is an option, Kinser executed the paper writing in accord with its terms and (2) even if Kinser did not execute the paper writing in accord with its terms, Kinser was not obligated to comply with its terms because Dixon was guilty of an anticipatory breach. The trial court was correct, and thus we have two additional bases for according Kinser relief.

1.

Dixon contends that the paper writing required Kinser to do several things, including either the preparation, execution or delivery of a deed, promissory note, deed of trust, fire and casualty insurance policy, settlement statement and $5,800.00 cash for the sale of the stable property and comparable documents on the lease of the house property. As we read the paper writing, Kinser was simply required to execute the following within 120 days from the date the agreement was signed:

(1) Note for balance of purchase price of stable property;

(2) Deed of trust securing that note;

(3) Lease of the house property setting forth terms and conditions required by the paper writing; and

(4) Indemnification agreement holding Dixon harmless from any obligations to Previews, Inc.

No other documents needing Kinser's signature were specified or required. The paper writing did not address the questions of delivery or tender of any documents nor the tender of any purchase price. Kinser executed all required documents and suffi-

ciently notified Dixon that he had executed the required documents. In addition to delivering the executed documents to Dixon's attorney who returned the documents to Kinser, Kinser also notified Dixon by telegram at her residence in Florida and her residence in Asheville, North Carolina, that he had executed the required documents. Moreover, Kinser delivered to his attorney to be placed in a trust account, the only cash involved in the transaction, the sum of $5,800.00 as down payment for the purchase of the stable property. Thus, Kinser executed the paper writing in accord with its terms.

2.

[2] The doctrine of anticipatory breach is well known: when a party to a contract gives notice that he will not honor the contract, the other party to the contract is no longer required to make a tender or otherwise perform under the contract because of the anticipatory breach of the first party. *See Burkhead v. Farlow*, 266 N.C. 595, 146 S.E. 2d 802 (1966); *Oil Co. v. Furlonge*, 257 N.C. 388, 126 S.E. 2d 167 (1962); *Douglass v. Brooks*, Consequently, we look to the trial court's findings of fact and conclusions of law to see if they are supported by competent evidence. The court found as a fact that William C. Moore was an attorney and agent for Dixon and that William C. Moore stated that Dixon did not wish to proceed with the agreement of October 6, 1975 and would not do so. Both Kinser and Attorney William C. Moore testified concerning Attorney Moore's involvement and representation of Dixon. On the basis of their testimony, the trial court made the following findings of fact, among others:

> 5. That [Kinser], . . . prior to October 6, 1975, met with [Dixon] and William C. Moore, an attorney . . . at the law office of Mr. Moore . . . to discuss the purchase and lease proposal. . . . That at said meeting William C. Moore acted for and advised with [Dixon], representing her as her attorney, and suggested on her behalf a number of changes in the proposal . . . among which were a change in the interest rate on the stable-purchase transaction from an annual rate of 6% to 8 1/4%, a reduction in the term of the lease from 35 to 20 years, an agreement that for three years of the lease term there would be no lease payments, and the agreement upon an interest rate of 1% less than the prime rate established at

the Winston-Salem office of Wachovia Bank and Trust Company in the event the option to buy was exercised; that at no time during the course of this conference did [Dixon] or Mr. Moore advise defendant Kinser that Mr. Moore did not fully represent [Dixon] in the aforesaid negotiations.

6. Subsequent to said meeting, . . . [Kinser] revised his proposal . . . . [Kinser] then met with William C. Moore in Moore's office to review such revised proposal and, at such meeting, William C. Moore, acting on behalf of [Dixon] caused a Memorandum Addendum to such written proposal to be prepared in his office; that at no time during the review of the revised proposal and the preparation of the Memorandum Addendum did William C. Moore advise [Kinser] that he did not fully represent [Dixon] in such negotiations.

. . .

8. Thereafter, in early November, 1975, [Kinser] made arrangements to permit the property owned by [Dixon] . . . to be used for the purpose of holding an art auction; when such arrangements became public, William C. Moore, attorney, called [Kinser] on behalf of [Dixon] to express some concern of [Dixon] about holding the auction; that [Kinser] thereupon called [Dixon] and [Dixon] indicated that she had instructed Mr. Moore to call [Kinser] because she was disturbed about the use of the property without her express permission . . . .

. . .

10. That, on November 24, 1975, William C. Moore, acting on behalf of [Dixon], met with [Kinser] . . . in the office of Mr. Wood. At this meeting, William C. Moore stated that *[Dixon] did not wish to proceed with the agreement of October 6, 1975, and would not do so.* . . .

. . .

15. That at no time prior to February 3, 1976, did [Dixon or William C. Moore] communicate to [Kinser] or to anyone acting on behalf of [Kinser] any statement concerning any limitation of authority for William C. Moore to act on behalf of [Dixon].

. . .

17. That [Dixon] sought advice and counsel from William C. Moore and Authorized William C. Moore to meet with [Kinser] and [Kinser's] attorneys and to negotiate with them on her behalf in discussions leading to the October 6, 1975, Agreement and in discussions subsequent to October 6, 1975, concerning the October 6, 1975 agreement.

We find the findings of fact to be supported by competent evidence and we further find that the Court's conclusions of law are supported by the findings of fact. So, even if, *arguendo*, the 6 October 1975 paper writing is construed as an option, and even if Kinser did not comply fully with all terms and provisions of that option, Kinser's failure to comply is excused because of Dixon's anticipatory breach. Dixon, through her attorney, said on 24 November 1975 that she would not go through with the agreement.

III

We have examined Dixon's two remaining assignments of error: (1) that the court erred in failing to determine that the paper writing was too vague and uncertain to be specifically enforced; and (2) that the trial court erred in failing to set aside the judgment. Simply stated, we find no error.

IV

Similarly, we reject Kinser's two assignments of error in his cross appeal, that the trial court erred in denying his motion for summary judgment and further erred in allowing recovery of only nominal damages for injuries and deterioration to the house property by reason of the neglect and delay in performance of Dixon's obligations.

Consequently, the judgment of the trial court is

Affirmed.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. GEORGE McCALL RICK

No. 8127SC200

(Filed 6 October 1981)

1. **Criminal Law § 33.4— evidence of cancer in victim—irrelevancy—harmless error**

In a prosecution for breaking and entering, attempted rape and larceny, testimony by the victim that she had had a breast removed because of cancer and that since being struck by defendant she has suffered a lot with her back and has been diagnosed as having bone cancer was irrelevant, but the admission of such testimony was not so prejudicial that a different result would have insued had such testimony not been admitted.

2. **Larceny § 6.1— value of automobile—incompetent testimony—verdict treated as for misdemeanor larceny**

In a prosecution for larceny of an automobile, the owner's testimony that "if I had been planning to sell it, I wouldn't have sold it for less than two thousand dollars" was incompetent to show value, and where there was no evidence of the value of the stolen automobile, the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny.

3. **Rape § 6.1— assault on female—lesser included offense of attempted rape**

Assault on a female is a lesser included offense of the charge of attempted first degree rape as set forth in G.S. 14-27.6.

4. **Rape § 6.1— prosecution for attempted rape—submission of assault on female**

The trial court in a prosecution for attempted first degree rape properly submitted an issue as to the lesser included offense of assault on a female where there was evidence tending to show that defendant grabbed the shoulders of the female victim, pushed her onto a bed, hit her across the face, cut her clothes off, and tied her up and choked her.

APPEAL by defendant from *Ferrell, Judge.* Judgments entered 2 October 1980 in Superior Court, GASTON County. Heard in the Court of Appeals 2 September 1981.

Defendant was indicted for breaking and entering with intent to commit first degree rape, attempted first degree rape, and larceny of a motor vehicle valued at over $400. Defendant was tried by a jury.

State's evidence tended to show that Carrie Jenkins was at home at about 6:00 p.m. on 11 March 1980 when the defendant entered through the front door of her home and stated that he was going to rob her. Defendant pushed her onto a bed and hit

her across the face when she raised up. Defendant took her car keys and a knife from the kitchen. He cut her clothes off, tied her up with strips cut from a blanket and choked her until she told him which key to use on the car. Defendant then left in her car.

At the close of State's evidence, the trial judge ruled that as to the first two charges listed above, he would only submit to the jury the lesser included offenses of misdemeanor breaking or entering and assault on a female. Defendant presented no evidence. The jury convicted the defendant of misdemeanor breaking or entering, assault on a female, and felonious larceny of a vehicle worth more than $400. Consecutive sentences of imprisonment were imposed, and defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Assistant Public Defender R. C. Cloninger, Jr., for defendant appellant.

MARTIN (Robert M.), Judge.

[1] Defendant presents five arguments on appeal. Two of the arguments raise similar points of evidence, and we will consider them first. Carrie Jenkins was allowed to testify, over defendant's objections, that she had had breast cancer several years before and that her left breast had been removed by an operation. She later testified, again over objection, that since being struck by the defendant she has suffered a lot with her back and has been diagnosed as having bone cancer. In each case, the defendant argues that Jenkins' testimony was irrelevant to the trial and had the effect of exciting sympathy for the witness and prejudice against him. Conceding, *arguendo*, that some of the testimony challenged by the defendant was irrelevant, it still does not follow that defendant is entitled to a new trial.

> [I]f the only effect of the evidence is to excite prejudice or sympathy, its admission *may* be grounds for a new trial. *State v. Lynch*, 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). Ordinarily, however, the reception of irrelevant evidence is considered harmless error. *See generally* 1 Stansbury's North Carolina Evidence § 9 (Brandis Rev. 1973). The burden is on the party

who asserts that evidence was improperly admitted to show not only error but also to show that he was prejudiced by its admission. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684 (1978); *State v. Cross*, 284 N.C. 174, 200 S.E. 2d 27 (1973).

State v. Atkinson, 298 N.C. 673, 683, 259 S.E. 2d 858, 864 (1979); *see also* G.S. 15A-1443. The State's evidence in this case was short and clear cut. Defendant did not present any evidence. In the present case, we hold that the defendant has not carried his burden of showing that the testimony now challenged was so prejudicial that a different result would have ensued had it not been for the admission of this testimony. These assignments of error are overruled.

[2] Two other assignments of error relate to the felonious larceny charge. The witness Jenkins, when asked for her opinion as to the fair market value of the automobile stolen from her, testified that "if I had been planning to sell it, I wouldn't have sold it for less than two thousand dollars." A motion to strike this answer was denied, and no further evidence of value was introduced. Defendant argues that this answer was incompetent. He further argues that the trial judge should have instructed the jury on the lesser included offense of misdemeanor larceny. We agree with defendant. The testimony quoted above should not have been allowed. The term "value" as used in the statute defining felonious larceny does not mean the price at which the owner would sell. *State v. Haney*, 28 N.C. App. 222, 220 S.E. 2d 371 (1975). Misdemeanor larceny should have been submitted as a possible verdict. These errors, however, relate to only one element of the larceny charge, the value element that distinguishes felonious larceny from misdemeanor larceny. The errors could not have influenced the jury's consideration of the other elements of larceny, and neither the evidence nor the jury instructions as to the other elements of larceny are challenged by the defendant. Therefore, we need not disturb the verdict insofar as it finds the defendant guilty of those elements constituting misdemeanor larceny. The prejudicial effect of these errors may be corrected by our treating the verdict as one of misdemeanor larceny. *See State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); *State v. Jones*, 275 N.C. 432, 168 S.E. 2d 380 (1969); *State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967); *State v. Keeter*, 35 N.C. App. 574, 241 S.E. 2d 708 (1978). *Compare State v. Stone*, 245 N.C. 42, 95

S.E. 2d 77 (1956) (wherein admission of incompetent evidence relating to an element of the greater offense was held prejudicial to defendant's right to a fair trial and thus a new trial, rather than resentencing for a lesser offense, was awarded). We vacate the judgment and remand the matter to the Superior Court for entry of a verdict of misdemeanor larceny and for sentencing for that offense.

[3] Defendant's remaining assignment of error challenges the submission of assault on a female as a possible verdict. Defendant denies that assault on a female is a lesser included offense of the charge of attempted first degree rape. The assignment presents an issue of first impression since the statutes dealing with rape and related offenses were rewritten effective 1 January 1980. The former statutory scheme did not recognize the separate crime of attempt to commit rape. "There is no such criminal offense as an 'attempt to commit rape.' It is embraced and covered by the offense of 'an assault with intent to commit rape,' and punished as such." *State v. Hewett*, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912), *quoted with approval in State v. Adams*, 214 N.C. 501, 199 S.E. 716 (1938) and *State v. Green*, 246 N.C. 717, 100 S.E. 2d 52 (1957). Assault on a female was held to be a lesser included offense of assault with intent to commit rape, *State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963); however, that holding does not answer our present inquiry. The new statutory scheme does recognize attempt to commit rape as a separate offense. The pertinent provisions of G.S. 14-27.2 and 14-27.6 are as follows:

> § 14-27.2. First-degree rape.—(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or

c. The person commits the offense aided and abetted by one or more other persons.

(2) With a victim who is a child of the age of 12 years or less and the defendant is four or more years older than the victim.

. . . .

§ 14-27.6. Penalty for attempt.—An attempt to commit first-degree rape as defined in G.S. 14-27.2 . . . is a felony . . . .

In the present case, the defendant was charged with attempt to commit first degree rape as defined in G.S. 14-27.2(a)(1)a.

The defendant may be convicted of the crime charged or of a lesser degree of the same crime. G.S. 15-170. *See also* G.S. 15-169. *State v. Riera*, 276 N.C. 361, 368, 172 S.E. 2d 535, 540 (1970), elaborates upon the law as follows:

> It is also well recognized in North Carolina that when a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment. [Citations omitted.] Further, when such lesser included offense is supported by some evidence, a "defendant is entitled to have the different views arising on the evidence presented to the jury upon proper instructions, and an error in this respect is not cured by a verdict finding the defendant guilty of a higher degree of the same crime, for in such case, it cannot be known whether the jury would have convicted of the lesser degree if the different views, arising on the evidence, had been correctly presented in the court's charge." [Citations omitted.]

Therefore, in deciding whether the trial court erred in submitting assault on a female as a lesser included offense of the charge of attempted first degree rape, we must consider (1) whether the charge of attempted first degree rape includes all the essential elements of assault on a female and (2) whether there was some evidence to support a finding of assault on a female.

An indictment is insufficient to charge the commission of a lesser included offense unless, in charging the greater offense, it necessarily includes within itself all of the essential elements of the lesser offense. *State v. Rorie*, 252 N.C. 579, 114 S.E. 2d 233 (1960); *State v. Chavis*, 9 N.C. App. 430, 176 S.E. 2d 388 (1970). The indictment in the present case charges, in pertinent part, that the defendant "unlawfully and wilfully did feloniously attempt to ravish and carnally know Carrie Leonard Jenkins, a female of the age of twelve years and more, by force and against her will by overcoming her resistance and procuring her submission by the use of a deadly weapon." The essential elements of assault upon a female are (1) assault and (2) upon a female person by a male person. *State v. Craig*, 35 N.C. App. 547, 241 S.E. 2d 704 (1978). Although G.S. 14-33 prescribes a greater punishment if the defendant is over 18 years of age, the defendant's age is not an essential element of the crime of assault upon a female and need not be alleged. *Id.* The element of assault, which is defined at common law as "an intentional offer or attempt by force and violence to do injury to the person of another," *State v. Hill*, 6 N.C. App. 365, 369, 170 S.E. 2d 99, 102 (1969), is necessarily included within the allegation that defendant "wilfully did feloniously attempt to ravish and carnally know [the victim] by force and against her will by overcoming her resistance and procuring her submission by the use of a deadly weapon." The element that the victim be a female person and the defendant a male person is also sufficiently alleged in the indictment in this case. The indictment identifies the victim as "a female of the age of 12 years or more." Although the indictment does not assert that the defendant is a male person, this need not be alleged specifically when the indictment charges a rape or related offense since the defendant's sex may be assumed from the nature of the offense charged. *State v. Craig, supra.* We thus conclude that all of the essential elements of assault on a female are necessarily included within the allegations of the present indictment for attempted first degree rape.

[4] Next, we must consider whether there was some evidence that the crime of assault on a female was committed. We find that there was. The evidence tended to show that the defendant grabbed the shoulders of the victim, who was a female person, and pushed her onto a bed. The defendant hit her across the face, cut her clothes off, tied her up and choked her. We find the evidence

sufficient to show an assault on a female. Although there was no testimony as to the defendant's age (so as to justify the greater punishment imposed by the trial court), there is a rebuttable presumption that the defendant is over 18 years of age which, in the absence of evidence to the contrary, is evidence for the jury to consider. *State v. Courtney*, 248 N.C. 447, 103 S.E. 2d 861 (1958).

The result is as follows:

As to misdemeanor breaking or entering and assault on a female, no error.

As to felonious larceny, judgment vacated and remanded for entry of a verdict of misdemeanor larceny and for sentencing for that offense.

Judges MARTIN (Harry C.) and BECTON concur.

FARMERS BANK OF SUNBURY AND T. L. HUTTO, TRUSTEE v. CITY OF ELIZABETH CITY

No. 811SC100

(Filed 6 October 1981)

Municipal Corporations § 37— destruction of property not complying with minimum housing standards — sufficiency of notice — summary judgment improper

In an action to recover damages from defendant city for the destruction of a residence on property held under a deed of trust to one plaintiff and secured under a promissory note held by the other plaintiff, summary judgment was improperly granted for defendant where one of the questions raised by defendant's motion was whether its building inspector used "reasonable diligence" in attempting to locate plaintiff and others connected with the property. Where one of the questions raised by a motion for summary judgment is one concerning the reasonableness of the movant, summary judgment is normally inappropriate. G.S. 160A-443; G.S. 160A-445.

APPEAL by plaintiffs from *Reid, Judge.* Order entered 1 December 1980 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 3 September 1981.

This is a civil action wherein plaintiff Farmers Bank of Sunbury (hereinafter "Bank") and plaintiff T. L. Hutto, Trustee seek

to recover damages from defendant for the destruction of a residence on property held under a deed of trust to plaintiff Hutto, Trustee, which secured a certain promissory note held by plaintiff Bank. In a complaint filed 23 May 1980 plaintiffs made allegations which can be summarized as follows: On 9 February 1977, James E. Gallagher and wife, Betty L. Gallagher, executed a promissory note in the principal amount of $15,000 payable to plaintiff Bank. At the same time, as security for the promissory note, the Gallaghers executed a deed of trust conveying property located at 401 North Martin Street, Elizabeth City, to plaintiff Hutto, Trustee. The Gallaghers defaulted on the note and thereafter, without notice to plaintiffs, defendant "completely destroyed a two-story residence" located on the subject property. Following the destruction of the property, the value of the property was only $3,000 and the value of the property had been "impaired" in the amount of $15,000. Plaintiffs maintained that the property "is and was the only source from which plaintiffs could collect and satisfy" the indebtedness of the Gallaghers. Plaintiffs sought damages in the sum of $15,000 plus accrued interest, and attorney's fees.

Defendant answered 23 July 1980, admitting that, "after complying with Article 19 of Chapter 160A of the North Carolina General Statutes and Ordinances of the City of Elizabeth City," it "lawfully removed" a structure located at 401 North Martin Street and owned by the Gallaghers, but denying the other material allegations of the complaint. Defendant further averred that the value of the property in question had increased as a result of its action, and in addition filed a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6) and a motion to stay the action until plaintiffs had completed foreclosure on the property.

Plaintiffs moved for summary judgment on 19 September 1980, and defendant moved for summary judgment on 24 November 1980. Plaintiffs supported their motion, and opposed defendant's motion, with the affidavit of plaintiff Hutto, Trustee, in which he stated *inter alia* that the Gallaghers defaulted on the promissory note, that he has been a resident, and has been present in, either Pasquotank or Gates Counties since the recording of the deed of trust, and that he never received notice or service of process with respect to the destruction of the residence on the mortgaged property. Defendant supported its motion, and opposed plaintiffs' motion, with the affidavit of its housing inspector,

Hubert Tarkenton. In his affidavit, Tarkenton stated the following: After an inspection, he determined that the dwelling located at 401 North Martin Street was "unfit for human habitation" and was "unsafe"; on 12 December 1978, pursuant to law, he sent by certified mail to the owner of the property, James E. Gallagher, a complaint and notice of a hearing scheduled for 28 December 1978; on or about 15 December 1978, the certified letter was returned marked "moved, left no address" and Tarkenton "thereafter and with reasonable diligence attempted to ascertain the whereabouts" of Gallagher and "the identity or whereabouts of any other persons connected with or responsible for the property, but said efforts were without success;" in accordance with the law, notice of a hearing scheduled for 21 March 1979 was published in a local newspaper of general circulation in the Elizabeth City area, and such notice was also posted on the dwelling at 401 North Martin Street; no one appeared at the hearing as advertised, and on 18 April 1979, the Public Works Committee of defendant recommended to the City Council of defendant that the dwelling in question be demolished due to its unsafe condition and because it was unfit for human habitation; defendant's City Council adopted an ordinance to that effect on 7 May 1979, and the building inspector carried out the demolition on 17 May 1979.

After a hearing, the court denied plaintiffs' motion for summary judgment, and entered summary judgment for defendant. Plaintiffs appealed.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and H. T. Mullen, Jr., for the plaintiff appellants.

Wilson & Ellis, by J. Kenyon Wilson, Jr., M. H. Hood Ellis, and David W. Boone, for the defendant appellee.

HEDRICK, Judge.

The questions presented on this appeal are whether summary judgment for defendant was proper, and whether the court erred in denying plaintiffs' motion for summary judgment. Summary judgment must be granted, upon motion, "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 any party is entitled to a

judgment as a matter of law." G.S. § 1A-1, Rule 56(c). *See also Oakley v. Little*, 49 N.C. App. 646, 272 S.E. 2d 370 (1980).

The briefs of both parties are essentially concerned with the question of whether there is a genuine issue of material fact as to whether defendant gave proper notice of hearing to interested persons as is required by G.S. § 160A-441 *et seq.* Plaintiffs contend in their brief that the conclusion of the building inspector that he used "reasonable diligence" in attempting to locate the whereabouts of all those persons "connected with or responsible for" the property in question was "not competent because it is wholly unsupported by facts such as would be admissible into evidence." Defendant, on the other hand, argues in its brief that it acted in strict compliance with G.S. § 160A-441 *et seq.*, especially in giving proper legal notice to owners and other interested parties, or alternatively, that plaintiffs were not entitled to notice since a search of the public records in Pasquotank County would not have revealed that plaintiffs had an interest in the property.

G.S. § 160A-441 *et seq.* (Part 6 of Article 160A) was enacted for the purpose of insuring that minimum housing standards would be met in the cities and counties of the State. *Harrell v. City of Winston-Salem*, 22 N.C. App. 386, 206 S.E. 2d 802, *cert. denied*, 285 N.C. 757, 209 S.E. 2d 281 (1974). G.S. § 160A-442 in pertinent part provides:

> The following terms shall have the meanings whenever used or referred to as indicated when used in this Part unless a different meaning clearly appears from the context:
>
> . . .
>
> (4) "Owner" means the holder of the title in fee simple and every mortgagee of record.
>
> (5) "Parties in interest" means all individuals, associations and corporations who have interests of record in a dwelling . . . .
>
> . . .

G.S. § 160A-443 in pertinent part provides:

> Upon the adoption of an ordinance finding that dwelling conditions of the character described in G.S. 160A-441 exist

within a city, the governing body of the city is hereby authorized to adopt and enforce ordinances relating to dwellings within the city's territorial jurisdiction that are unfit for human habitation. These ordinances shall include the following provisions:

(1) That a public officer be designated or appointed to exercise the powers prescribed by the ordinance.

(2) That . . . whenever it appears to the public officer (on his own motion) that any dwelling is unfit for human habitation, the public officer shall, if his preliminary investigation discloses a basis for such changes, issue and cause to be served upon the owner of and parties in interest in such dwellings a complaint stating the charges in that respect and containing a notice that a hearing will be held before the public officer (or his designated agent) at a place within the county in which the property is located fixed not less than 10 days nor more than 30 days after the serving of the complaint; . . .

G.S. § 160A-445, at the time of the incident in question, provides:

Complaints or orders issued by a public officer pursuant to an ordinance adopted under this Part shall be served upon persons either personally or by registered or certified mail. If the whereabouts of persons are unknown and cannot be ascertained by the public officer in the exercise of *reasonable diligence*, and the public officer makes an affidavit to that effect, then the serving of the complaint or order upon the persons may be made by publication in a newspaper having general circulation in the city at least once no later than the time at which personal service would be required under the provisions of this Part. When service is made by publication, a notice of the pending proceedings shall be posted in a conspicuous place on the premises thereby affected. [Emphasis added].

In the present case, on 9 February 1977, James E. Gallagher and wife, Betty L. Gallagher, made a promissory note in the principal amount of $15,000 payable to plaintiff Bank. That same day, the Gallaghers secured this promissory note by executing a deed

of trust conveying the property at 401 North Martin Street, Elizabeth City, to plaintiff Hutto, Trustee. The deed of trust was duly recorded in the Pasquotank County Registry on 15 February 1977. While the promissory note made reference to plaintiff Bank, the deed of trust did not, and though the deed of trust did refer to plaintiff Hutto, Trustee, it did not give any address for him. On 12 December 1978, the building inspector for defendant city determined that the dwelling at 401 North Martin Street was "unfit for human habitation" and thus he instituted the prescribed procedures under G.S. § 160A-443. When he could not serve the complaint and notice of hearing upon the Gallaghers, he sought "with reasonable diligence" to ascertain the whereabouts of the Gallaghers and any other interested parties "without success." Thereafter, service was made by publication, and following a hearing and upon direction by the City Council, the dwelling was destroyed. The only evidence advanced by defendant with respect to the building inspector's exercise of "reasonable diligence," however, is the assertion to that effect in the building inspector's affidavit.

In *Smith v. Currie*, 40 N.C. App. 739, 253 S.E. 2d 645, *disc. rev. denied*, 297 N.C. 612, 257 S.E. 2d 219-220 (1979), we said that in cases where one of the questions raised by a motion for summary judgment is one concerning the reasonableness of the actions of the movant, summary judgment is normally inappropriate, since the resolution of the question "necessarily involves conflicting interpretations of the perceived events, and even where all the surrounding facts and circumstances are known, reasonable minds may still differ over their application to the legal principles involved." *Id.* at 743, 253 S.E. 2d at 647. We also stated in *Smith v. Currie, supra*, that summary judgment is inappropriate when issues such as motive, intent, and other subjective feelings and reactions are material, citing 6 Moore's Federal Practice ¶ 56.17 [41.-1] (1978). We find this reasoning to be applicable in the present case, especially since defendant's prevailing on its motion for summary judgment depends upon an interpretation of the reasonableness of the building inspector's diligence in identifying and ascertaining the whereabouts of interested parties as required by G.S. § 160A-445. Under the circumstances of this case, reasonable minds could differ as to whether the building inspector exercised reasonable diligence in

ascertaining the identity and whereabouts of all interested parties in the property.

Finally, we note that defendant in its answer alleges that plaintiffs' claim against it was "premature" because plaintiffs had not foreclosed on the deed of trust. In its brief, defendant argued that plaintiffs "have failed to allege and prove that they were in any way damaged by the acts of Defendant such that a legally recognized right of recovery exists." Defendant cited no authority in support of this argument. Since it is neither necessary nor advisable for the trial court to specify bases for entering summary judgment for either party, and since the trial court did not do so in this case, we cannot overlook the possibility that the trial court did in fact conclude that the record disclosed an insurmountable bar to plaintiff's claim. Thus, we point out that in *Federal Land Bank of Columbia v. Jones*, 211 N.C. 317, 318, 190 S.E. 479, 480 (1937), Chief Justice Stacy said: "Can a mortgagee, after default and before foreclosure, maintain an action for trespass against one [third person] who has tortiously injured the mortgaged estate? The answer is, 'Yes.'" Furthermore, in *Federal Land Bank of Columbia v. Jones, supra*, in discussing the propriety of a judgment as of nonsuit in favor of the defendant, Chief Justice Stacy said: "We are not now concerned with whether the plaintiff can make out its case or with the extent of its right of recovery. These are matters which will arise on the hearing." *Id.* at 319, 190 S.E. at 480. We think what was said in that case with respect to a judgment as of nonsuit is even more applicable to the question of summary judgment in the present case.

We hold summary judgment for defendant was improper, and the court did not err in denying plaintiffs' motion for summary judgment. The judgment is reversed and the cause is remanded to the superior court for further proceedings.

Reversed and remanded.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. CURTIS McDONALD HUGHES

No. 8121SC314

(Filed 6 October 1981)

1. **Constitutional Law § 52— fourteen-month delay between arrest and trial—no denial of speedy trial**

Defendant was not denied his constitutional right to a speedy trial by a fourteen-month delay between his arrest and trial for armed robbery, although defendant timely asserted his right to a speedy trial, where the cause of the delay was a backlog of cases and a policy of giving priority to current jail cases, defendant was serving a prison sentence upon conviction on another charge, and defendant failed to show that the delay hampered his ability to present his defense because of chilled memories or unavailability of his witnesses.

2. **Criminal Law § 99.4— court sustaining own objection—no expression of opinion**

The trial court did not express an opinion on the evidence in sustaining its own objection to two questions asked by defense counsel on cross-examination and to one question asked by defense counsel during direct examination where two of the court's sustained objections were directed to argumentative questions and one to a question calling for repetitious testimony.

3. **Criminal Law § 99.4— court's statement about repetition—no expression of opinion**

The trial court, in ruling on the State's objection to testimony on the ground of repetition, did not express an opinion in stating, "Yes, I think she has been over that . . . and most of this other testimony, my recollection is," where the record shows that the witness's testimony was indeed repetitive of her earlier testimony.

4. **Criminal Law § 99.3— remark by court—no comment on defendant's failure to testify**

The trial court did not improperly comment on defendant's failure to testify when defense counsel stated he was going to introduce defendant into evidence and the court replied, "He'll have to take the witness stand," since the court's remark merely explained evidentiary procedure.

5. **Constitutional Law § 46— refusal to replace appointed counsel**

Defendant was not denied a fair trial by the trial court's refusal to replace his court-appointed counsel because defendant disagreed with his counsel on whether a particular witness should be subpoenaed.

6. **Constitutional Law § 45— denial of replacement counsel—no instruction on right to appear pro se**

The trial court was not required to advise defendant of his right to proceed without counsel upon denial of his motion to replace his court-appointed attorney.

7. Constitutional Law § 48— effective assistance of counsel

Defendant was not denied the effective assistance of counsel because his court-appointed attorney recalled three of the State's chief witnesses.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 11 March 1976 in Superior Court, FORSYTH County. Writ of Certiorari issued by the North Carolina Court of Appeals on 3 February 1981. Heard in the Court of Appeals 22 September 1981.

Defendant was arrested on 2 January 1975 for armed robbery in violation of G.S. 14-87. On 4 March 1976, the court denied defendant's motion to dismiss, and on 11 March 1976, defendant was convicted of the charge.

An armed robbery occurred at a Stop-N-Go food store in Forsyth County the night of 27 December 1974. On 2 January 1975, defendant was arrested, charged with the robbery, and placed in custody with bond. An indictment was returned against defendant on 3 March 1975.

On 11 June 1975, defendant was convicted of an unrelated offense and sentenced to Central Prison. From there he filed a motion on 8 July 1975 requesting a speedy trial upon the armed robbery charge or a dismissal for failure to prosecute. There was no ruling on defendant's motion. On 19 February 1976, defendant filed a second motion to dismiss. After a hearing on the motion held 2 March 1976, the court denied defendant's motion. On 11 March 1976, a jury convicted defendant of the charge of armed robbery.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

David B. Hough, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first assigns as error the State's failure to grant him a speedy trial. We begin by noting that North Carolina's Speedy Trial Act does not apply since the offense occurred before the statute's effective date. G.S. 15A-701 to -704. Defendant's claim, therefore, rests on his right to a speedy trial, guaranteed by the Sixth Amendment, made applicable to the states through the Fourteenth Amendment. *Klopfer v. North Carolina,* 386 U.S.

213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967). The right to a speedy trial is more vague than other procedural rights because "speedy" is not defined by any particular time period. The concept is necessarily relative. To determine whether a speedy trial has been afforded, courts must consider each case in light of four factors: (1) the length of the delay, (2) the causes of the delay, (3) defendant's assertion of his right and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 2d 101 (1972).

The first factor is primarily a triggering mechanism. The delay of trial must at least raise a question of reasonableness. In the present case, the fourteen months which passed between defendant's arrest and his trial on the armed robbery charge is a sufficient delay to merit our consideration of the other factors.

Because there is some delay inherent in every criminal prosecution, the burden is on the accused to show that the delay of his trial was due to the neglect or wilfulness of the prosecutor. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980); *State v. Branch*, 41 N.C. App. 80, 254 S.E. 2d 255 (1979). There is no evidence in the present case of deliberate delay by the State. At the hearing on defendant's motion to dismiss, the district attorney testified that the cause of delay was a backlog of cases. When he took office on 1 January 1975, there were 714 cases pending. Because of the backlog, his office adopted a policy of priority to current jail cases—people who are not incarcerated on prior charges but are simply awaiting trial. Under this policy, defendant lost his priority as a jail case once he was convicted of the unrelated offense and incarcerated in Central Prison.

Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay. *State v. Smith*, 289 N.C. 143, 221 S.E. 2d 247 (1976); *State v. Brown*, 282 N.C. 117, 191 S.E. 2d 659 (1972). Expediting jail cases so that those people can be released if acquitted or sent into the criminal system if convicted is one reasonable way of handling a backlog. The district attorney in the instant case testified that in Forsyth County there were always at least fifteen people in jail each week. Admittedly, fifteen jail cases is not such a large number that defendant's trial should indefinitely be on hold. *Compare with State v. Brown, supra.* The evidence, however, does not warrant a finding of neglect.

The third factor to consider is defendant's assertion of his right to a speedy trial. A defendant who seeks or acquiesces to continuances cannot later complain of unreasonable delay. The defendant in this cause, however, moved for a speedy trial or for dismissal on 8 July 1975. He moved a second time for dismissal on 19 February 1976. Defendant, therefore, has not waived his right to a speedy trial.

Courts will not presume that a delay in prosecution has prejudiced the accused. The defendant has the burden of proving the fourth factor. The present defendant claims he was prejudiced because the fourteen-month delay in trial caused him anxiety and concern and resulted in the chilled memories of his witnesses.

Most important in our consideration is whether the prosecutor's delay hampered defendant's ability to present his defense to the armed robbery charge. *Barker v. Wingo, supra.* Two of defendant's alibi witnesses testified at the 2 March 1976 hearing that they could no longer recall specific dates. Lapses of memory can be prejudicial to a defendant, but here at least one of the two witnesses was able to narrow down the date in question to the Friday after Christmas. A check of that year's calendar could quickly provide the precise numerical date.

Defendant also testified that because of the delay he could no longer locate his other three alibi witnesses. Presumably these witnesses would have offered testimony to corroborate defendant's evidence that he was at a party on the night in question. Defendant, however, has made no showing as to when the witnesses became unavailable. Their disappearance was first discovered in the latter part of February 1976 when defendant's wife tried to contact them for purposes of the motion hearing. Because defendant has not demonstrated that his witnesses were available at any earlier time, we cannot conclude that the prosecutor's delay caused him prejudice. *State v. Williams,* 40 N.C. App. 178, 252 S.E. 2d 245 (1979).

Defendant is not removed from the constitutional guarantee of a speedy trial because he was incarcerated for an unrelated offense at the time he made his motion to dismiss. *State v. Vaughn,* 296 N.C. 167, 250 S.E. 2d 210 (1978), *cert. denied,* 441 U.S. 935, 99 S.Ct. 2060, 60 L.Ed. 2d 665 (1979). Upon balancing the

four factors, however, we conclude that defendant has failed to show evidence requiring dismissal of the charges.

[2] Defendant next assigns as error improper expressions of opinion during the course of his trial on armed robbery. Twice the court sustained its own objection to questions defense attorney asked during a cross-examination and once to a question defense attorney asked during direct examination. Defendant argues that by sustaining its own objection, the court improperly expressed an opinion adverse to the defendant.

A judge may always properly exclude inadmissible evidence. 1 Stansbury, N.C. Evidence § 27 (Brandis rev. 1973). He is prohibited, however, by G.S. 15A-1222 and -1232 from doing so in a manner which intimates any judicial favoritism. In the instant case, two of the court's sustained objections were directed to argumentative questions and one to a question calling for repetitious testimony. The judge made no additional remarks. The situation can be distinguished from that in *State v. Lemmond*, 12 N.C. App. 128, 182 S.E. 2d 636 (1971). There the court sustained its own objection sixteen times and made the further comment to defense attorney, "You know better than that." We conclude that in the present case, the trial judge exercised his discretion without exceeding the bounds of impartiality.

[3] Another remark of which defendant complains occurred during the testimony of defendant's first witness. Defense attorney asked, "Now, when was it that you first had knowledge that these two men were in the courtroom?" The State objected on grounds of repetition. The court ruled, "Yes, I think she has been over that . . . and most of this other testimony, my recollection is." Defendant contends this remark improperly expressed dissatisfaction with the manner in which defendant was presenting his evidence. An examination of the record, however, reveals that the witness's testimony was indeed repetitive of her earlier testimony. Since the court must be left free to keep the examination of witnesses under control and within the bounds of lawful, relevant, and nonrepetitive inquiry, we hold the judge's comment was not error. *State v. Frazier*, 278 N.C. 458, 464, 180 S.E. 2d 128, 132 (1971).

[4] Defendant argues that a third remark by the court constituted an improper comment on defendant's failure to testify. The following exchange took place:

> "Defense attorney: 'But the man you saw last night had a crooked nose?'
>
> The court: 'Sustained.'
>
> Defense attorney: 'I'm going to introduce him into evidence, then.'
>
> The court: 'He'll have to take the witness stand.' "

G.S. 8-54 unquestionably prohibits any comment before the jury concerning defendant's failure to testify. The court's comment here, however, does not specifically point to defendant's failure to testify. Neither is it likely that the jury would so interpret it. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976). Rather the judge's remark explains evidentiary procedure. Any possible harmful effect was removed by the court's explicit instruction to the jury that defendant's election not to testify was an exercise of his legal right and should not be considered against him. *See State v. Lindsay*, 278 N.C. 293, 179 S.E. 2d 364 (1971).

[5] Defendant's final assignment of error is that he was denied a fair trial because he was forced to continue with his court-appointed attorney and because he failed to receive effective assistance of counsel. A criminal defendant is guaranteed the right to assistance of counsel. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). The right to appointed counsel, however, does not include the right to a substitute counsel on demand. The defendant must show good cause for dismissal such as a conflict of interest or a complete breakdown in communications. *United States v. Young*, 482 F. 2d 993 (5th Cir. 1973).

There is no such evidence in the present case. Defendant expressed dissatisfaction to the court because he disagreed with his court-appointed attorney on whether a particular witness should be subpoenaed. Defendant is not entitled to a substitute counsel merely because he disagrees with the trial tactics his attorney has chosen. *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). His attorney had the responsibility for selecting defense witnesses, and in his discretion, he decided that the particular

witness in queston would not be an effective alibi witness. Defendant was not entitled to a replacement of counsel.

[6] Defendant, nevertheless, contends that before his present attorney was allowed to continue, the court should have advised defendant of his right to conduct his own defense. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975). *Faretta* does not address the present situation where the defendant failed to request self-representation. There are North Carolina cases on point, however. *See State v. Cole*, 293 N.C. 328, 237 S.E. 2d 814 (1977); *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). In *State v. Cole*, the defendant never indicated a desire to represent himself yet he argued that the trial court should have advised him of his right to proceed without counsel upon denial of his motion to replace his attorney. The Supreme Court disagreed. We, therefore, find no merit in this assignment of error. We do emphasize, however, that it is advisable for a court to inquire of a defendant whether he desires to represent himself any time the defendant expresses to the court dissatisfaction with his appointed attorney.

[7] Defendant's right to representation is not an empty formality. Every criminal defendant has the right to *effective* assistance of counsel. *Moorefield v. Garrison*, 464 F. Supp. 892 (W.D.N.C. 1979). The general rule is that there is no constitutional violation "unless an attorney's representation is so lacking that the trial has become a farce and a mockery of justice." *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974). Defendant specifically questions his attorney's recalling three of the State's chief witnesses. We cannot consider retrospectively whether defense attorney's selection of witnesses was a wise one. There is evidence in the record which suggests that defense attorney's examination of state witnesses highlighted some inconsistencies in their testimony. We conclude that defendant has failed to show such divided loyalties or slack representation as amounts to a mockery of justice.

The defendant has had a fair trial, and we find no error.

No error.

Judges ARNOLD and WEBB concur.

LINDSEY LEO SMITH AND WIFE, EUDELL SMITH v. POWELL FUNERAL HOME

No. 8113SC115

(Filed 6 October 1981)

Dead Bodies § 2— breach of contractual duty to perform burial in workmanlike manner—summary judgment improper

In an action by plaintiffs to recover for mental anguish resulting from the manner in which their deceased son was buried by defendant, where, based upon the forecast of evidence, the jury could find that the defendant was responsible for the digging of the grave, that the grave site was of uneven grade and the grave was dug so that the joint between the box and the top of the vault was exposed above ground at one point, that gases from inside the vault were thereby able to escape through the seal to the open air resulting in an odor and the attraction of flies, that this was not a proper practice, and that the defendant thereby breached its contractual duty to perform the burial in a good and workmanlike manner, entry of summary judgment for defendant was improper.

APPEAL by plaintiffs from *Braswell, Judge.* Judgment entered 6 November 1980 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 3 September 1981.

Plaintiffs instituted this action to recover for mental anguish resulting from the manner in which their deceased son was buried by the defendant. Plaintiffs alleged that they contracted with the defendant to inter the body of their son, that defendant breached the contract by failing to bury their son's body in a good and workmanlike manner, and that some months after the burial they found a strong odor and a large number of flies around the grave. Defendant filed answer, denying the material allegations of the complaint. Discovery was conducted and the defendant then moved for summary judgment. Summary judgment was allowed the defendant and the plaintiffs appeal.

Walton, Fairley & Jess, by Ray H. Walton and Elva L. Jess, for plaintiff-appellants.

Powell and Smith, by William A. Powell, for defendant-appellee.

ARNOLD, Judge.

The principles applicable to consideration of summary judgment motions are well established. The moving party has the burden of clearly establishing the lack of any triable issue of fact. The papers supporting the movant's position are to be carefully scrutinized while those of the opposing party are to be regarded indulgently. The motion may only be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See, e.g., Yount v. Lowe,* 288 N.C. 90, 215 S.E. 2d 563 (1975); *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974); *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972). In order for a defendant's motion for summary judgment to be granted, the defendant must produce a forecast of the evidence which he has available for presentation at trial which is sufficient, if considered alone, to compel a verdict in favor of defendant as a matter of law. Failure of the plaintiff to counter the effect of defendant's forecast by his own forecast of evidence sufficient to create a genuine issue of material fact will result in a judgment against him. The test is whether plaintiff has presented evidence sufficient to survive a motion for a directed verdict if such evidence were offered at trial. *Cockerham v. Ward* and *Astrup Co. v. West Co.,* 44 N.C. App. 615, 262 S.E. 2d 651, *disc. review denied,* 300 N.C. 195, 269 S.E. 2d 622 (1980).

The law with respect to an undertaker's liability for breach of a contract of burial has also been addressed in North Carolina. In *Lamm v. Shingleton,* 231 N.C. 10, 55 S.E. 2d 810 (1949), the plaintiff alleged that defendant undertakers' failure to lock the vault in which they buried the plaintiff's deceased husband resulted in water and mud entering the vault and forcing it to the surface. In the course of holding that the plaintiff's action was properly based on contract rather than tort law, our Supreme Court wrote:

> The defendants held themselves out as specially qualified to perform the duties of an undertaker. When they undertook to conduct the funeral of plaintiff's deceased husband they impliedly convenanted to perform the services contemplated by the contract in a good and workmanlike manner. Any breach of the duty thus assumed was a breach of the duty imposed by the contract and not by law.

Id. at 13, 55 S.E. 2d at 812. With these principles in mind, we now turn to the forecast of evidence presented at the hearing on the defendant's motion for summary judgment in this case.

Defendant presented several depositions in support of its motion. The plaintiffs relied upon these same depositions and presented one affidavit. These materials tended to show the following: The defendant is a family business operated by Gerald E. Powell, his brother Michael Dixon Powell, and their mother. The plaintiffs' son Jerry Smith was killed in an accident on 31 October 1977. The family made funeral arrangements with Michael Powell and selected a casket and vault. The family decided upon a surface burial in which the top of the vault would be exposed above the ground. There are different types and grades of caskets, and the one selected in this case was not air tight. There was testimony that Michael Powell told the *feme* plaintiff that the vault selected for this burial had a fifty year warranty, but he denied this. Defendant ordered the vault from Wilbert Burial Vault Company in Lumberton. W. Marshall Ouzts is president of a company that has a franchise from Wilbert Burial Vault Company to manufacture and sell vaults, and his company supplied the vault to the defendant. The vault used for this burial was guaranteed by Ouzts but was not covered by the Wilbert warranty. The box portion of the vault was made of reinforced concrete and was 26 inches high. The vault was not designed for surface burial; however, Ouzts had designed and manufactured a top for this vault so that it could be used for surface burial. Wilbert Burial Vault Company had not approved the modification that Ouzts made in the vault top. The top that Ouzts designed looked like a flat concrete slab over the grave. It was 7½ inches high on the sides and was heavier than the top ordinarily used with this vault box, but it was otherwise the same. Ouzts explained that there was a tongue and groove joint where the vault top fitted onto the box and that a butyl sealer was placed in the joint to make it "hermetically sealed."

The defendant was responsible for digging the grave. The vault company placed the vault box in the grave and placed the sealer and top on the vault. Ouzts asserted that his company worked under the general supervision of the defendant, but the Powell brothers indicated that the vault company was responsible for installing the vault and that they had no control over it. Ouzts

asserted that he advised funeral directors to dig the grave to a depth of 29 inches for a burial of this type but that the final decision as to the depth of the grave was a matter for the family and the funeral director to decide. The family did not give any instructions as to how deep the grave should be in this case. The Powell brothers stated that they made the decision as to the depth of this grave and that it was approximately 29 inches deep. Neither the family nor the vault company questioned the depth of the grave. Plaintiffs' son was buried on 3 November 1977. Gerald Powell asserted that he did not examine the seal. Michael Powell stated that the vault appeared to be placed and closed to his satisfaction.

A one- to two-foot area around the grave caved in following a heavy rain shortly after the burial, and the family had it filled up with sand. The family did not become concerned until on or about 9 July 1978 when the plaintiffs noticed flies and an odor about the grave. Gerald Powell was called to the scene the following day, and he told the *feme* plaintiff that there was definitely something wrong. He put more dirt and grass around the grave and contacted Ouzts. The vault was subsequently removed and the body was reinterred in a new vault at no cost to the plaintiffs. Neither Ouzts nor Gerald Powell could remember whether the grave was made deeper. Ouzts stated that he examined the original vault and that he found that it was not defective and that it had been sealed. Other testimony indicated a difference of opinion among the persons at the scene as to whether there was sufficient sealer at one point of the vault joint. Further, in the deposition of Ouzts we find the following:

> The cemetery lot where this grave was was not level and a part of the seam between the base and the cover was exposed to the air on the low side before we started digging it up. If the flat surface, the top of that cover was exposed to the sun, and if the grade of the ground was such that on the low side of that slope the seam between the cover and the base was exposed to the air, it would not, in my opinion, have been unusual for gases to escape from the inside of that vault to the outside air through the seal because body gases have got to go somewhere. So far as I know, and from my experience, there are body gases within a vault simply as a result of the natural decomposition of the body inside. If that

> seam is exposed it's not unusual for those gases to work through the seal to the outside air I wouldn't think. There would, of course, be an odor attributed to such gases once they are in the outside air.

As to the proper method of burial, Ouzts stated that he did not know whether it was accepted practice to cover the joint between the vault box and top or to leave it exposed to the air. He stated that "the way the family wants [the funeral director] to do it is between them." The *homme* plaintiff stated in his affidavit "that he assumed that the type of burial that he and his wife discussed would be satisfactory and that no odors would be emitting therefrom; that he is not at all familiar with body interment practices and was relying entirely on Powell Funeral Home, who had made other similar interments, to take care of the details." Michael Powell acknowledged that the only information the family had about the vault was what he told them and that he did not tell them that there was a danger of an odor coming from the grave if this vault was used for a surface burial. Gerald Powell asserted in his deposition that he "would not consider it a proper practice" to inter a body so that offensive odors would escape from the grave or flies would be attracted to it. Defendant has had a problem with one other surface burial in a vault similar to that used in this case. Defendant now buries these vaults below the ground and puts a separate slab on top if the family wants the grave to look like a surface burial. Ouzts' company is now making holes in the bottom of vaults used for surface burials so that the escaping gases can pass out through the bottom and be filtered through the ground.

Based upon the above forecast of evidence, a jury could find, among other possibilities, that the defendant was responsible for the digging of the grave, that the grave site was of uneven grade and the grave was dug so that the joint between the box and the top of the vault was exposed above ground at one point, that gases from inside the vault were thereby able to escape through the seal to the open air resulting in an odor and the attraction of flies, that this was not a proper practice, and that the defendant thereby breached its contractual duty to perform the burial in a good and workmanlike manner. The defendant failed to establish the absence of triable issues of fact in this case. Summary judg-

ment should not have been allowed the defendant, and we reverse it and remand the matter for trial before a jury.

Reversed and remanded.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. GARY JOYNER

No. 813SC177

(Filed 6 October 1981)

1. **Criminal Law § 76.2— general objection to in-custody statement—necessity for motion to suppress**

The trial court could properly overrule defendant's general objection to an officer's testimony concerning defendant's in-custody statement since a motion to suppress in accordance with G.S. 15A-971 *et seq.* was the proper procedure to challenge the admission of evidence allegedly required to be excluded by the United States or North Carolina Constitutions.

2. **Criminal Law § 75.5— sufficiency of Miranda warnings**

Miranda warnings given by an officer to defendant prior to defendant's in-custody statement were in all respects complete and adequate.

3. **Criminal Law § 76.2— in-custody statement—voir dire not required**

Where defendant's in-custody statement was not in the nature of a confession or an acknowledgment of guilt of any element of the charge against him, the trial court was not required to conduct a voir dire hearing in order to determine its admissibility.

4. **Criminal Law § 162— absence of objection—waiver of objection to similar testimony**

Through the admission of testimony without objection defendant waived subsequent objection to the admission of testimony of a similar character by another witness.

5. **Criminal Law § 113.9— misstatement of evidence—waiver of objection**

Defendant waived objection to the court's statement of a non-material fact not shown in evidence by failing to call the misstatement to the attention of the trial judge before the jury retired.

6. **Assault and Battery § 15.6; Criminal Law § 168.3— erroneous instruction on self-defense—harmless error**

In a prosecution for assault with a deadly weapon with intent to kill, defendant was not prejudiced by the trial court's erroneous instruction that, in

determining whether defendant acted in self-defense, the jury should consider whether "defendant" rather than "the victim" had a weapon in his possession.

7. **Assault and Battery § 15.6— self-defense—instruction on defendant as aggressor**

The State's evidence in a felonious assault case would support a finding that defendant was the aggressor and warranted an instruction that self-defense is an excuse only if defendant himself was not the aggressor where it tended to show that defendant intervened in an altercation between the victim and a third person; defendant produced a pistol and was told by the victim to put the gun away; defendant replied that he was going to shoot the victim if the victim hit the third person; and the third person then hit the victim with a beer bottle and defendant shot the victim in the back.

8. **Assault and Battery § 15.7— defense of third person—instruction not required**

In a prosecution for assault with a deadly weapon with intent to kill, the trial court did not err in failing to instruct the jury on defense of a third person where the State's evidence tended to show that the victim was unarmed and had done nothing to cause the third person to believe that a felonious assault was about to be committed upon him by the victim, and defendant's evidence tended to show that he acted in defending himself from an assault by the victim.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 13 November 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 1 September 1981.

Defendant was charged in a proper bill of indictment with assault with a deadly weapon with intent to kill. The jury found defendant guilty of assault with a deadly weapon inflicting serious injury. From a judgment entered thereon imposing a prison sentence of not less than six years nor more than seven years, defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Appellate Defender Adam Stein, for the defendant appellant.

HEDRICK, Judge.

Based on his first and second assignments of error, defendant contends that the court erred in admitting into evidence over his objection a statement made by defendant while in custody of the sheriff's department. He argues that the *Miranda* warnings given by Officer Richard A. Motto prior to the statement were inade-

quate and that the court failed to conduct a *voir dire* to determine the voluntariness of the statement. We do not agree.

These assignments of error are based on Exceptions Nos. 1 and 2. Officer Motto gave the following testimony at trial with respect to his giving the *Miranda* warnings to defendant:

> I spoke with Gary Joyner on July 5, 1980, at approximately 1:38 A.M. at the Craven County Sheriff's Department. I do not know how Mr. Joyner got to the Craven County Sheriff's Department. I read Gary Joyner the Miranda warnings off of a card. He indicated that he knew and understood those rights. The card that I read to Gary Joyner stated, "Before you are asked any questions it is required that you be advised of your rights. You have the right to remain silent. Anything you say can or will be used against you in Court. You have the right to talk to a lawyer and have him present while you are being questioned. If you cannot afford a lawyer you have the right to request the Court to appoint one for you before you answer any questions. If you decide to answer questions now, without a lawyer, you may refuse to answer any particular question or stop answering at all any time you wish to do so, and having been advised of your rights, do you want to answer questions now before you talk to a lawyer?" Gary Joyner said that he would talk to me and did not want an attorney present at that time. I asked him if he understood each of the rights I explained to him and he answered "Yes," . . .

When the district attorney then asked Officer Motto what conversation he had with defendant, counsel for defendant made a general objection, which was overruled by the trial judge, forming the basis for Exception No. 1. Officer Motto thereafter testified that defendant gave an oral statement in which he said that he had hit someone who pulled a knife on him, but that he did not have a gun and did not shoot anyone. Following such testimony, defendant moved to strike that testimony, and the court's denial of that motion constitutes the basis for Exception No. 2.

In *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980), our Supreme Court held that a general objection to testimony whose admissibility could be challenged pursuant to a ground

specified in G.S. § 15A-974 could properly be overruled by the trial judge. The Court indicated that a motion to suppress in accordance with G.S. § 15A-971 *et seq.* was the proper procedure to challenge the admission. The Court further indicated that a general objection to the introduction of the testimony at trial, assuming a motion to suppress under G.S. § 15A-971 *et seq.* could properly be made at that time, could be overruled by the trial judge since G.S. § 15A-977 requires that a motion to suppress allege a legal or factual basis for the suppression or else the trial judge may summarily deny it.

[1] In the present case, defendant's general objection obviously sought to exclude the proffered testimony of Officer Motto on the ground that defendant's oral statement was taken in violation of his Fifth and Sixth Amendment rights. Defendant apparently had no prior notice of the State's intention to introduce the statement, so he was entitled to make a motion to suppress at trial. *See* G.S. § 15A-975. Evidence for which exclusion is required by either the United States or the North Carolina Constitutions is a specified ground for a motion to suppress under G.S. § 15A-974(1), and thus under *State v. Satterfield, supra*, defendant's general objection could be properly overruled by the trial judge. It follows, then, that the court did not err in overruling the objection and, as a consequence, in denying defendants motion to strike.

[2, 3] Assuming arguendo that defendant's general objection was sufficient to challenge the admission of the testimony, the prior testimony of Officer Motto as set out above clearly demonstrates to us that the *Miranda* warnings given by the officer to defendant were in all respects complete and adequate. Moreover, since defendant's statement was not in the nature of a confession or an acknowledgment of guilt of any element of the charge against him, the court was not required to conduct a *voir dire* in order to determine its admissibility. *State v. Jones*, 294 N.C. 642, 243 S.E. 2d 118 (1978). These assignments of error are without merit.

[4] Defendant by his fourth, fifth, and sixth assignments of error contends that he is entitled to a new trial because of improper cross-examination by the State of defense witnesses Jessie Jones and wife Mary Jones as to Jessie Jones's prior arrests for assaulting his wife. Defendant argues that the State "violated

several well-established North Carolina evidentiary rules" in eliciting such testimony. We disagree.

These assignments of error are based on Exceptions Nos. 3 and 4. Exception No. 3 relates to the testimony of Jessie Jones and is set out in the record as follows:

> Q. How many times has your wife had you arrested for assaulting her?
>
> A. I believe it was twice.

Exception No. 4 relates to the testimony of Mary Jones and is set out in the record as follows:

> Q. What time did you have your husband arrested for assaulting you?
>
> MR. MILLS: OBJECTION.
>
> COURT: OVERRULED.
>
> DEFENDANT'S EXCEPTION NO. 4.
>
> A. I guess a couple of times. We are just like any other married couples [sic]. We have our ups and downs, . . .

The record indicates that defendant made no objection at the time the question upon which Exception No. 3 is based was put to Jessie Jones, and the objection upon which Exception No. 4 is based was to essentially the same question later put to Mary Jones. By failing to object at the time the question was asked Jessie Jones, defendant waived his right to do so, and the admission of such evidence, even if incompetent, would not entitle him to a new trial. *State v. Shrader*, 290 N.C. 253, 225 S.E. 2d 522 (1976). Since the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character, *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979), the trial judge could properly overrule defendant's objection when a similar question was later asked of Mary Jones. We note that the trial judge did sustain defendant's objection to further questioning on this point. Defendant has shown no prejudice in the admission of the testimony challenged by these exceptions, and these assignments of error are without merit.

[5] By his seventh assignment of error, defendant contends that the court erred in its summary of the evidence to the jury by

stating that defendant offered evidence tending to show he had not shot anyone, when in fact defendant did not offer any such evidence. He argues that the misstatement was of such material fact that it was prejudicial to him. We do not agree. The general rule is that where the trial judge misstates the evidence or the source of the evidence in the charge to the jury, such inaccuracy must be called to the attention of the trial judge before the jury retires, or else any objection thereto is deemed waived and will not be considered on appeal; if, however, the misstatement is of a material fact not shown in evidence, it is not required that the error be called on the judge's attention before the jury retires. *State v. Butcher*, 13 N.C. App. 97, 185 S.E. 2d 11 (1971). In the present case, defendant did not object to the misstatement before the jury retired. The misstatement is not, as defendant contends, one of a material fact. Under the circumstances of this case, such an inaccuracy would not have affected the outcome of the trial. Defendant's objection to the misstatement, therefore, is deemed waived, *State v. Butcher, supra*, and this assignment of error is without merit.

[6] Defendant's ninth assignment of error relates to the court's instructions on self-defense. In its instructions, the court instructed the jury that in determining whether defendant acted in self-defense it should consider whether defendant had a weapon in his possession. Defendant argues that the court should have referred to "the victim" instead of defendant, and that such a misstatement constitutes prejudicial error. We disagree. While we recognize that the court should have inserted "the victim" in place of defendant's name in the challenged instruction, we find such error to be nonprejudicial. Based on the evidence presented, and the remaining portions of the charge, we are convinced that the jury could not have been misled by this *lapaus linguae*, and a different result would not have been reached by them. This assignment of error is meritless.

[7] Defendant's tenth assignment of error also relates to the court's instructions on self-defense. Defendant contends the court erred in instructing that self-defense is an excuse only if defendant himself was not the aggressor. He argues that such an instruction was not warranted by the evidence, since no evidence was presented that defendant was the aggressor. We disagree.

In the present case, the State's evidence tends to show that an argument had ensued between the victim, Fred Gathercole, and Jessie Jones, after Jones had intervened in a dispute between Gathercole and one Karen Stilley. Defendant then stepped between Gathercole and Jones, and Jones picked up a beer bottle. Defendant then unwrapped a pistol from a napkin, and Gathercole told defendant to put up the gun, to which defendant replied, "If you hit Jessie, I am going to shoot you." Gathercole again told defendant to put up the gun, and as he turned around, Jones hit Gathercole with a beer bottle, and then defendant shot Gathercole in the back.

Defendant's evidence, on the other hand, tended to show that defendant tried to break up the argument between Jones and Gathercole, as he was attempting to persuade Jones to leave because Gathercole was "going to hurt" them. Gathercole then started verbally and physically abusing defendant. Gathercole then attacked defendant and in the ensuing struggle defendant drew a gun from his pocket and shot Gathercole.

Therefore, the State's evidence tends to show that defendant was the aggressor as between him and Gathercole, while defendant's evidence tends to show that he acted in self-defense. Based on the evidence presented, the trial judge was obligated to instruct on self-defense but because the State's evidence tended to show that defendant was the aggressor, he properly instructed further that self-defense would be an excuse only if defendant was *not* the aggressor. This assignment of error is without merit.

[8] Defendant finally contends, based on his twelfth and thirteenth assignments of error, that the court erred in not instructing that defendant acted in defense of a third person, and particularly in failing to instruct further in the instruction challenged by his tenth assignment of error that one is not an aggressor if he voluntarily enters the fight in defense of a third person. Defendant argues that the evidence presented requires such instructions. We disagree. A person has the right to go to the defense of another if he has a well-grounded belief that a felonious assault is about to be committed upon such other person. *State v. Fields*, 268 N.C. 456, 150 S.E. 2d 852 (1966); *State v. Graves*, 18 N.C. App. 177, 196 S.E. 2d 582 (1973). In the present case, the State's evidence tends to show that Gathercole, the vic-

tim, was unarmed and that Gathercole had done nothing to cause Jones to believe that a felonious assault was about to be committed upon him by Gathercole. In fact, the State's evidence tends to show just the opposite; Jones was getting ready to, and did, hit the victim with a beer bottle. Defendant's evidence tends to show that defendant acted in *self*-defense as to an assault by Gathercole. We are of the view that the court properly did not instruct that defendant was acting in defense of another person, and these assignments of error are without merit.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges HILL and WHICHARD concur.

THOMAS GARLAND DYER v. THOMAS W. BRADSHAW, JR., SECRETARY OF THE N. C. DEPARTMENT OF TRANSPORTATION, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, AND HIS AGENTS, ASSIGNS, AND SUCCESSORS IN INTEREST

No. 8110SC140

(Filed 6 October 1981)

Master and Servant § 10.2— dismissal from employment—superior court without jurisdiction—no "contested case"—no entitlement to procedural due process

Where plaintiff was discharged from employment in the Department of Transportation for improper use of state equipment, the superior court was without jurisdiction to hear his appeal. G.S. 150A-43 of the Administrative Procedure Act provides, among other things, that plaintiff is not entitled to judicial review unless his is a "contested case," and review by an Employee Relations Committee was not an adjudicatory hearing making defendant's case "contested." Neither did plaintiff's claim entitle him to procedural due process as his employment contract did not provide him with a legitimate expectation of continued employment and there was no statutory recognition of a property interest as plaintiff has been employed by the State for less than five years. G.S. 126-4 and G.S. 126-39.

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 9 January 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 15 September 1981.

Plaintiff was discharged by defendant Bradshaw, Secretary of the North Carolina Department of Transportation, for improper use of state equipment. On 28 August 1980, plaintiff filed a complaint in Superior Court seeking judicial review of his discharge under G.S. 150A-43. Defendant moved to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). The court allowed the motion. Plaintiff appeals.

Plaintiff was first employed by the North Carolina Department of Transportation on 3 August 1975. On 28 December 1979, plaintiff was involved in an accident while driving a state-owned GMC dump truck. As a result of the accident, the Department lost use of the vehicle for three months and spent $1,498.76 for vehicle repair. An investigation by the Department of Transportation revealed that plaintiff was exceeding a safe speed while driving the truck. He was also out of his work area without proper authorization. Plaintiff was subsequently discharged from employment.

Pursuant to the Department of Transportation's personnel manual, plaintiff was provided an opportunity to present his case to a five-member Employee Relations Committee. The Committee recommended that plaintiff be reinstated. Defendant, nevertheless, upheld plaintiff's dismissal.

Attorney General Edmisten, by Associate Attorney James W. Lea, III, and Assistant Attorney General J. Chris Prather, for respondent appellee.

Western North Carolina Legal Services, Inc., by Patrick Lordeon and Raymond D. Large, for plaintiff appellant.

VAUGHN, Judge.

The sole issue presented is whether the Superior Court had jurisdiction under any statute to review defendant's action in upholding plaintiff's dismissal. We hold the Superior Court was without jurisdiction and therefore properly dismissed plaintiff's complaint.

Plaintiff seeks judicial review of defendant's decision under G.S. 150A-43 of the Administrative Procedure Act. The statute provides:

> Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. . . .

G.S. 150A-43 (1973). There are five requirements under this statute: (1) plaintiff must be an aggrieved person; (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) plaintiff must have exhausted administrative remedies; (5) there must be no other adequate procedure for judicial review.

In the case at bar, plaintiff fails to meet the third element of a "contested case." "Contested case" is defined by G.S. 150A-2(2) as "any agency proceeding, by whatever name called, wherein the legal rights, duties, or privileges of a party are *required by law* to be determined by an agency after an opportunity for an *adjudicatory hearing.*" (Emphasis added). It is clear that no statute requires the Secretary of Transportation to provide an adjudicatory hearing in reviewing the recommendation of the Employee Relations Committee.

Chapter 4 of Title 19A, North Carolina Administrative Code, sets forth the mechanics for dismissal of an employee of the Department of Transportation. The unit head must thoroughly investigate the case before taking any action. If the unit head discharges an employee and the employee feels his dismissal was unjustified, the aggrieved person may then appeal to an Employee Relations Committee. The Employee Relations Committee is a five-member panel appointed by the Department of Transportation's Director of Personnel. The decision handed down by this Committee is then reviewed by the Secretary of the Department of Transportation. According to 4B.0303, "the Secretary may either agree or disagree with the recommendations made by the committee." At no point does Chapter 4 require the Secretary to provide "an opportunity for an adjudicatory hearing" before making his determination. *See also Advertising Co. v. Bradshaw, Sec. of Transportation,* 48 N.C. App. 10, 268 S.E. 2d 816 (1980).

Plaintiff, however, contends that the hearing before the Employee Relations Committee was itself an adjudicatory hearing, and thus there was a "contested case" triggering the application of G.S. Chapter 150A. We disagree. According to the Department of Transportation's personnel manual, the Employee Relations Committee hears appeals from state employees who have been suspended, demoted, or discharged. No final determination is made by the Employee Relations Committee. Its inquiry results in a recommendation with which the Secretary is free to agree or disagree in reaching his final decision. Title 19A, North Carolina Administrative Code 4B.0303. Such recommendation is binding only if the Secretary fails to render a decision within thirty working days of receiving its recommendation, an event which did not occur in the present case.

Plaintiff must show "an opportunity for an adjudicatory hearing" in order for there to be "a contested case" as required for judicial review under G.S. 150A-43. Because plaintiff has failed to do so, we hold that the trial court properly dismissed plaintiff's claim for relief under the Administrative Procedure Act.

Plaintiff nevertheless contends that his complaint states a claim for relief under 42 U.S.C. § 1983. Plaintiff argues that his loss of employment constituted deprivation of a constitutionally protected property and liberty interest, thereby entitling him to procedural due process. We find no constitutional violation.

Not every property interest requires procedural due process. A protected property interest arises when one has a legitimate claim of entitlement as decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed. 2d 684 (1976). Thus, unless plaintiff can demonstrate that he had a legitimate claim to continued employment under either his employment contract or a state statute, he is not entitled to procedural due process in the form of an adjudicatory hearing. On this record, it is clear that plaintiff cannot so demonstrate.

First, employment by the State of North Carolina does not automatically confer tenure. *Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976). There is nothing in the record which suggests that plaintiff's contract contained a duration clause. It is well established in this State that, absent such a clause, a contract of employment is terminable at the will

of either party, irrespective of the quality of performance. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971). Plaintiff's employment contract did not, therefore, provide him with a legitimate expectation of continued employment.

Second, there is no statutory recognition of a property interest in continued employment. G.S. 126-35 of the State Personnel Act states that no permanent employee shall be discharged except for just cause. It has been held that G.S. 126-35 "creates a reasonable expectation of continued employment and a property interest within the meaning of the due process clause." *Faulkner v. North Carolina Dept. of Corrections*, 428 F. Supp. 100, 103 (W.D. N.C. 1977). That statute, however, only applies to employees who have been "continuously employed by the State of North Carolina for five years at the time of the act, grievance, or employment practice complained of." G.S. 126-39. The present case is governed by G.S. 126-4 which provides that the policies and rules of the State Personnel Commission

> ". . . shall not limit the power of any elected or appointed department head, in his discretion and upon his determination that it is in the best interest of the Department, to transfer, demote, or separate a State employee who has not been continuously employed by the State of North Carolina for the immediate five preceding years."

G.S. 126-4 (1977).

In the case at bar, plaintiff had been employed by the State of North Carolina for less than five years at the time of his dismissal. He has, therefore, been deprived of neither "liberty" nor "property" within the scope of the Fourteenth Amendment. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).

The order dismissing the action is affirmed.

Affirmed.

Judges ARNOLD and WEBB concur.

BARBARA RICE SAWYER v. JOE RICHARD SAWYER

No. 8128DC137

(Filed 6 October 1981)

1. **Divorce and Alimony § 5— divorce based on separation—amendment abolishing defense of recrimination—marriage before amendment—due process**

The amendment to G.S. 50-6 abolishing the defense of recrimination in a divorce action based on a year's separation does not deprive a party who was married before the amendment of a vested property right under the due process clause of the Fourteenth Amendment to the United States Constitution or the "law of the land clause" of Art. I, § 19 of the North Carolina Constitution.

2. **Divorce and Alimony § 5— divorce based on separation—amendment abolishing defense of recrimination—no deprivation of rights as tenant by the entirety**

The amendment to G.S. 50-6 abolishing the defense of recrimination in a divorce action based on a year's separation does not deprive defendant husband of a vested property right as a tenant by the entirety without due process of law because it permits plaintiff wife to obtain a divorce from defendant and defeat defendant's right upon death of the wife to become the sole owner of the property held by the parties as tenants by the entirety.

APPEAL by defendant from *Styles, Judge.* Judgment entered 18 November 1980 in District Court, BUNCOMBE County. Heard in the Court of Appeals 15 September 1981.

Plaintiff sought an absolute divorce from defendant based upon one year's separation under G.S. 50-6. Defendant filed an answer containing, among other things, two affirmative defenses. In his First Affirmative Defense defendant contends that the parties' separation was occasioned by plaintiff's abandonment of defendant, a recriminatory defense. Also, defendant contends that G.S. 50-6 is unconstitutional in that it impairs the obligation of the contract of marriage, it operates to deprive defendant of property without due process of law, it denies equal protection of the laws, and it constitutes a retroactive law. In his Second Affirmative Defense defendant contends that plaintiff's divorce under the current G.S. 50-6 would divest defendant of his vested property rights in real estate the parties acquired in 1969 as tenants by the entirety.

Prior to trial, the trial judge struck defendant's First and Second Affirmative Defenses under G.S. 1A-1, Rule 12(f), as insuf-

ficient defenses to plaintiff's cause of action. At trial defendant's motion for involuntary dismissal under G.S. 1A-1, Rule 41(b) was denied. Judgment was entered for plaintiff, and defendant appeals therefrom. We affirm.

Riddle, Shackelford & Hyler, by John E. Shackelford, for plaintiff-appellee.

Barnes, Wadford & Carter, by Steven Kropelnicki, Jr., for defendant-appellant.

HILL, Judge.

Defendant contends on appeal that the trial judge erred in striking his affirmative defenses, in denying his motion for involuntary dismissal, and in granting to plaintiff an absolute divorce because these rulings require an unconstitutionally retroactive application of G.S. 50-6; to wit, the parties hereto were married before the amendment to G.S. 50-6 abolishing the defense of recrimination. In addition, defendant contends that this retroactive application of G.S. 50-6 divests him of vested property rights as a tenant by the entirety without due process of law. We do not agree.

[1] Substantially, the issue before us is whether the North Carolina legislature may abolish the defense of recrimination in a statute which is the basis of an action for divorce after one year's separation without unconstitutionally depriving a party of a vested property right under the due process clause of the 14th Amendment to the United States Constitution, and "the law of the land clause," Art. I, § 19 of the North Carolina Constitution, where the abolition of the defense occurred after the marriage sought to be dissolved.

> It has been held by the highest authority that marriage is an institution of society, creating a status which may be regulated and controlled by public law; that legislation affecting the institution or annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts, or against ex post facto laws.

Tipping v. Tipping, 82 F. 2d 828, 830 (D.C. Cir. 1936), *citing Maynard v. Hill,* 125 U.S. 190, 8 S.Ct. 723, 31 L.Ed. 654 (1888).

Likewise, the "power over divorces" is controlled by the legislature. *Maynard v. Hill, supra* at 209, 8 S.Ct. at 728, 31 L.Ed. at 658. Thus, our State's legislature created a divorce right under G.S. 50-6 based upon the parties' habitation separate and apart for one year. In 1977 and 1979 G.S. 50-6 was amended to provide that a divorce granted under this statute would not be barred by a plea of recrimination. These actions were within the legislature's control of the marital status. The defense of abandonment in the case *sub judice* was properly dismissed. *Boone v. Boone*, 44 N.C. App. 79, 259 S.E. 2d 921 (1979).

[2] We now turn to the question of whether the above legislative action deprived defendant of a vested property right as a tenant by the entirety without due process of law. The rights of tenants by the entirety originate from the common law when husband and wife were regarded as one person. "[U]pon the death of one, the whole belongs to the other, not solely by right of survivorship, but also by virture of the grant which vested the entire estate in each grantee." *Davis v. Bass*, 188 N.C. 200, 203, 124 S.E. 566, 567 (1924), *quoted in Combs v. Combs*, 273 N.C. 462, 160 S.E. 2d 308 (1968). An absolute divorce destroys the unity of person and thereby converts an estate by the entirety into a tenancy in common, wherein the parties hold undivided one-half interests. *Highway Commission v. Myers*, 270 N.C. 258, 154 S.E. 2d 87 (1967); *Davis v. Bass, supra.* Thus, the common law relationship between tenants by the entirety makes it plain that their rights arise out of, and must depend upon, the continuance of the marital status.

The nature of the tenancy by the entirety, then, does not insulate it from legislative change. We find the following language determinative of this case:

> When a divorce occurs, the marital relation is altered, and the rights of the severed parties in the property are altered as well, so that the parties become tenants in common. This is not because of any retroactive effect of the decree of divorce on the original grant to the spouses, but because the creation of the tenancy by the entirety was dependent on their marriage and the marriage was a continuing condition for the existence of the tenancy. . . .

> No matter, then, how the marital status is ended, by the very nature of the relationship between the tenants by the entirety their rights are immediately altered by that ending.

Plancher v. Plancher, 35 A.D. 2d 417, 421, 317 N.Y.S. 2d 140, 143-44 (1970). *See generally Valladares v. Valladares*, --- A.D. 2d ---, 438 N.Y.S. 2d 810 (1981).

Therefore, we hold that defendant's right eventually to hold the entire property upon the death of his wife as a tenant by the entirety was not unconstitutionally taken away when the legislature removed his affirmative defense of abandonment by amendment to G.S. 50-6, thus allowing plaintiff's divorce from him. Defendant's argument is without merit.

Affirmed.

Judges HEDRICK and WHICHARD concur.

SHIRLEY D. FAYNE, EMPLOYEE, PLAINTIFF v. FIELDCREST MILLS, INC., EMPLOYER, DEFENDANT

No. 8110IC110

(Filed 6 October 1981)

Master and Servant § 66— workers' compensation—injury causing emotional disturbance—incapacity to work—entitled to compensation

If an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under G.S. 97-29. Therefore, where plaintiff suffered from a severe neurotic depressive reaction which made her unable to work, there was evidence her emotional condition was directly related to and caused by a back injury plaintiff suffered during the course of her employment, this was evidence which would support an award for compensation for total incapacity.

APPEAL by defendant from order of North Carolina Industrial Commission entered 24 November 1980. Heard in the Court of Appeals 3 September 1981.

The plaintiff injured her back on 18 May 1976. The defendant stipulated that the accident in which the plaintiff received her in-

jury occurred while she was employed by the defendant and that the physical damage to the back is compensable under the Workers' Compensation Act. The dispute in this case is whether the plaintiff is entitled to compensation for an injury on account of certain mental problems she has suffered since the accident. At a hearing before Deputy Commissioner John Charles Rush, the deposition of Dr. B. R. Ashby, a psychiatrist, was introduced into evidence. Dr. Ashby testified in answer to a hypothetical question that the plaintiff had "been suffering from a severe neurotic depressive reaction, which has caused her to have significant impairment from a psychological and emotional point of view, which in my opinion has made her unable to work." He testified further: "I think that there is a strong likelihood or probability that her depressive reaction is related to her injury and subsequent surgery" and that there is a causal relationship between the accident and surgery and the depressive reaction. He also testified that in his opinion she had not reached maximum improvement. The defendant introduced into evidence a report by Dr. W. J. Grant, III, a psychiatrist, which stated that he classified her depression as a compensation neurosis and that she is unable to work because of her depression. The report also stated that the plaintiff is in the lower three percent of the population in intellectual capacity and as "would an eleven year old child, she expected the doctor to 'make it well' after her alleged injury at work in 1976. She has been unable to comprehend the ensuing complex, and confusing course of events."

Deputy Commissioner Rush found facts based on the evidence, including a finding of fact that the "emotional condition of the plaintiff is directly related to and was caused by the back injury the plaintiff sustained on May 18, 1976." He concluded she was temporarily totally disabled and awarded compensation accordingly. On appeal, the Industrial Commission modified the order of Deputy Commissioner Rush by reserving the question of whether the plaintiff may be entitled to compensation for permanent total disability, and adopted the order as modified. The defendant appealed.

Smith, Patterson, Follin, Curtis, James and Harkavy, by Henry N. Patterson, Jr., for plaintiff appellee.

Smith, Moore, Smith, Schell and Hunter, by Gerard H. Davidson, Jr., Suzanne Reynolds, and J. Donald Cowan, Jr., for defendant appellant.

WEBB, Judge.

It has been held in this state that if an employee receives an injury which is compensable under the Workers' Compensation Act and as a result of pain and suffering from this injury he becomes so deranged that he commits suicide, the death is compensable under G.S. 97-38. *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970) and *Thompson v. Transfer Co.*, 48 N.C. App. 47, 268 S.E. 2d 534 (1980). We believe under the holdings of these cases that if an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity under G.S. 97-29.

In this case Dr. Ashby testified that the plaintiff was suffering from a severe neurotic depressive reaction which made her unable to work. In his opinion "there is a strong likelihood or probability that her depressive reaction is related to her injury and subsequent surgery" and he considered it a causal relationship. Deputy Commissioner Rush found as a fact that the "emotional condition of the plaintiff is directly related to and was caused by the back injury the plaintiff sustained on May 18, 1976." We hold that the evidence supports this finding of fact, and the finding of fact supports the award of compensation to the plaintiff under the rule of *Petty* and *Thompson*.

The appellant contends that the Commission was in error for several reasons. It says first that in order for Mrs. Fayne's depression to be compensable, it must be a compensable injury under some provision of the Workers' Compensation Act. The defendant also contends that the depression was not an injury that occurred in the course of employment. *See Bartlett v. Duke University*, 284 N.C. 230, 200 S.E. 2d 193 (1973) for a discussion of accidents that occur in the course of employment. We believe that *Petty* and *Thompson* have answered both of these contentions adversely to the defendant. In order to reach the results of those

two cases, the court in each case had to hold that an abnormal mental condition is compensable if it is caused by a compensable injury. The court in each case also had to hold that the injury occurred in the course of employment.

The defendant also contends that when a person seeks compensation for a mental disability there must be unequivocal medical testimony to establish the causal connection between the accident and the mental condition. In *Petty* the psychiatrist testified that in his opinion "the injury . . . could have contributed to the mental condition . . ." and "if Petty suffered great pain it could have contributed to an emotional condition such as depression, particularly if the pain was chronic and he saw no end or solution to it." Our Supreme Court held this was sufficient evidence to support a finding of fact that the injury caused the mental derangement which caused the suicide. We believe the testimony of Dr. Ashby as to the causation of Mrs. Fayne's mental condition by her injury meets the test of *Petty*.

The defendant also contends the plaintiff's claim for mental distress is not compensable because the mental distress was not caused by pain and suffering but by her frustration in not recuperating from the operation. We do not believe this distinction makes a difference.

Affirmed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. CHARLES OLLIS BLEVINS

No. 8128SC217

(Filed 6 October 1981)

Criminal Law § 143.7— suspended sentence—failure to comply with conditions—findings supported by evidence

There was no abuse of discretion or arbitrariness in the trial court's conclusion that defendant willfully violated the conditions of his suspended sentence as there was certainty in the conditions of the judgment requiring him to pay $100 monthly in restitution, defendant had failed to pay $100 since his initial payment, defendant's evidence did not rebut the court's finding that

defendant had been able to control his health problems and been able to work, and defendant had been gainfully employed since 1979.

APPEAL by defendant from *Kirby, Judge.* Judgment entered 25 September 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 3 September 1980.

In 1978, defendant was indicted on a charge of obtaining property by false pretenses, and in 1979, he was convicted on that charge. With defendant's consent, the sentence of five years' imprisonment was suspended for a period of three years on condition that he

> pay into the office of the Clerk of Superior Court of Buncombe County the sum of $1,031.06 for the use and benefit of . . . [the victim of the crime], to be paid monthly on or before the 10th day of each month until paid in full, first payment on or before May 10, 1979. Pay the costs of this action, and pay $100 today toward the costs and the balance to be paid later.

On 19 June 1980, the district attorney in Buncombe County filed a motion alleging defendant's failure to comply with the conditions of his suspended sentence and requesting that an arrest order be issued immediately and that defendant's suspended sentence be placed into effect. Defendant was arrested, and after admitting the payment of only $100 since judgment, defendant requested, and the court held, a hearing on the State's motion.

The pertinent evidence at the hearing came from testimony by the defendant. Defendant testified that in 1972 and 1975 he had health problems which persisted. While he had done some construction jobs to support his wife, his daughter, and himself, defendant had completed several jobs for which he had received no compensation. Upon examination by the court, defendant stated that he had been partially able to control his health problems as an outpatient and that, because of his health, he had chosen not to work on a regular basis. Defendant denied that he willfully failed to pay restitution under the judgment.

The court entered a judgment finding that defendant had willfully failed to comply with the 1979 judgment and placing into effect the suspended sentence. The court recommended that defendant be granted immediate work release on condition that

he make restitution to the victim of his crime of false pretense. From this judgment, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

J. Robert Hufstader, Public Defender, for defendant-appellant.

HILL, Judge.

The suspension of a prison sentence comes as an act of grace to one who is convicted of a crime. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967). When an inquiry is made into a defendant's compliance with the terms of his suspended sentence, the question presented is whether the defendant has abused the privilege of grace extended to him by the court. *Id.* In *Hewett* the Supreme Court described the nature of hearings reviewing compliance with the conditions of a suspended sentence:

> All that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended. Judicial discretion implies conscientious judgment, not arbitrary or willful action.

Id. at 353, 154 S.E. 2d at 480.

Applying the foregoing principles to the case *sub judice*, we can find no abuse of discretion or arbitrariness in the trial court's finding that defendant willfully violated the conditions of his suspended sentence. Defendant argues error in several findings of the court, but his arguments contain no merit.

First, defendant assigns as error the trial court's finding that he had willfully failed to comply with the 1979 judgment ordering restitution. He contends that the conditions of the judgment lacked required certainty as to the amounts he was to pay monthly. We agree with defendant that a criminal judgment must be sufficiently specific to allow enforcement ministerially by its very directions. *State v. Wilson*, 216 N.C. 130, 4 S.E. 2d 440 (1939). We

disagree with defendant, however, in his contention that this judgment failed the test of certainty.

The pertinent portion of the trial court's judgment, quoted above, clearly directed defendant to pay $100 on the day of the judgment and to make monthly payments thereafter. Judge Kirby, in reviewing defendant's compliance with those conditions, reasonably construed the judgment to mean that defendant's monthly payments were to be $100. The facts showed, and the trial court found, that defendant had paid nothing since the initial $100 payment. Defendant had made no attempt to comply with the terms of the suspended sentence, and he had made no attempt to clarify any misunderstanding he might have had concerning the conditions of the suspension.

Defendant next assigns as error the trial court's finding that defendant had been able to control his health problems, had been able to work since 1975, and was able-bodied. In *State v. Young*, 21 N.C. App. 316, 204 S.E. 2d 185 (1974), this Court noted that, if a defendant in this situation wishes to rely upon his inability to make the payments required by the terms of his suspended sentence, he should offer evidence of that inability for the trial court's consideration. The trial court, of course, may believe him or not. *Id.* In the record before us, we find ample evidence to support the findings of fact of which defendant complains. Defendant testified that since 1975, three years before his indictment, he had "been able to control . . . [his] health through diet and proper treatment." Defendant testified that he had worked on several projects since 1975, and he offered no evidence which showed that his work was hampered by his health, that he had been advised by doctors not to work, or that his health had suffered because of the work he had done.

Defendant also assigns as error the trial court's finding that he had been gainfully employed since 1979. Again, it is apparent that these findings are fully supported by the evidence and that the trial court did not abuse its discretion in so finding. Defendant testified that he had been able to do work, that he had performed various jobs since 1979, that he was able to collect a few odd jobs, and that he could do cabinet work and other construction work.

Defendant's final assignments of error are all dependent upon his success in arguing the preceding three arguments. Since these assignments of error contain no merit, we find no need to discuss them.

Affirmed.

Judges HEDRICK and WHICHARD concur.

S. F. McCOTTER & SON, INC. v. O.H.A. INDUSTRIES, INC.

No. 813SC190

(Filed 6 October 1981)

1. Principal and Agent § 4.2— proof of agency—extrajudicial statements of agent

Out-of-court statements of an alleged agent are inadmissible to prove the position of the agent or that he was acting within the scope of his authority, and the trial court therefore properly excluded plaintiff's testimony that defendant's employee told him that he was defendant's general manager and had authority to enter into an agreement for defendant to resell a grain dryer plaintiff had purchased from defendant.

2. Principal and Agent §§ 4.2, 5.2— scope of authority—declaration by agent—authority of sales agent

Evidence that defendant's agent listed his title as general manager when he signed a supplier's agreement for sale of a grain dryer to plaintiff constituted a mere declaration by the agent which was incompetent to show his position and authority, and plaintiff's evidence was therefore insufficient to show that the agent was anything other than a sales agent who had authority to make the original sales agreement but had no apparent authority to bind defendant to an agreement to resell the grain dryer and to give plaintiff the option of a return of his purchase price or application of the proceeds to a larger grain dryer.

APPEAL by plaintiff from *Peel, Judge.* Judgment entered 16 December 1980 in Superior Court, PAMLICO County. Heard in the Court of Appeals 22 September 1981.

Plaintiff initiated an action against defendant for breach of an oral contract made by its alleged agent Bartels. The court granted defendant's motion for a directed verdict at the close of plaintiff's evidence.

Plaintiff first met Lewis Bartels at a promotional meeting for O.H.A. Industries, American Grain Dryers. On 26 February 1975, plaintiff purchased an automated grain dryer from O.H.A. Industries. Bartels signed the purchase order. Approximately one month later, the grain dryer was shipped to plaintiff in a freight truck containing other O.H.A. dryers. By that time, the equipment needs of plaintiff had changed. Plaintiff alleges that defendant, through its agent Bartels, negotiated a new contract in April of 1975, whereby defendant agreed to pick up the grain dryer and resell it. Upon resale, defendant would return to plaintiff the dryer's purchase price or apply it toward the purchase of another grain dryer at plaintiff's option. In September or October of 1977, the machine was removed. Plaintiff later demanded return of his purchase price which defendant failed to pay.

Mayo and Swindell, by Hiram J. Mayo, Jr., for plaintiff appellant.

Ward and Smith, by Thomas E. Harris, for defendant appellee.

VAUGHN, Judge.

Plaintiff assigns as error the order entered granting a directed verdict in defendant's favor. Plaintiff argues that the judge improperly excluded testimony which would have established that Bartels was an agent of the defendant with apparent authority to bind defendant to terms of a new oral contract. We disagree and therefore affirm the court's order.

There are two contracts involved in the present cause. The first contract is the original purchase agreement of the automated grain dryer. It is admitted in defendant's answer that on or about 26 Feburary 1975, plaintiff purchased from defendant an automated grain dryer for the price of $8,000.00. Since the only contact defendant had with plaintiff was through Bartels, defendant's admission to the purchase agreement constitutes an admission of Bartels' agency. Admissions contained in a pleading are conclusive against the pleader. Therefore, defendant was estopped at trial from denying that Bartels was acting as its agent under the original purchase agreement.

Defendant has not admitted the existence of the alleged second contract. This "contract" is in effect a repurchase agreement

with different terms from the original sales contract. At trial, plaintiff attempted to admit into evidence its terms and to impose liability on defendant as principal for breach of the contract made by its agent. Before the contract can be admitted into evidence, however, plaintiff must prove not only the existence of Bartels' agency but also the authority of Bartels to bind defendant by such a contract. *Albertson v. Jones*, 42 N.C. App. 716, 257 S.E. 2d 656 (1979). It is this latter element which is lacking in plaintiff's evidence.

Plaintiff contends that Bartels had apparent authority to bind defendant to a new agreement. Apparent authority is defined as that authority which the principal has held its agent out as possessing and upon which a third party reasonably relies. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E. 2d 795, 799 (1974). Plaintiff argues that defendant employed Bartels as general manager and thereby endowed him with powers greater than those of a sales agent.

[1] At trial, plaintiff attempted to prove that Bartels was a general manager by statements made by Bartels to plaintiff and by a supplier's agreement. Out-of-court statements of an alleged agent are inadmissible to prove an agency relationship. *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716 (1952). They are likewise inadmissible to prove the position of the agent or that he was acting within the scope of his authority. *D.L.H., Inc. v. Mack Trucks, Inc.*, 3 N.C. App. 290, 164 S.E. 2d 532 (1968). The court, therefore, properly excluded plaintiff's testimony that Bartels told him he was defendant's general manager and had authority to enter into an agreement to resell.

[2] Plaintiff argues the supplier's agreement is extrinsic evidence that Bartels was a general manager. Bartels is the only signer of the agreement, and it is he who listed his title as general manager. Although a witness testified that the supplier's agreement was mailed to defendant's office in Georgia, the witness was unsure whether Bartels brought the agreement back or if it was returned by mail. One cannot conclude, therefore, that defendant saw Bartels' signature as general manager and ratified his representations by returning the agreement without change. Without evidence to that effect, the supplier's agreement is simply another declaration by the agent. We also note that nowhere in

plaintiff's testimony does he suggest he relied on this agreement in concluding Bartels was general manager. In fact, his testimony indicates otherwise:

> "Q. Now, at the time in April of 1977—of 1975 when you talked with Mr. Bartels, did you know his title with the company?
>
> Objection.
>
> Sustained.
>
> A. Only what he told me. I mean he didn't walk in my office and present me a legal document telling me what he was. He just told me—He didn't say he was Vice President or General Manager or anything. He said he represented O.H.A. . . . ."

We conclude that plaintiff has presented no evidence establishing Bartels as anything other than a sales agent of defendant. As a sales agent, he had authority to make the original sales contract. Unless otherwise agreed, however, the authority to sell does not include the authority to rescind or modify terms of the sale after its completion. Restatement (Second) of Agency § 66 (1958). Bartels, therefore, had no authority to enter into a completely new agreement with plaintiff which, without consideration, placed an obligation on defendant to sell the grain dryer and gave plaintiff the option of a return of his purchase price or application of the proceeds to a larger grain dryer.

By relying on the authority of a sales agent to negotiate a new contract after the completed transaction, plaintiff acted at his own risk, especially here where the sales agreement was written and the alleged new contract was oral. In the absence of evidence that defendant had knowledge of and acquiesced to the terms of this later unauthorized contract with plaintiff, defendant was entitled to a directed verdict.

Affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA EX REL. H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY 22ND SOLICITORIAL DISTRICT v. JOHNNY MASON, III, AND OSCAR BLACKWELL, D/B/A "THE EL CAMINO CLUB"

No. 8122SC168

(Filed 6 October 1981)

Contempt of Court § 3.2— error to find contempt—acts not forbidden by restraining order

It was error to find defendant in contempt for removing a copy of a temporary restraining order and padlocks from premises described as a public nuisance where the temporary restraining order did not specifically forbid defendant from doing those acts. G.S. 19-2.3.

APPEAL by defendant Oscar Blackwell from *Davis, Judge.* Judgment entered 19 November 1980 in Superior Court, ALEXANDER County. Heard in the Court of Appeals 17 September 1981.

The defendant was held in contempt of court for violating a temporary restraining order issued in an action to padlock certain premises in Davie County. He was sentenced to serve six months in prison and fined $1,000.00. The District Attorney for the Twenty-Second District brought this action alleging the defendants were operating the premises as a public nuisance in contravention of G.S. 19-1 et seq. A temporary restraining order was issued on 12 November 1980 which among other things ordered:

> "THAT THE DEFENDANT [sic], their servants, agents, and employees be, and they are hereby enjoined and restrained from entering, operating, maintaining, removing the contents or any portions thereof, and otherwise using those certain premises in the town of Cooleemee, Jerusalem Township, and known as 'The El Camino Club' or 'The Cooleemee Dance Hall' . . . ."

At the hearing on the contempt citation, Deputy Sheriff Larry Hayes testified that he helped padlock the premises on 13 November 1980 by placing locks on the doors and posting a copy of the temporary restraining order on the premises. He testified that later that day the defendant Oscar Blackwell appeared at the Sheriff's Office and told him he had taken the locks off the building. Deputy Sheriff Hayes testified that he saw the locks at the Sheriff's Department which Mr. Blackwell told him he had

taken from the building. Mr. Hayes testified further that he and another deputy returned to the premises and replaced the locks at which time they observed that the copy of the temporary restraining order had been removed.

Ricky Howell, a detective with the Davie County Sheriff's Department, testified that he went to the premises on 14 November 1980 and the locks and the copy of the temporary restraining order had been removed a second time. There was no evidence that Oscar Blackwell removed the locks or the notices the second time. All the evidence showed that nothing had been removed from the premises.

The court found the facts in accordance with the evidence and held the defendant Oscar Blackwell in contempt of court. Mr. Blackwell appealed.

Attorney General Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Powell, Yeager and Fischer, by Harrell Powell, Jr. and J. Clark Fischer, for defendant appellant.

WEBB, Judge.

The defendant assigns error to the court's finding him in contempt for removing the locks and copy of the temporary restraining order when the temporary restraining order did not forbid him from doing so. We believe this assignment of error has merit. G.S. 19-2.3 provides in part:

> "[T]he court may, on application of the complainant showing good cause, issue an ex parte temporary restraining order in accordance with G.S. 1A-1, Rule 65(b), preserving the status quo and restraining the defendant and all other persons from removing or in any manner interfering with any evidence specifically described, or in any manner removing or interfering with the personal property and contents of the place where such nuisance is alleged to exist, until the decision of the court granting or refusing such preliminary injunction and until further order of the court thereon . . . .
>
> * * *

> Any violation of such temporary restraining order is a contempt of court, and where such order is posted, mutilation or removal thereof, while the same remains in force, is a contempt of court, provided such posted order contains therein a notice to that effect."

The statute requires that in order for a person to be found in contempt for removing a posted restraining order the order must by its terms forbid the removal. The order did not do so in this case. Although the statute does not mention the removal of the padlocks, we believe a person does not violate the terms of an order by removing a padlock when the order does not forbid such removal. We hold it was error to find the defendant Oscar Blackwell in contempt for removing the copy of the temporary restraining order and padlocks when the temporary restraining order did not forbid him from doing so.

The State contends that by removing the locks Mr. Blackwell violated the part of the temporary restraining order which forbade him from using the premises. We do not believe we should so interpret the action of Mr. Blackwell in relation to the order. We believe that to use the premises he would have had to take them under his control in a more positive way than removing the padlocks. There is no evidence that he did so.

Mr. Blackwell also contends that he had a constitutional right to a jury trial which was infringed when the court heard the matter without a jury. He relies on *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed. 2d 522 (1968) and *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed. 2d 629 (1966). In light of our decision, we do not pass on the constitutional question.

We reverse and remand for an order consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and ARNOLD concur.

ROBERT CARRINGTON, EMPLOYEE, PLAINTIFF v. HOUSING AUTHORITY OF THE CITY OF DURHAM, EMPLOYER; U. S. FIRE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC94

(Filed 6 October 1981)

Master and Servant § 74— workers' compensation—award for disfigurement—insufficient evidence

An observation by the hearing commissioner in a workers' compensation hearing that the very tip of plaintiff's left index finger was missing was insufficient to support an award to plaintiff for serious bodily disfigurement.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and award filed 3 November 1980. Heard in the Court of Appeals 2 September 1981.

Plaintiff brought this action to recover workers' compensation for serious bodily disfigurement resulting from an accidental injury sustained at work. Plaintiff was employed by defendant Housing Authority as a Maintenance Engineer, a job which entailed general maintenance work. On 20 September 1977, as plaintiff was taking a tire off a truck, the tire rim fell on his left index finger. The fingertip was injured and required treatment at the Durham County General Hospital. The very tip of plaintiff's left index finger, the fleshy part above the top of his fingernail, is missing as a result of this accident. Plaintiff missed no time at work because of this injury. Both parties have stipulated that plaintiff's injury arose out of and in the course of his employment.

By stipulation of the parties, the hearing before Deputy Commissioner Denson was limited solely to the issue of disfigurement, and the amount, if any, to which plaintiff was entitled due to disfigurement. Plaintiff was awarded $300.00 for disfigurement. Defendant appealed to the Full Commission.

By order dated 3 November 1980, the Full Commission affirmed and adopted Deputy Commissioner Denson's opinion and award. Defendant has appealed from this opinion and award.

F. H. Brown, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, by William H. Lipscomb, for defendant-appellant.

WELLS, Judge.

The question brought forward in this appeal is whether the Commission's findings of fact upon which plaintiff's award was based are supported by competent evidence. In an appeal from the Industrial Commission, our scope of review is limited. The Industrial Commission's findings of fact are binding on us if supported by competent evidence. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). The Commission's findings of fact may be set aside on appeal only when there is a complete lack of competent evidence to support them. *Click v. Freight Carriers*, 300 N.C. 164, 265 S.E. 2d 389 (1980).

Plaintiff's award for disfigurement was based upon the following findings of fact made by Deputy Commissioner Denson and adopted by the Full Commission:

> Plaintiff has sustained disfigurement in scarring described as follows:
>
> > "The very very tip of plaintiff's left index finger is missing. Plaintiff indicates that he has numbness in the end of that finger so that if he tries to screw a bolt, for example, he can't hold on to it for very long at a time and he has to change hands."
>
> As a result fo the injury in question, the plaintiff has suffered bodily disfigurement as herein described which is permanent and serious and is such as would hamper plaintiff in his earnings and in seeking employment.

Defendant contends that this finding is not supported by competent evidence. We agree. The only competent evidence on the subject of plaintiff's disfigurement came from the plaintiff, who testified that: "I couldn't see any disfigurement myself, but I don't know". During the course of the hearing, Deputy Commissioner Denson observed and described plaintiff's fingertip as follows:

> The very tip of plaintiff's left index finger is missing. There is no area below the end of the nail that is gone but the very fleshy part at the end is gone. He has some small linear scars, not really very discolored, going into the nail itself, but

> the main thing is that the—just the very, very tip of the finger is missing.

Such an observation on the part of the Hearing Commissioner does not constitute evidence and cannot provide the basis for any finding of fact. *See Weidle v. Cloverdale Ford*, 50 N.C. App. 555, 274 S.E. 2d 263 (1981).

Over defendant's objection, Deputy Commissioner Denson asked plaintiff to testify as to the functional condition of his left index finger, as follows:

> COURT: Do you notice that you have any problems with that at all?
>
> PLAINTIFF: Well, it's numb across the end of—
>
> MR. MCLAMB: Objection . . .
>
> . . .
>
> PLAINTIFF: I notice this anytime I try to screw a bolt or something. It hurts just a little bit but I can tell it. I can't really hold it long at the time. When I feel the numbness I have to change hands, for a little while anyway. I do not notice any other problems with it at all.

"Serious bodily disfigurement"[1] has been construed by our Supreme Court as follows:

> "A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power."

Davis v. Sanford Construction Co., 247 N.C. 332, 101 S.E. 2d 40 (1957); *see also Click v. Freight Carriers*, supra. The testimony quoted above was not relevant to the question of disfigurement and should have been excluded.

Since the findings of fact upon which plaintiff's award was based was not supported by competent evidence, the award and order of the Commission must be and is

1. *See* G.S. 97-31(22).

Reversed.

Chief Judge MORRIS and Judge CLARK concur.

KATY S. OAKLEY v. JESSE FLOYD OAKLEY

No. 8126DC208

(Filed 6 October 1981)

1. **Divorce and Alimony § 13.1— no abandonment—husband sleeps in separate bedroom**

A husband who has neither left the marital home nor withheld support cannot be found to have abandoned his wife merely by electing to sleep in a separate bedroom.

2. **Divorce and Alimony § 14.3; Rules of Civil Procedure § 50— grant of directed verdict motion after jury verdict proper—evidence insufficient to support verdict of adultery**

Where the evidence relating to the issue of adultery was merely that husband and another woman had been seen together and had exchanged one kiss, the trial court correctly entered a directed verdict for husband after the jury returned a verdict finding adultery as the evidence did not support the verdict. The court deferred its ruling on the husband's motion for directed verdict at the end of the evidence; therefore, it was not necessary for the husband to move for judgment n.o.v.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 19 September 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 September 1981.

Plaintiff brought this action seeking sequestration of the parties' home for her exclusive use, alimony pendente lite, permanent alimony and attorney's fees. Plaintiff alleged that the defendant had rendered indignities to her, and that defendant had consorted with one Jean Phillips and had committed adultery with her while married to the plaintiff. Plaintiff further alleged that defendant had deserted the marital bed and that this constituted abandonment.

The trial court tendered the issues of indignities and adultery to the jury which found for the defendant on the issue of indignities and for plaintiff on the issue of adultery. The judge

granted a directed verdict for the defendant on the issue of adultery and dismissed the complaint.

Plaintiff appeals.

James L. Roberts for plaintiff appellant.

Peter J. Underhill for defendant appellee.

ARNOLD, Judge.

Plaintiff brings forth three assignments of error on appeal.

I.

[1] Plaintiff's first two assignments of error concern the propriety of the trial court's refusal to submit the issue of abandonment to the jury. Plaintiff argues that there was uncontroverted evidence that defendant had moved into the guest bedroom of the couple's home in March 1978. Although no allegations of non-support or other evidence of abandonment were received, plaintiff contends that desertion of the marital bed is sufficient to support a finding of abandonment. We disagree.

It has long been established in North Carolina that a married couple living in the same house and holding themselves out as man and wife cannot be deemed to have separated. *Ledford v. Ledford*, 49 N.C. App. 226, 231, 271 S.E. 2d 393, 397 (1980). By analogy, we hold that a husband who has neither left the marital home, nor withheld support, cannot be found to have abandoned his wife merely by electing to sleep in a separate bedroom.

II.

[2] Plaintiff's final argument is that the court erred by entering a directed verdict in favor of the defendant on the issue of adultery after a jury verdict for the plaintiff.

Plaintiff's first basis for this argument seems to rest on defendant's failure to move for a judgment notwithstanding the verdict (j.n.o.v.). We note that defendant moved for a directed verdict at the end of all of the evidence, and that the trial judge deferred his ruling on this motion. If the motion had been denied, the defendant would have had no right to reconsideration of his directed verdict motion following the jury verdict. However, having deferred his ruling on the directed verdict motion, the trial judge had authority under N.C.R.C.P. 50(b)(1) and (b)(2) to later

enter a directed verdict without the necessity of a j.n.o.v. motion. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973).

Finally, plaintiff argues that there was sufficient evidence to support the jury verdict on the issue of adultery, and that the directed verdict was therefore entered in error. The standard for entry of a directed verdict is that the evidence, when viewed in the light most favorable to the non-movant, is insufficient as a matter of law to support a verdict in favor of the non-movant. *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972), *vacated on other grounds*, 283 N.C. 277, 196 S.E. 2d 262 (1973). Here, the evidence of defendant's alleged adultery was of the most speculative nature. While it was conceded that defendant and Mrs. Phillips were friends, that they were seen together on occasion, and that Mrs. Phillips once kissed defendant on the cheek, this evidence hardly establishes a case for adultery. The plaintiff's efforts to obtain more substantial evidence through a private detective produced little more than a report that one kiss had been exchanged by the two. We agree with the trial court that this evidence was insufficient as a matter of law to support the jury verdict.

Accordingly, the judgment below is

Affirmed.

Judges VAUGHN and WEBB concur.

THERON WOODROW PITTS v. WILLIE ALICE PITTS

No. 8130DC109

(Filed 6 October 1981)

1. **Appeal and Error § 49.1— exclusion of tape recording—failure of record to show contents of recording**

The trial court's exclusion of a tape recording was harmless as a matter of law where the record failed to reveal the contents of the recording.

2. **Divorce and Alimony § 13.1— divorce based on year's separation—casual acts of sexual intercourse between parties**

In an action for a divorce based on a year's separation, the trial court erred in failing to instruct the jury that isolated or casual acts of sexual inter-

course between separated spouses will toll the statutory period required for such a divorce.

APPEAL by defendant from *Snow, Judge.* Judgment entered 17 September 1980 in District Court, HAYWOOD County. Heard in the Court of Appeals 3 September 1981.

On 10 March 1980, plaintiff appellee filed an action for divorce from defendant appellant based on one year's separation as authorized by G.S. 50-6.

Defendant testified that the parties had engaged in sexual relations during the course of the one year separation period. Plaintiff denied the allegations of sexual relations between the parties.

The jury returned a verdict for the plaintiff on the issue of fulfillment of the statutory separation requirement and the court granted the plaintiff an absolute divorce from the defendant.

Defendant appeals.

John I. Jay for plaintiff appellee.

Lentz, Ball and Kelley, by Phillip G. Kelley, for defendant appellant.

ARNOLD, Judge.

Defendant brings forth three assignments of error on appeal. Plaintiff presents one cross-assignment of error.

I.

[1] Defendant first argues that the trial court erred in excluding from evidence the contents of a tape recording of a conversation between the parties. We are unable to review the court's ruling here because the record before us fails to reveal the contents of the recording. This omission renders the exclusion harmless as a matter of law since it precludes determination on appeal of the prejudicial effect of the exclusion. *State v. Miller*, 288 N.C. 582, 593, 220 S.E. 2d 326, 335 (1975). While defendant correctly notes that the North Carolina Supreme Court carved out a narrow exception to this rule in *In re Gamble*, 244 N.C. 149, 93 S.E. 2d 66 (1956), we find this case distinguishable on its facts from *Gamble.*

II.

[2] Defendant's second and third assignments of error relate to the court's instructions to the jury with regard to the statutory requirements for a grant of absolute divorce based on one year's separation. Here, we must agree with the defendant that the trial court erred in failing to instruct the jury that isolated or casual acts of sexual intercourse between separated spouses toll the statutory period required for divorce predicated on separation. This is the law in North Carolina as applied by this Court in *Ledford v. Ledford*, 49 N.C. App. 226, 271 S.E. 2d 393 (1980).

The *Ledford* result was dictated by the North Carolina Supreme Court's holding in *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978), which defined "separation" under North Carolina law to preclude any and all sexual relations between the parties, however "isolated" or "casual." *Id.* at 397, 245 S.E. 2d 698. *Murphy* marked a dramatic change from prior North Carolina law as interpreted and applied by this Court. *See Cooke v. Cooke*, 34 N.C. App. 124, 237 S.E. 2d 323, *cert. denied* 293 N.C. 740, 241 S.E. 2d 513 (1977); *Newton v. Williams*, 25 N.C. App. 527, 214 S.E. 2d 285 (1975). Moreover, the *Murphy* rule is in direct conflict with the general rule in other jurisdictions wherein intent of the parties and appearance of reconciliation are important considerations. *See* 1 Lee, N.C. Family Law § 35 (3d ed. 1963) at 152-53, cited by this Court in *Newton v. Williams, supra* at 531, 214 S.E. 2d 287.

We are of the opinion that the rule in North Carolina has the effect of discouraging estranged spouses from attempting to reconcile their differences lest they risk a claim of sexual intercourse by the other spouse which could defeat the statutory right to a divorce. Also, the rigid standard imposed by *Murphy, supra*, may serve to encourage manipulation of one spouse, who desires in good faith to attempt reconciliation, by the other, whose intent is only to avoid the terms of the separation agreement or otherwise alter the parties' respective property rights. In view of such dangers, the dictates of public policy strongly suggest that this matter is worthy of legislative consideration. *See* 1 Campbell Law Review 131 (1979), Note: *Separation Agreement, for a thoughtful discussion of the Murphy* rule and attendant public policy considerations.

Until the legislature or the North Carolina Supreme Court shall act to bring our law into the mainstream of legal thought on this issue, however, we are bound by *Murphy*. We must therefore grant a new trial since the court failed to adequately explain to the jury our state's unusual policy with regard to isolated incidents of sexual relations between estranged spouses.

III.

We find plaintiff's cross-assignment of error to be without merit as any error was harmless beyond a reasonable doubt.

New trial.

Judges VAUGHN and WEBB concur.

JUDITH ANN LARSEN v. CHARLES H. SEDBERRY, ADMINISTRATOR CTA DBN OF THE ESTATE OF WILLIAM JOSEPH JOHNSON, DECEASED

No. 8110SC178

(Filed 6 October 1981)

Divorce and Alimony § 24.4; Equity § 2— laches no bar to support claim

The court did not err in failing to grant summary judgment for husband's estate based on the doctrine of laches in that wife did not seek enforcement of the child support order until fourteen years after it was entered and until after husband died as the obligation of support is a continuing one and involves past due court-ordered payments. Wife's claim was limited, however, to those arrearages arising in the last ten years under the applicable statute of limitations. G.S. 1-47.

APPEAL by defendant from *Smith, Judge*. Judgment entered in the WAKE County Superior Court 19 December 1980. Heard in the Court of Appeals 18 September 1981.

Defendant, Administrator of William Johnson's estate, appeals from an order granting summary judgment to plaintiff, Judith Ann Larsen, on her claim against the estate for child support. Plaintiff and William Johnson were divorced by a Florida court in 1966. Under the terms of the divorce decree, Johnson was ordered to pay $15.00 per week in support for the parties' minor daughter, Lura Lynn, who was then four years old. Plain-

tiff, alleging that Johnson, who died on 12 February 1980, never made any of the court-ordered child support payments prior to his death, filed her Complaint in this matter on 16 June 1980,[1] seeking to recover $10,710.00 in past due child support.

Defendant, in his Answer and Amended Answer, denied the material allegations of the Complaint and asserted several defenses, including laches. Summary judgment was entered in plaintiff's favor for $7,530.00, the amount of support owed from 16 June 1970 to 12 February 1980.

Joslin, Culbertson, Sedberry & Houck by Charles S. Sedberry, for defendant appellant.

Sanford, Adams, McCullough & Beard, by Renee J. Montgomery and William G. Pappas for plaintiff appellee.

BECTON, Judge.

The only question for resolution on appeal is whether the trial court erred in granting summary judgment for plaintiff and in failing to grant summary judgment for defendant based on the doctrine of laches in that plaintiff did not seek enforcement of the child support order until fourteen years after it was entered and until after Johnson died. We resolve the question in favor of plaintiff.

We are not unmindful of the policy consideration that produced the doctrine of laches:

> The doctrine of laches is based upon grounds of public policy, which require for the peace of society discouragement of stale demands. And where the difficulty of doing entire justice by reason of death of the principal witness or witnesses, or from the original transaction having become obscured by time, is attributable to gross negligence or deliberate delay, a court of equity will not aid a party whose application is thus destitute of conscience, good faith and reasonable diligence. [Citations omitted.]

MacKall v. Casilear, 137 U.S. 556, 566, 34 L.Ed. 776, 779, 11 S.Ct. 178, 181 (1890). Indeed, our courts, consistent with the letter and

1. Plaintiff filed an Amended Complaint on 11 August 1980.

spirit of the law in *MacKall*, have recognized the doctrine of laches as a valid defense in various types of proceedings.[2] *See, for example, Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976) (an action to have rezoning ordinances declared unconstitutional); *Teachey v. Gurley*, 214 N.C. 288, 199 S.E. 83 (1938) (an action to enforce a resulting trust); *McRorie v. Query*, 32 N.C. App. 311, 232 S.E. 2d 312, *cert. denied*, 292 N.C. 641, 235 S.E. 2d 62 (1977) (an action for ejectment).

The case *sub judice* is distinguishable from the cases cited above. Significantly, neither *Taylor*, *Teachey* nor *McRorie* involved a claim of past due court-ordered payments. In this case, plaintiff was suing on a money judgment. By a 1966 Florida Court Order, Johnson was ordered to pay $15.00 per week as support for his minor daughter, Lura. The obligation of Johnson to furnish support for Lura was a continuing one. *Streeter v. Streeter*, 33 N.C. App. 679, 236 S.E. 2d 185 (1977); Lee, North Carolina Family Law, § 164 (4th ed. 1980). Professor Lee, in his treatise on family law states:

> Although a number of states seem inclined to recognize laches as a possible defense to an action for the enforcement of a court order for alimony and support, depending upon the particular circumstances present, yet in the majority of the cases in which the question has been considered, the defense of laches has not been accepted as sufficient. No North Carolina case has been found wherein laches has been allowed as a defense to the enforcement of a court-order for alimony or support.

Lee, North Carolina Family Law, § 164 at 302 (4th ed. 1980).

More important, our Supreme Court in *Nall v. Nall*, 229 N.C. 598, 50 S.E. 2d 737 (1948), refused to recognize the defense of laches when a wife brought an action for legal separation and support seven years after the parties had separated. Similarly, this Court found a husband's defense of laches to be "untenable" in *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E. 2d 561 (1977), in which an ex-wife sued on a support judgment more than ten years after the judgment was entered. *See also Streeter v. Streeter*, in

2. Laches is an affirmative defense under our statute, G.S. 1A-1, Rule 8(c).

which this Court refused to find laches when the wife waited nine years prior to asserting her right to support.

The only bar to plaintiff's action for enforcement of the child support judgment is the applicable ten-year statute of limitations, 34 N.C. App. at 203, 237 S.E. 2d at 563, G.S. 1-47. Plaintiff alleged arrearages totalling $10,710 for a fourteen-year period. The trial court, reducing plaintiff's monetary claim to the extent it was barred by the ten-year statute of limitations, awarded plaintiff $7,530. In this we find no error.

But even if, *arguendo,* laches were a valid defense to claims for past due child support, plaintiff would nonetheless win on the facts of this case. Laches is an affirmative defense and the defendant was required to show that plaintiff's delay in bringing this action (1) was inexcusable and (2) has resulted in prejudice to the defendant. *Holt v. May,* 235 N.C. 46, 50, 68 S.E. 2d 775, 778 (1952); *Stell v. Trust Co.,* 223 N.C. 550, 552, 27 S.E. 2d 524, 526 (1943); G.S. 1A-1, Rule 8(c). Plaintiff filed an affidavit in support of her motion for summary judgment. Defendant did not file an affidavit or offer any evidence in support of his laches defense. A mere lapse of time alone does not bar an action for the enforcement of a support order. *Nall; Streeter; Lindsey.*

Summary judgment was appropriate in this case, and we accordingly

Affirm.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC.
v. DAVID T. GREER

No. 8110DC155

(Filed 6 October 1981)

Insurance § 141; Quasi Contracts and Restitution § 5— insurance payment for loss by theft—restitution made by thief—unjust enrichment—recovery of payment by insurer

Plaintiff insurer was entitled to recover from defendant insured under the theory of unjust enrichment the sum of $2500 which it paid to defendant pursuant to the terms of its contract insuring defendant against loss of a cow by theft where the thief paid defendant $7500 as restitution for the cow under the terms of a probation judgment, and plaintiff reported the value of the cow to be only $5000 in his claim filed with plaintiff.

APPEAL: by defendant from *Barnette, Judge.* Order entered 7 November 1980 in District Court, WAKE County. Heard in the Court of Appeals on 17 September 1981.

This is a civil action wherein plaintiff, insurer, seeks to recover from defendant, insured, $2,500 paid to defendant by plaintiff pursuant to the terms of its insurance contract insuring defendant against the loss of a cow by theft.

Both parties moved for summary judgment.

The pleadings, exhibits, and affidavits establish the following facts: On November 9, 1976, the plaintiff issued to the defendant an insurance policy covering cattle owned by the defendant. The policy contained a "Conditions" section, and "Condition 6" thereof stated that "no loss shall be paid hereunder if the insured has collected the same from others." On November 3, 1977 pursuant to the terms of its contract of insurance, plaintiff paid defendant $2,500 for the loss of his cow because of the theft of the cow by Henry Norman Stallings, who was indicted for and pleaded guilty of felonious larceny of the cow in Superior Court, Edgecombe County. The judgment sentencing Stallings to prison was suspended and he was placed on probation. One of the conditions of the suspended sentence was that he make restitution to the defendant for the theft of the cow in the amount of $7,500. Stallings, in compliance with the condition, paid $7,500 to the office of the Clerk of Superior Court, and on December 6, 1977 the payment was forwarded by the Clerk to the defendant. In his claim

filed with the plaintiff, defendant reported the value of his cow to be $5,000.

The court denied defendant's motion for summary judgment and allowed summary judgment for the plaintiff in the amount of $2,500. Defendant appealed.

Broughton, Wilkins & Crampton, by Robert B. Broughton and H. Julian Philpott, Jr., for plaintiff appellee.

Hopkins & Allen, by G. P. Hopkins and Janice W. Davidson, for defendant appellant.

HEDRICK, Judge.

There are no genuine issues of material fact. Thus, the one question to be resolved is whether the plaintiff or defendant is entitled to judgment as a matter of law on the undisputed facts.

We perceive plaintiff's complaint to state its claim against the defendant on two theories—(1) subrogation, and (2) unjust enrichment. Defendant, in his brief, argues persuasively against the propriety of summary judgment for plaintiff on the subrogation theory; however, his arguments, if such may be gleaned from his brief, against summary judgment for plaintiff on the theory of unjust enrichment are less persuasive.

Defendant suggests that plaintiff should have brought its action against Stallings, the wrongdoer. Such an action would be subject to the defense of payment. *See Travelers Insurance Co. v. Chalona*, 293 So. 2d 498 (La. App. 1974), and G.S. § 15A-1343(d) (Cum. Supp. 1979). As was said in *Fidelity Insurance Co. v. Atlantic Coast Line Railroad Co.*, 165 N.C. 136, 141, 80 S.E. 1069, 1072 (1914), where the insurer sought to recover from the "wrongdoer" money the insurer had paid to the insured, "It is well settled that the wrongdoer cannot be made to pay twice for the same property. When the insured obtains full satisfaction from the wrongdoer, he *must account to the insurer*." (Emphasis added.) To the same effect, *see United States Fidelity & Guaranty Co. v. Reagan*, 256 N.C. 1, 9, 122 S.E. 2d 774, 780 (1961), where Justice Parker (later Chief Justice) wrote:

> It is a firmly established general rule that an insurer who has made a payment under an erroneous belief induced

by a mistake of fact that the terms of the insurance contract required such payment is entitled to restitution from the payee, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund. The rule is bottomed on the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong, the law presuming a promise to pay. . . .

"An action to recover money paid under a mistake of fact is an action in assumpsit and is permitted on the theory that by such payment the recipient has been unjustly enriched at the expense of the party making the payment and is liable for money had and received." *Morgan v. Spruill*, 214 N.C. 255, 199 S.E. 17, 19.

The record establishes that to date defendant has been paid $10,000 for a $5,000 loss. Seven thousand five hundred dollars of this payment was made by the "wrongdoer." Clearly, if defendant is allowed to retain the $2,500 paid by the plaintiff, defendant will have been unjustly enriched in that amount at the expense of the plaintiff, and surely under the circumstances of this case the payment by the plaintiff has not caused such a change in the position of the payee that it would be unjust to require a refund. The fact that the payment by the insurance company was made before the defendant received $7,500 from Stallings is of no significance in determining whether defendant has been unjustly enriched at the expense of the plaintiff. The law as well as the contract of insurance, particularly Condition 6, presumes a promise upon the part of the defendant in this case to refund the $2,500. Summary judgment for plaintiff was proper.

Affirmed.

Judges HILL and WHICHARD concur.

CHARLES W. HILLIARD, EMPLOYEE, PLAINTIFF v. APEX CABINET COMPANY, EMPLOYER, DEFENDANT AND AMERICAN MUTUAL LIABILITY COMPANY, CARRIER, DEFENDANT

No. 8110IC80

(Filed 6 October 1981)

Master and Servant § 68— workers' compensation—failure to prove occupational disease

Benefits under the Workers' Compensation Act are paid only when, due to occupational disease or injury, the employee is incapable of earning the same wages he earned at the time of contracting the disease or receiving the injury at his job or any other employment. Therefore, where claimant's evidence showed he had a diminution in earning capacity but failed to show that the diminution was due to an occupational disease, the denial of an award by the Industrial Commission was proper.

APPEAL by plaintiff from an Order of the North Carolina Industrial Commission filed 18 April 1980. Heard in the Court of Appeals 2 September 1981.

McCain & Moore, by Grover C. McCain, Jr., for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by George W. Dennis, III, and Jeffrey L. Jenkins, for defendant appellees.

BECTON, Judge.

The scope of review of Workers' Compensation awards made by the Industrial Commission is limited (1) to a determination of whether the Commission's findings of fact are supported by any competent evidence, and (2) to a determination of whether the Commission's findings of fact support its conclusions of law. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980); *Buck v. Proctor & Gamble*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981); *Walston v. Burlington Industries*, 49 N.C. App. 301, 271 S.E. 2d 516 (1980). The Commission's findings of fact, if supported, are conclusive and binding on us on appeal. G.S. 97-86. We conclude that the findings of fact by the Industrial Commission are supported by competent evidence and that its conclusions of law are supported by its findings of fact.

Suffering from headaches, nosebleeds, dizziness and shortness of breath and complaining that he was unable to work because of his health problems, the claimant, Charles Hillard, quit his job of twenty-two years with Apex Cabinet Company. After

quitting his job, Hilliard became self-employed and suffered a diminution in earnings. In filing his Workers' Compensation claim, Hilliard specifically alleged that his health problems were caused by his constant exposure to wood dust and fumes from glues, sealers, and lacquer in the cabinet shop where he worked. Hilliard argues that he is unable to find other jobs in pollutant-free environments because of his age, lack of education, and limited work experience. Significantly, Hilliard's personal doctors found no temporary or permanent disability arising from the health problems he complained of. One physician, Dr. Baggett, found no disability and opined that Hilliard could return to work. Dr. Sieker concluded that there was no abnormality, that there was no permanent damage, and that Hilliard could work in an environment free of wood dust and chemical fumes.

Although finding that Hilliard suffered from an occupational disease, the Commission determined that he suffered no temporary or permanent disability due to the occupational disease. The Commission's findings are based on competent evidence and are binding on us on appeal. That conflicting evidence which could lead to a contrary result was presented does not undermine the Commission's findings. Disability is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." G.S. 97-2(9). This definition applies equally to occupational diseases. G.S. 97-52. The Workers' Compensation Statute does not guarantee that benefits will be paid whenever an employee is injured or suffers from an occupational disease. The Act is not designed to be a health or accident insurance policy. *Lewter v. Enterprises, Inc.*, 240 N.C. 399, 403, 82 S.E. 2d 410 (1954); *Martin v. Georgia Pacific*, 5 N.C. App. 37, 41, 167 S.E. 2d 790 (1969).

Benefits are paid only when, *due to occupational disease or injury*, the employee is incapable of earning the same wages he earned at the time of contracting the disease or receiving the injury at his same job or any other employment. The claimant must show that the diminution in earning capacity is due to the disease or illness; it is not enough merely to show a diminution in wages earned subsequent to the affliction or injury. *Pruitt v. Publishing Co.*, 27 N.C. App. 254, 218 S.E. 2d 876 (1975), *rev'd. on other grounds*, 289 N.C. 254, 221 S.E. 2d 355 (1976); *Hill v. DuBose*, 237

N.C. 501, 75 S.E. 2d 401 (1953). Although the claimant has not solicited employment from other employers, he has met the requirement of the statute that he show a diminution in earning capacity in the same or other employment by resorting to self-employment. He has failed, however, to show that the diminution is due to the occupational disease. Consequently, we must uphold the Commission's award and order since its conclusions of law are supported by its findings of fact.

This Court has ruled in two recent cases that employees who suffer occupational diseases due to personal sensitivities are not entitled to Workers' Compensation benefits when there is no finding that the disability is due to an occupational disease. *Mills v. J. P. Stevens & Co.*, 53 N.C. App. 341, 280 S.E. 2d 802 (1981); *Sebastian v. Hairstyling*, 40 N.C. App. 30, 251 S.E. 2d 872, *disc. rev. denied*, 297 N.C. 301, 254 S.E. 2d 921 (1979). In *Sebastian*, this Court upheld a denial of benefits to a 42-year-old woman who had been employed as a hairdresser for over twenty years. The Court held that the employee was not entitled to permanent disability compensation due to her susceptibility to a skin disease which she contracted while using work-related chemicals, despite a finding by the Industrial Commission that she suffered from an occupational disease. In *Mills*, this Court upheld the Commission's decision denying benefits to a textile employee whose prior health conditions were aggravated temporarily by cotton dust.

Counsel for the claimant suggests that those cases were properly decided since the employees' sensitivities were personal in nature, but that those cases should be limited to their facts. We agree that the case *sub judice* presents a different question since Hilliard's sensitivities were not personal in nature, but were work related. Here, the claimant, in good health, began work with Apex Cabinet Company twenty-two years ago and worked for the company continuously since then. The Commission found that the claimant suffered from an occupational disease due to causes and conditions of his employment with Apex Cabinet Company. Because of the fact that the claimant's sensitivities resulted from his prolonged exposure to the pollutants at Apex Cabinet Company, neither *Mills* nor *Sebastian* controls this case. That does not help the claimant, however, since the Commission explicitly found that he suffered no disability due to the occupational disease from which he suffers.

For the foregoing reasons, the award of the Industrial Commission is

Affirmed.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

OREE FISHER, EMPLOYER-PLAINTIFF v. E. I. DU PONT DE NEMOURS, EMPLOYER, SELF-INSURED, DEFENDANT

No. 8110IC82

(Filed 6 October 1981)

Master and Servant §§ 95, 95.1— workers' compensation proceeding—notice of appeal not timely—interlocutory appeal

Defendant's purported appeal from a workers' compensation proceeding must be dismissed where the notice of appeal was filed after the expiration of the thirty-day period provided by G.S. 96-86. Furthermore, the appeal must be dismissed as interlocutory where the Industrial Commission determined only that plaintiff sustained an injury by accident and no final award has been entered.

APPEAL by defendant from the opinion and award of the North Carolina Industrial Commission filed 24 October 1980. Heard in the Court of Appeals 2 September 1981.

Michaels & Jernigan, by Paul J. Michaels and Leonard T. Jernigan, Jr., for plaintiff-appellee.

Wallace, Langley, Barwick, Llewellyn & Landis, by F. E. Wallace, Jr., and P. C. Barwick, for defendant-appellant.

MARTIN (Robert M.), Judge.

This appeal must be dismissed. The procedure for appeal from the full Commission shall be as provided in the North Carolina Rules of Appellate Procedure. N.C. Gen. Stat. 97-86. The full Commission filed its opinion and award on 24 October 1980.

Defendant could, within thirty days from the date of the award,[1] but not thereafter, appeal from the decision of the Commission to the Court of Appeals. N.C. Gen. Stat. 97-86; Rule 18(b), N.C. Rules App. Proc. The thirty days expired on Monday, 24 November 1980 (the thirtieth day being Sunday, 23 November 1980). Defendant's notice of appeal is dated 25 November 1980 and was mailed for service on that date. The notice of appeal was filed after the expiration of the thirty-day period. For failure to enter notice of appeal within the required time, this Court did not obtain jurisdiction, and the appeal must be dismissed. *Oliver v. Williams*, 266 N.C. 601, 146 S.E. 2d 648 (1966); *Brooks v. Matthews*, 29 N.C. App. 614, 225 S.E. 2d 159 (1976). *See Higdon v. Light Co.*, 207 N.C. 39, 175 S.E. 710 (1934).

Moreover, the attempted appeal is interlocutory, and it should be dismissed for that reason.

> The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

N.C. Gen. Stat. § 97-86 (1977).

In this case the Commission has not entered an award from which defendant may appeal. The Commission has only determined that plaintiff had sustained an injury by accident. The parties requested that only this issue be resolved by the Commission. The parties cannot by stipulation modify the extent of appellate

1. The statute also allows notice of appeal to be made within thirty days after receipt of notice by registered or certified mail of the award. The record on appeal, however, is devoid of anything indicating that notice of the award was so mailed. We are bound by the record before us.

review prescribed in the statute. It is true that the Commission ordered defendant to pay the costs; however, that does not make the decision a final order or award for the purposes of appellate review. The question of the amount of compensation plaintiff is entitled to receive has not been determined in this case. No final award has been entered. Until a final order or award has been entered by the Commission, defendant has no right of appeal. *Lynch v. Construction Co.*, 41 N.C. App. 127, 254 S.E. 2d 236, *dis. rev. denied*, 298 N.C. 298 (1979); *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 245 S.E. 2d 892 (1978), *aff'd*, 296 N.C. 683 (1979); N.C. Gen. Stat. § 7A-29 (1967 & Supp. 1979).

It should be noted that the failure of the defendant to comply with Rule 28(b)3, N.C. Rules App. Proc. also mandates the dismissal of this appeal.

For the foregoing reasons this appeal must be dismissed.

Dismissed.

Judges MARTIN (Harry C.) and BECTON concur.

STATE OF NORTH CAROLINA v. HARRY RAY LUCKEY

No. 8118SC277

(Filed 6 October 1981)

Automobiles § 126.3— testimony of breathalyzer operator competent

It was not error to admit the testimony of a breathalyzer operator who met the requirements of *State v. Powell*, 279 N.C. 608 (1971) and N.C.G.S. 20-139.1.

Judge BECTON concurring.

APPEAL by defendant from *Martin, Judge.* Judgment entered 2 December 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 September 1981.

Defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor and running a red light. He was found guilty of the traffic light charge and of operating a

motor vehicle when his alcohol blood level content was 0.10 percent or greater.

Attorney General Edmisten, by Associate Attorney Richard H. Carlton, for the State.

David M. Dansby, Jr. for defendant appellant.

MARTIN (Harry C.), Judge.

We find no error in defendant's trial. He first contends the court erred in admitting the testimony of the breathalyzer operator because the operator was not an "expert" witness. The thrust of his argument is that he was not afforded the full potential of cross-examining the witness about blood chemistry and the technical aspects of the machine. This could very well be true of any witness, expert or otherwise. Defendant cannot pick and choose the witnesses aginst him. If they are competent to testify, he must accept the witnesses against him as he finds them for the purposes of cross-examination. Moreover, the state is not required to produce an expert witness to testify concerning a breathalyzer test. The admissibility of such testimony is governed by the rules set forth in *State v. Powell*, 279 N.C. 608, 184 S.E. 2d 243 (1971), and it is not necessary to repeat them here. The evidence in this respect complied with *Powell* and N.C.G.S. 20-139.1, and defendant's assignment of error is overruled.

Defendant next argues that N.C.G.S. 20-138(b) is unconstitutional, and the court erred in submitting this issue to the jury. This Court has previously resolved this question against defendant's position. The statute is constitutional. *State v. Basinger*, 30 N.C. App. 45, 226 S.E. 2d 216 (1976).

Defendant attempts to make two additional arguments in his brief. However, he has failed to comply with Rule 28(b)(3) of the North Carolina Rules of Appellate Procedure. No assignment of error or exception is referred to in the brief and we are not directed to that part of the record about which defendant complains. Nevertheless, we have made a voyage of discovery through the record and find no merit in defendant's last arguments.

The events in question in this appeal occurred on 17 March 1980; the case was tried in district court on 20 May 1980, in

superior court 2 December 1980, and heard and determined by this Court on 16 September 1981. As a part of the judgment by the district court, defendant was ordered to surrender his operator's license. Presumably, he has been driving since that time. This case is another illustration why the method of appellate review should be studied and the use of review by petition for certiorari considered in certain cases to avoid unnecessary delay and expense. *See Bass v. Bass*, 43 N.C. App. 212, 258 S.E. 2d 391 (1979).

No error.

Judges MARTIN (Robert M.) and BECTON concur.

Judge BECTON concurring.

Luckey's case was not wholly frivolous. Indeed, his arguments were exceptionally well briefed. I concur in the result, however, because the law is against him. It is especially because I believe each defendant has a right to have his "one day in court"—at the trial *and* appellate levels—that I write this concurring opinion. I do not oppose methods to expedite appeals of right to avoid unnecessary delay and expense, but I do oppose suggestions to substitute petitions for certiorari for appeals of right.

MARY COLLINS v. NANCY HAMILTON EDWARDS

No. 819SC175

(Filed 6 October 1981)

Actions § 10— commencement of action—summons not signed

Plaintiff's original action arising out of an automobile accident was never commenced by the issuance of summons and an order extending time for filing complaint pursuant to G.S. 1A-1, Rule 3 where the summons was not signed by anyone, and plaintiff's subsequent action filed after plaintiff purportedly took a voluntary dismissal of the original action and after the statute of limitations had expired was properly dismissed by the trial court.

APPEAL by plaintiff from *McKinnon, Judge.* Judgment entered 9 October 1980 in Superior Court, VANCE County. Heard in the Court of Appeals 17 September 1981.

This is a civil action wherein plaintiff seeks to recover damages for personal injuries allegedly resulting from an automobile accident on 21 September 1973.

The record on appeal discloses, among other things, the following: (1) an application for an order extending time to file complaint signed by the plaintiff and plaintiff's attorney wherein plaintiff stated that her cause of action was "[t]o recover for personal injuries suffered in automobile collision on or about September 21, 1973;" (2) an order signed by the Clerk of the Superior Court extending the time for filing complaint to 11 October 1976; (3) a civil summons "filled in" but not signed by anyone.

On 23 October 1978, the plaintiff voluntarily dismissed her action against the defendant, and purportedly refiled the action on 13 November 1979.

On 9 October 1980 Judge McKinnon allowed defendant's Rule 12(b) motion to dismiss. Plaintiff appealed.

Harvey D. Jackson, for plaintiff appellant.

Haywood, Denny & Miller, by Charles H. Hobgood, for defendant appellee.

HEDRICK, Judge.

The one question presented on this appeal is whether Judge McKinnon erred in allowing defendant's Rule 12(b) motion to dismiss and in dismissing plaintiff's claim with prejudice.

A motion to dismiss will be allowed if a complaint is clearly without merit; this lack of merit may consist in an absence of law to support a claim, or in the disclosure of some fact that will necessarily defeat the claim, *F.D.I.C. v. Loft Apartments Ltd. Partnership,* 39 N.C. App. 473, 250 S.E. 2d 693 (1979), or when the complaint shows on its face that there is an *insurmountable bar.*

The Statute of Limitations can be raised on a Rule 12(b)(6) motion

> [w]hen the complaint discloses on its face that plaintiff's claim is barred by the statute of limitations, such defect may be taken advantage of by a motion to dismiss under Rule 12(b)(6). *Travis v. McLaughlin*, 29 N.C. App. 389, 224 S.E. 2d 243, *cert. denied*, 290 N.C. 555, 226 S.E. 2d 513 (1976); *Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E. 2d 671 (1972); Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 608 (1969).

F.D.I.C. v. Loft Apartments Ltd. Partnership, *supra* at 475, 250 S.E. 2d at 694-95.

An action for damages for personal injuries arising out of an automobile accident must be commenced within three years of the date of occurrence of such accident. G.S. §§ 1-15(a), 1-46, 1-52(5). A civil action may be commenced

> by the issuance of a summons when
>
> (1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and
>
> (2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

G.S. § 1A-1, Rule 3 (1969). Furthermore, "[a] summons is issued when, after being filled out and dated, it is signed by the officer having authority to do so." G.S. § 1A-1, Rule 4 (1969); *see also* 1 McIntosh, North Carolina Practice and Procedure § 863 (Supp. 1970).

In the present case, the record discloses that the summons was never *issued*. Plaintiff, in her brief, states the following:

> Also in the court file of this case is a Civil Summons to be served with Order Extending Time, which bears the date of September 21, 1976. It bears no signature for the plaintiff's attorney and it bears no signature of the clerk or any deputy clerk. The sheriff's return section is not filled in.

We think it is clear the summons was not issued on 21 September 1976, and thus the action was never commenced. The record discloses that plaintiff's claim is barred by the three year

statute of limitations. It is not necessary, therefore, that we discuss the other possible grounds supporting Judge McKinnon's order dismissing the action, nor is it necessary that we discuss the fact that the plaintiff took a voluntary dismissal and purportedly refiled her claim within one year thereof, since Rule 41 does not breathe life into an action already barred by the statute of limitations. *Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234 (1978). The order appealed from is

Affirmed.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. DARYL WESLEY FERREE

No. 8120SC340

(Filed 6 October 1981)

1. **Robbery § 2— armed robbery—not necessary to charge aiding and abetting in indictment**

A person who aids or abets another in the commission of armed robbery is guilty under the provisions of N.C.G.S. § 14-87, and it is not necessary that the indictment charge the defendant with aiding and abetting.

2. **Criminal Law § 9.2— aider and abettor—guilt as to all criminal acts**

A defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such design; therefore, where defendant knew that his companion was going to rob a store, it did not matter that he did not know his companion was going to use a firearm.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 3 November 1980 in Superior Court, MOORE County. Heard in the Court of Appeals 23 September 1981.

The defendant was indicted for armed robbery and the jury found him guilty as charged. From a sentence of a maximum of seven years imprisonment as a committed youthful offender, the defendant appeals.

The State's evidence tended to show that on 9 September 1980 the defendant participated in the armed robbery of the West End Grocery Mart. Wardell Blackman testified that he and the defendant drove to the scene of the crime, that they decided to rob the store, and that the defendant waited outside in the car while Blackman went into the store and robbed the proprietors at gunpoint. Blackman then got back into the car with the defendant, who drove them away from the scene. The two men agreed to split the robbery proceeds and Wardell gave the defendant a handful of the coins prior to their arrests.

The defendant testified that he had no agreement with Blackman to rob the store and that he did not realize that Blackman planned the robbery until Blackman got a toboggan and a bag out of the trunk immediately before going into the store. The defendant did not know that his companion had a gun and did not intend to take any of the robbery proceeds.

Attorney General Edmisten by Assistant Attorney General Tiare B. Smiley, for the State.

Seawell, Robbins, May, Webb & Rich by H. F. Seawell, Jr., for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] The defendant assigns as error the trial court's denial of his motion to dismiss for fatal variance between the indictment and the State's proof. The defendant contends that the court erred in charging the jury that they could find the defendant guilty if they found he aided and abetted in the commission of armed robbery, because the indictment did not charge the defendant with aiding and abetting. We disagree. *State v. Bell*, 270 N.C. 25, 153 S.E. 2d 741 (1967) holds explicitly that a person who aids or abets another in the commission of armed robbery is guilty under the provisions of N.C. Gen. Stat. § 14-87, and it is not necessary that the indictment charge the defendant with aiding and abetting.

[2] The defendant also contends that although he knew that his companion was going to rob the store, he did not know that his companion was going to use a firearm. A defendant who enters into a common design for a criminal purpose is equally deemed in law a party to every act done by others in furtherance of such

design. *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1967). Thus, if "two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose; that is, the common plan to rob, or as a natural or probable consequence thereof." *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971), *vacated on other grounds* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972), conformed to 281 N.C. 748, 191 S.E. 2d 68 (1972). Thus defendant's argument is without merit and is overruled.

We add that in this case it may be easily inferred from the State's evidence that the defendant and Wardell Blackman went to the scene in an automobile; that the defendant stayed in the car while his companion entered the West End Grocery Mart and with the use of a firearm robbed the proprietors; that the defendant drove Blackman away from the scene of the robbery; and that the defendant had some of the robbery proceeds in his possession upon his arrest. Taking the evidence in the light most favorable to the State, we find the evidence sufficient to warrant submitting the case to the jury. *See, State v. Corbin*, 48 N.C. App. 194, 268 S.E. 2d 260, *disc. review denied* 301 N.C. 97, 273 S.E. 2d 301 (1980); *State v. Allen*, 24 N.C. App. 692, 212 S.E. 2d 389 (1975); *State v. Goodman*, 26 N.C. App. 276, 215 S.E. 2d 842 (1975).

For the foregoing reasons the defendant's assignments of error is without merit and is overruled.

No error.

Judges MARTIN (Harry C.) and BECTON concur.

STATE OF NORTH CAROLINA v. CHARLES KEITH HAYNES

No. 8123SC241

(Filed 6 October 1981)

Narcotics § 3.1— exhibits showing defendant's disposition to deal in drugs—admission proper

Where defendant was charged with intent to sell or deliver drugs, it was not error for the court to admit into evidence a paper taken from defendant's wallet which had the words "345 decimal plus 1 gram" and "Coke" written on it as it tended to show defendant's disposition to deal in drugs.

APPEAL by defendant from *Mills, Judge.* Judgment entered 21 November 1980 in Superior Court, WILKES County. Heard in the Court of Appeals 15 September 1981.

Defendant was tried under a bill of indictment for possession with intent to sell or deliver more than 100 dosage units of methaqualone, a felony. He was convicted of felonious possession of methaqualone. Defendant appeals from a judgment of imprisonment.

Attorney General Edmisten, by Associate Attorney General R. Darrell Hancock, for the State.

Brewer & Freeman, by Joe O. Brewer, for defendant-appellant.

HILL, Judge.

The trial court permitted Officer Johnson to identify certain papers which had been removed from defendant's billfold at the time of arrest and to testify as to their contents. The officer read the words "345 decimal plus 1 gram" and "Coke," which were written on one of the papers. Later the court allowed the exhibits into evidence. The exhibits and testimony offered by the officer tended to show defendant's disposition to deal in drugs. In his first assignment of error defendant contends this evidence was immaterial and had the sole effect of inciting the prejudice of the jury. We do not agree.

> In drug cases, evidence of other drug violations is relevant and admissible if it tends to show plan or scheme, disposition to deal in illicit drugs, knowledge of the presence

and character of the drug, or presence at and possession of the premises where the drugs are found.

State v. Richardson, 36 N.C. App. 373, 375, 243 S.E. 2d 918, 919 (1978); *State v. Sink*, 31 N.C. App. 726, 230 S.E. 2d 435 (1976). Furthermore, to warrant a new trial defendant must show "that the ruling complained of was material and prejudicial to [his] rights and that a different result would have likely ensued." *State v. Sanders*, 276 N.C. 598, 615, 174 S.E. 2d 487, 499 (1970); *Collins v. Lamb*, 215 N.C. 719, 2 S.E. 2d 863 (1939). *See* G.S. 15A-1443(a). This he has not done. This assignment of error therefore is overruled.

In his remaining arguments defendant contends the trial court erred in failing to grant his motions for dismissal and in charging the jury and submitting the issue of felonious possession of methaqualone. Specifically, defendant argues that he was not properly charged in the bill of indictment with felonious possession of methaqualone but was charged with possession with intent to sell and deliver a controlled substance, more than 100 dosage units of methaqualone. In fact, the indictment charges that defendant "unlawfully and wilfully did feloniously *possess* with intent to sell or deliver a controlled substance to wit, *more than 100 dosage units of methaqualone.*" (Emphasis added.)

Possession is an element of possession with intent to deliver, and unauthorized possession is by necessity included in that crime. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974). To prove the crime of felonious possession of methaqualone, the State must show only (1) possession of methaqualone, a Schedule II controlled substance, and (2) the amount exceeded 100 dosage units. G.S. 90-95(d)(2). The indictment specifically alleges possession and that the amount possessed was in excess of 100 dosage units. We find the indictment sufficient to charge the crime for which defendant was convicted, the evidence thereon sufficient to withstand his motions to dismiss, and the trial court's jury charge proper. These assignments of error are overruled.

No error.

Judges HEDRICK and WHICHARD concur.

ROSE MORRIS PIGUERRA v. DONALD RAY PIGUERRA

No. 8119DC144

(Filed 6 October 1981)

Appeal and Error § 39.1— dismissal of appeal not docketed in time

Appeal is dismissed where the record on appeal was filed in the appellate court more than 150 days from the date notice of appeal was given in violation of Appellate Rule 12(a) and no extension of time for filing the record on appeal was requested or granted by the appellate court.

APPEAL by plaintiff from *Faggart, Judge.* Judgment signed 29 August 1980 in District Court, ROWAN County. Heard in the Court of Appeals 16 September 1981.

Robert M. Davis for plaintiff appellant.

No counsel contra.

MARTIN (Harry C.), Judge.

Plaintiff gave notice of appeal on 5 September 1980. The record on appeal was filed in this Court on 10 February 1981, more than 150 days from the date notice of appeal was given, in violation of Rule 12(a) of the North Carolina Rules of Appellate Procedure. No extension of time within which to file the record on appeal was requested or granted by this Court. N.C.R. App. P. 27(c). The North Carolina Rules of Appellate Procedure are mandatory. *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126 (1930); *In re Allen,* 31 N.C. App. 597, 230 S.E. 2d 423 (1976). The appeal must be dismissed.

We also note that plaintiff and defendant failed to file the statement under oath required by N.C.G.S. 50A-9(a) in proceedings involving child custody.

Appeal dismissed.

Judges MARTIN (Robert M.) and BECTON concur.

SYLVIA E. WINBORNE v. MELVIN D. WINBORNE

No. 816SC209

(Filed 6 October 1981)

Husband and Wife § 11; Partition § 2— separation agreement preventing partition

Where the parties executed a separation agreement which provided: "The parties own a home as 'tenants by the entirety,' in which husband will continue to live and make payments," they modified and limited their right to partition the property.

APPEAL by respondent from *Llewelyn, Judge.* Judgment entered 21 January 1981 in Superior Court, HERTFORD County. Heard in the Court of Appeals 24 September 1981.

The petitioner commenced this proceeding for the sale for petition of a house and lot she and the respondent had owned as tenants by the entirety before they were divorced. Prior to the divorce, the parties entered into a separation agreement which provided: "The parties own a home as 'tenants by the entirety,' in which husband will continue to live and make payments." The defendant pled this agreement as a bar to the sale for partition.

The court granted the petitioner's motion for summary judgment. Respondent appealed.

Jenkins and Jenkins, by Robert C. Jenkins, for petitioner appellee.

Revelle, Burleson, Lee and Revelle, by L. Frank Burleson, Jr., for respondent appellant.

WEBB, Judge.

We believe we are governed by *Hepler v. Burnham,* 24 N.C. App. 362, 210 S.E. 2d 509 (1975) in which case the parties entered into a separation agreement which provided:

> "It is understood and agreed that the parties hereto, prior to separation, resided at 739 Fairfield Street, Burlington, North Carolina, and the party of the first party (sic), wife now resides in and shall be permitted to continue to reside in and at said location unmolested, and party of the second part does hereby lease said premises to party of the

first part, free of any rent, for her continued use of said premises as her home during the existence of this agreement."

In *Hepler* this Court held that by executing the separation agreement, the petitioner had modified and limited his right to partition the property. We believe the agreement in the case sub judice is sufficiently similar to *Hepler* so that we would have to overrule that case to sustain the position of the appellee. In each case the gravamen of the separation agreement as to the disposition of the entirety property is that the respondent will be allowed to live in the house so long as he or she meets certain conditions. There is no dispute that the respondent has met the conditions in this case.

It was error for the court not to dismiss the petition. We reverse and remand for an order consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and ARNOLD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 OCTOBER 1981

BURNS v. MYERS No. 8121DC130	Forsyth (79CVD2175)	Dismissed
CAMPBELL v. CAMPBELL No. 8122DC64	Davie (80CVD233)	Affirmed
GODWIN v. ALBEMARLE No. 811SC27	Pasquotank (78CVS386)	Reversed & Remanded
LORDEON v. PETERS No. 8130SC173	Jackson (80CVS29)	Affirmed
MITCHELL v. PETERS No. 8112SC214	Cumberland (80CVS1252)	Affirmed
PRUETT v. PRUETT No. 8119DC133	Cabarrus (79CVD199)	Affirmed
SNIDER v. SNIDER No. 8119DC118	Rowan (80CVD241)	Affirmed in Part & Remanded
STATE v. BALDWIN No. 8112SC312	Cumberland (80CRS24111)	No Error
STATE v. CHAPMAN No. 8118SC344	Guilford (80CRS19468)	No Error
STATE v. CLARK No. 8110SC288	Wake (80CRS32385)	No Error
STATE v. FREEMAN No. 8114SC189	Durham (80CRS9099)	No Error
STATE v. GASKINS No. 812SC275	Beaufort (80CRS6915)	Reversed
STATE v. KENNEDY No. 8121SC329	Forsyth (80CRS26581)	New Trial
STATE v. LEAK No. 8114SC263	Durham (80CRS14011)	No Error
STATE v. McLEAN & McFAYDEN No. 8112SC285	Cumberland (80CRS21116) (80CRS21117) (80CRS40411) (80CRS40412)	No Error
STATE v. MORGAN No. 8128SC325	Buncombe (80CRS20991)	No Error
STATE v. SMITH No. 8118SC279	Guilford (80CRS27476)	No Error

STATE v. SNIPES No. 8115SC248	Orange (80CRS7460)	No Error
STATE v. THOMPSON No. 8110SC301	Wake (80CRS29324)	No Error
STATE v. WALKER No. 8123SC286	Wilkes (80CRS1094)	No Error
STATE v. WELLS No. 815SC52	New Hanover (80CRS404)	No Error
STATE v. YOUNG No. 812SC317	Washington (80CRS760) (80CRS763) (80CRS764) (80CRS792)	No Error
SUMMER v. MORRISON No. 8122SC206	Iredell (79CVS764)	Reversed
UHWARRIE v. JOINES No. 8118SC176	Guilford (80CVS5995)	Affirmed
WIKE v. WIKE No. 8130SC83	Swain (74CVS62)	Plaintiff's Appeal is Dismissed in Part; Judge Ferrell's Order is Affirmed

STATE OF NORTH CAROLINA v. JOHN RHODES

No. 8118SC215

(Filed 6 October 1981)

Arrest and Bail §§ 5.2, 6— resisting arrest—no illegal entry by officer

Where there was evidence that one police officer made a lawful entry into defendant's home, read an order for his arrest, and defendant understood the order but did not submit peacefully; that the officer called for assistance, defendant heard the call, and another officer came to defendant's home to assist the first officer, the evidence failed to indicate an illegal entry into defendant's home. Where a law officer makes a lawful entry of a home with consent of the owner to apprehend and arrest a suspect, then other officers may enter the home to assist those officers who have been voluntarily admitted.

Judge WELLS dissenting.

APPEAL by defendant from *Helms, Judge.* Judgment entered 6 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 September 1981.

Defendant was convicted, as charged, of resisting arrest and appeals from the judgment imposing confinement for a term of six months.

STATE'S EVIDENCE

Greensboro City Policeman Hastings, in uniform, went to defendant's apartment to execute an order for arrest. He knocked at the door and was invited in by defendant. He explained his purpose, and defendant read the order. Hastings permitted defendant to call his lawyer by phone, but he was unable to reach him. Defendant said he was tired of going to jail for nothing and that if he had to go, one of them was going to the morgue. After some discussion Hastings, in defendant's presence, by radio called Officer Workman and requested assistance in effecting the arrest. Workman arrived at the apartment, knocked on the door, and Hastings opened the door for him. The officers explained to defendant that he had to go with them. Defendant refused. They attempted to pull defendant up from a chair. He struggled and resisted. Officer Workman sprayed a burst of chemical mace in defendant's face. The two officers managed to handcuff defendant. They took him to the hospital, but he refused treatment for the mace.

DEFENDANT'S EVIDENCE

Defendant testified that he was informed by his wife that there was an order for his arrest. He telephoned the Police Department and told them he would be happy to discuss the matter if they sent an officer. Shortly thereafter Officer Hastings arrived, and he invited him in. He read the order for arrest. He telephoned his lawyer but was unable to reach him. He had a discussion with Hastings. He heard Hastings make a two-way radio call. Soon Officer Workman walked in the apartment and said, "What the hell is going on," and told defendant he had to go with them right now. Defendant was confused and upset. Workman sprayed mace in his face two or three times. He called his wife, and when she entered the room Hastings pushed her out.

Defendant's wife testified that she was ill and in bed, that when she entered the living room both officers had hold of defendant, and together they threw him in a chair. Workman then sprayed mace in his face.

Attorney General Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

CLARK, Judge.

Defendant first makes the argument that the trial court erred in failing to instruct the jury on his right to resist an arrest pursuant to an illegal entry into his home.

We reject the argument on the ground that there is no evidence of an illegal entry into defendant's home. Defendant does not question the validity of the order for his arrest which Officer Hastings had in his possession. Hastings knocked on the door of the home and entered at the invitation of the defendant, who then read and understood the warrant for his arrest. There is no question about the legality of Hastings' entry. *See* G.S. 15a-401(e)(1)a.

After Hastings' legal entry he had the right and duty to arrest the defendant pursuant to the order of arrest. In effecting

the arrest Hastings had the right to use such force as he may reasonably believe necessary to the proper discharge of his duties. The amount of force which a law officer may use in effecting a lawful arrest is largely within the discretion of the officer, subject to the limitation that he may not use any greater force than is reasonably and apparently necessary under the circumstances. *State v. Fain*, 229 N.C. 644, 50 S.E. 2d 904 (1948); *State v. Anderson*, 40 N.C. App. 318, 253 S.E. 2d 48 (1979). *See* Annot., 77 A.L.R. 3d 281 (1977).

It is clear that Officer Hastings made a lawful entry into defendant's home, and that before Officer Workman arrived he did not use or attempt to use force in effecting an arrest. In determining whether there was evidence that Officer Workman made an illegal entry into defendant's home, we must consider all the evidence, since the trial judge had the duty in his instructions to the jury to apply the law to the various factual situations presented by the conflicting evidence. G.S. 15A-1232. *State v. Blackmon*, 38 N.C. App. 620, 248 S.E. 2d 456 (1978), *cert. denied*, 296 N.C. 412, 251 S.E. 2d 471 (1979); 4 Strong's N.C. Index 3d *Criminal Law* § 113 (1976).

All of the evidence tends to show that Officer Hastings had an order for arrest of defendant and that defendant read and understood it. Defendant had the duty to submit peaceably to the arrest. *State v. Summerell*, 282 N.C. 157, 192 S.E. 2d 569 (1972); *State v. Cooper*, 4 N.C. App. 210, 166 S.E. 2d 509 (1969); 1 Strong's N.C. Index 3d *Arrest and Bail* § 6 (1976). Hastings did not announce to defendant that he was under arrest or attempt to use force to effect an arrest. It appears from Hastings' testimony that he radioed for help because defendant stated he was not going to jail and if he had to go one of them was going to the morgue. Defendant admitted that Hastings told him he would have to go downtown, denied that he told Hastings that he would not go with him, and admitted that he heard the two-way radio call between Officers Hastings and Workman. It is reasonable to assume that defendant knew that Hastings asked Workman to assist him in effecting the arrest.

When Officer Hastings made a lawful entry into the home of the defendant who understandingly read the order for his arrest but did not submit peaceably, Officer Workman, when called for

assistance, had the duty to assist Hastings in effecting the arrest and the right to enter the defendant's home without knocking and without the invitation or consent of the defendant. *State v. Basden*, 8 N.C. App. 401, 174 S.E. 2d 613 (1970), held that where law officers make a lawful entry of a home with consent of the owner to apprehend and arrest a suspect, then other officers may enter the home to assist those officers who have been voluntarily admitted.

In the absence of hostile action from within the home or other exigent circumstances, a law officer is required before entry to make an arrest to knock, disclose his identity, his authority, and his mission. *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). The purpose for this requirement is the protection of both the officer and the occupant as well as the recognition of the constitutional rights of the occupant. *State v. Sparrow, supra.* The defendant by first inviting a law officer into his home and then refusing to submit to a lawful arrest by the officer, waived his Fourth Amendment right of home security to the extent that he had no right to deny entry to another officer who was called to assist in effecting the arrest. And the same conduct by defendant obviated the need for the protection which the requirement was intended to provide.

State v. Sparrow, supra, and other cases relied on by defendant support his argument that where there is an illegal entry the trial court must instruct the jury on the right of the defendant to resist such entry; but these cases are inapplicable to the case *sub judice* because there is no evidence of any illegal entry.

Though defendant concedes in his brief that the trial judge in general properly instructed the jury on the right of the defendant to resist excessive force in the arrest, he argues that prejudicial error was committed when the court, after explaining the law on the subject, instructed "If G. W. Hastings and W. A. Workman used more force than was apparently necessary," contending that the court should have used the disjunctive "or" instead of the conjunctive "and." This argument must be considered in light of the fact that both the State and defendant offered evidence that after Officer Workman entered the home both officers grabbed defendant and acted together in effecting the arrest. On appellate

review of trial court instructions to the jury, the charge will be read contextually and an excerpt will not be held prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978). Reading the charge as a whole and considering the evidence of concerted action by both officers in effecting the arrest, we find no prejudicial error.

We find no merit in defendant's argument that the trial court erred in failing to instruct on his right to resist an illegal arrest. There was no evidence of an illegal arrest.

No error.

Chief Judge MORRIS concurs.

Judge WELLS dissents.

WELLS, Judge, dissenting.

On the factual aspects of Officer Workman's entry into defendant's residence, the evidence for the State and for the defendant is clearly conflicting. The State's evidence tended to show that defendant was hostile to Officer Hastings, indicated a clear disinclination to submit to arrest, that Hastings radioed for help in defendant's presence, that Officer Workman responded to the call for help, that Workman knocked on the door when he arrived, that Hastings then announced to defendant Workman's purpose by explaining to Workman that defendant had refused to submit to arrest, that Workman attempted to persuade defendant to submit, and that only after defendant's refusal to submit did Workman lay hands upon defendant.

On the other hand, defendant's evidence tended to show that he had cooperated with Officer Hastings, that his conversation with Hastings was peaceful, that he had indicated to Hastings that he was preparing to submit to arrest, that Workman arrived and entered without knocking or announcing his purpose or identifying himself, and that upon entry, Workman immediately manifested hostility to defendant and then physically assaulted him.

Such a conflict in the evidence clearly raised the issue of the legality of Workman's entry and subsequent conduct. Such evidence required the trial court to submit this factual controversy to the jury and to instruct the jury as to defendant's rights should they find Workman's entry to be illegal. *State v. Sparrow*, 276 N.C. 499, 173 S.E. 2d 897 (1970). *See also State v. Anderson*, 40 N.C. App. 318, 253 S.E. 2d 48 (1979). In my opinion, the failure of the trial judge to so instruct the jury entitles defendant to a new trial. *Sparrow*, supra.

WACHOVIA BANK & TRUST COMPANY, TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF GEORGE G. JOHNSON v. CHARLES H. LIVENGOOD, JR., NORMAN B. LIVENGOOD, D. JOHNSON LIVENGOOD, BETTY J. CRISP, J. ERIC JOHNSON, JR. AND BETTY BUGG CROUCH

No. 8114SC161

(Filed 6 October 1981)

Wills § 44— trust corpus—per capita or per stirpes distribution

Where testator's will provided that the net income of a trust should be paid in equal shares to his two sisters and his sister-in-law, or the survivors of them, and that at the death of the last survivor, the trust should terminate and be paid over "in equal shares" to his nieces and nephews "per stirpes," the will required a per stirpes rather than a per capita distribution of the trust principal and accrued income to testator's nieces and nephews.

APPEAL by defendants Livengood from *Brewer, Judge.* Order entered 12 December 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 September 1981.

This case comes on appeal from an order granting summary judgment in favor of defendant Betty Bugg Crouch and denying summary judgment to defendants Charles Livengood, Jr., Norman B. Livengood, and D. Johnson Livengood. All defendants are nephews and nieces of George G. Johnson whose last will and testament is the subject of the present controversy.

The plaintiff, Wachovia Bank & Trust Company, N.A., Trustee under a testamentary trust created under George Johnson's will, brought an action for declaratory judgment, requesting construction of a provision of the trust respecting disposition at its termination.

Powe, Porter & Alphin, by E. K. Powe and Eugene F. Dauchert, Jr., for defendant appellants.

Marshall, Williams, Gorham & Brawley, by Daniel Lee Brawley and A. Dumay Gorham, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Item Fourth of the last will and testament of George G. Johnson provides:

> All of my other property, real, personal, and mixed, wherever the same may be situated, I give, devise and bequeath unto the Wachovia Bank and Trust Company, Durham, N.C., as Trustee, to be held, managed, and invested, reinvested, used and disposed of as follows:
>
> (1) The Trustee shall pay over the net income in equal shares to my sister [*sic*], Mary Johnson Livengood, Helen Johnson Bugg, and my sister-in-law Helen Noell Johnson, or the survivors of them.
>
> (2) Upon the death of the last survivors of my sisters, Mary Johnson Livengood, and Helen Johnson Bugg, and my sister-in-law Helen Noell Johnson, this trust shall terminate and be paid over in equal shares to my nieces and Nephews per Stripes [*sic*].

The life tenants are now deceased. Mary Johnson Livengood left surviving her the defendants Charles H. Livengood, Jr., Norman B. Livengood, and D. Johnson Livengood, nephews of the testator. Betty Bugg Crouch is the daughter of Helen Johnson Bugg and is a niece of the testator. Helen Noell Johnson left surviving her a son and a daughter.

It is appellants' contention that paragraph 2 of Item Fourth of the will should be construed to require a per capita distribution of principal and accrued income from the trust. Each of the remaindermen, the class of nephews and nieces, would receive a one-sixth share of the trust estate under this construction. Appellee, Betty Bugg Crouch, argues for a per stirpes distribution, entitling her to a one-third share. Under this construction, appellants would be entitled to a one-ninth share each. Under either construction Helen Noell Johnson's two children would each receive a one-sixth share.

The parties have argued ably and vigorously, citing numerous North Carolina cases to support their respective positions. We begin with the proposition that if persons designated in a will stand in equal degrees of relationship to the testator, and the devise or bequest enures to the benefit of all of them, a division per capita is indicated, prima facie. *Roberts v. Bank*, 271 N.C. 292, 156 S.E. 2d 229 (1967); *Trust Co. v. Bryant*, 258 N.C. 482, 128 S.E. 2d 758 (1963); *Tillman v. O'Briant*, 220 N.C. 714, 18 S.E. 2d 131 (1942); *Burton v. Cahill*, 192 N.C. 505, 135 S.E. 332 (1926); *Dew v. Shockley*, 36 N.C. App. 87, 243 S.E. 2d 177, *cert. denied*, 295 N.C. 465 (1978); Restatement (Second) of Property § 300 (1940). This presumption is based on the theory that equality is intended unless language or circumstances indicate a contrary intent. Supporting a per capita construction in the present case are (1) that the trust assets are to be distributed to a class of nephews and nieces identically related to the testator, and (2) that the assets are "to be paid over in equal shares." It appears, however, that the testator has manifested a contrary intent, rebutting the per capita presumption by the addition of "per stirpes" language.

Appellants urge us to consider and adopt the reasoning in a line of cases which hold that the per stirpes language merely regulates the distribution of the gift, substituting on a representative basis children of a nephew or niece who died prior to distribution. *Roberts, supra; Trust Co. v. Bryant, supra; Walsh v. Friedman*, 219 N.C. 151, 13 S.E. 2d 250 (1941); *Dew, supra.* Where the courts have adopted this reasoning, however, there has been language in the will to suggest that the testator intended to preserve the first taker's share by providing for substituted gifts.[1] We are thus left with no North Carolina case which speaks

1. In *Trust Co. v. Bryant*, the will provided for a life estate in trust income to testator's wife and at her death "to convey and transfer the entire principal sum . . . to my nephews and nieces, *the child or children of any deceased nephew and niece to receive the share the parent would have taken, the said distribution to be per stirpes and not per capita.*" 258 N.C. at 483, 128 S.E. 2d at 760 (emphasis added).

In *Dew v. Shockley*, testator devised "all my property of every kind . . . to my two brothers and three sisters, to have and to hold the same for and during the term of their natural lives with remainder in fee to their children, in equal shares, *the children of any deceased child to take the share the parent, if living, would take.*" 36 N.C. App. at 88, 243 S.E. 2d at 179 (emphasis added).

directly to the perplexing ambiguity raised in paragraph 2, Item Fourth, of George G. Johnson's last will.

We find most persuasive the opinion in *Cole v. Bailey,* 218 Md. 177, 146 A.2d 14 (1958), which was decided on strikingly similar facts. The testator in *Cole* established a trust, income from which was to be paid to the testator's wife for life and at her death the principal and accumulated income was to be divided equally between his nephews and nieces living at the death of the wife, "share and share alike per representation." The court first concluded that the phrase "per representation" was not meaningless; nor could it be treated as surplusage. Within the clear meaning of the term was a direction that the nephews and nieces were to take not as individuals but as representatives of their parents, that is, on a "per stirpes" basis.

As in the present case, the will in *Cole* was silent with respect to providing for substitutional gifts. This is an important fact which distinguishes these two cases from those North Carolina cases upon which appellants would have us rely. Determining first that the "per stirpes" or "per representation" language was not applicable to substitutional gifts, the *Cole* court found that the language could only "denote the division of the gift among the primary legatees who are also the *only* legatees designed by testator to participate in his bounty." *Id.* at 181, 146 A.2d at 16. Thus a "per stirpes" construction was indicated.

The Maryland court next answered appellants' contention that the *Cole* nephews and nieces were the first takers and therefore they could not take in substitution from an ancestor. Noting that because only the nephews and nieces alive at the time of distribution could take under his will, and "the words 'per representation' therefore could not conceivably apply to anyone below the inheritance line of nephew and niece," the court found no reason why "in the construction of a gift per stirpes the stocks should be found among takers and not among their ancestors." *Id.* at 182, 146 A.2d at 16.

We find the per stirpes construction even more compelling in the present case in that testator's sisters and his sister-in-law, parents of the class of nephews and nieces, did receive a life interest in the income of the trust. "[I]f the members of the class are of two or more families and the parent of each of these

families is given a prior life interest in an equal share in the subject matter of the class gift, this fact tends to establish that those class members who are the children of one life tenant are to take only that share in which the parent life tenant had his interest." Restatement (Second) of Property § 301, comment j at 1649-50 (1941).

Finally, we quote from *Siders v. Siders*, 169 Mass. 523, 524-25, 48 N.E. 277, 277 (1897), a case cited in *Cole:*

> But for the words "by right of representation," there could be no doubt that each nephew and niece would be entitled to an equal share. But for the words "in equal shares," there could be no doubt that they would take per stirpes. The difficulty arises from the use of the two expressions in juxtaposition. Not much aid is derived from a perusal of the other parts of the will. . . . We have a difficulty in giving any adequate meaning to the words "by right of representation," except upon the theory of a distribution per stirpes. These words, though technical, are not obscure; and most men of ordinary intelligence, who have occasion to dispose of their property by will, and who use the words, may be supposed to know their meaning.

Based on the foregoing, we affirm the decision of the trial court which held that the trust assets were to be distributed to testator's nephews and nieces on a per stirpes basis.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

WINSTON-SALEM JOINT VENTURE v. CITY OF WINSTON-SALEM AND FORSYTH COUNTY

No. 8121SC35

(Filed 6 October 1981)

Evidence § 4.2; Taxation § 25.1— late listing property tax penalty—conflict as to whether listing was mailed and received—summary judgment improper

Where plaintiff alleged it mailed its tax listing before the deadline and defendants alleged the listing was not received, G.S. 105-311(b), dealing with

timeliness of a listing as revealed by a postmark on an envelope, was not dispositive and did not apply to the situation where the receipt of the listing was denied by defendants. Resort must be had to the common law on the issue of receipt and that issue must be decided by a jury.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 17 November 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 3 June 1981.

Plaintiff, a general partnership, brought an action to recover a ten percent late listing penalty which was levied for alleged failure to list its real property for tax purposes. The property is the Hanes Mall Shopping Center in Winston-Salem. Plaintiff maintains that it listed the property on or about 24 February 1978, prior to the listing deadline of 2 March 1978, but that in September of that year defendants, nevertheless, billed plaintiff for a late listing penalty of $22,361.03 in addition to the real estate property tax assessment for that year.

Defendants denied that plaintiff properly listed its taxes for 1978 as required by G.S. 105-301 and contended that the penalty was lawfully imposed pursuant to G.S. 105-312, as no listing of the property was ever received by the tax supervisor. Defendants stated, in answers to interrogatories, that plaintiff's county tax on the Hanes Mall property for 1978 was $116,756.25, upon which a late listing penalty of $11,675.63 was assessed, and that plaintiff's city tax on the Hanes Mall property for that year was $96,699.96, to which a $9,670 late penalty was affixed.

James Gudin of Jacobs, Visconsi and Jacobs Company averred that his company listed real estate taxes for plaintiff and other clients and that he personally handled the preparation of the subject property's listing by completing forms forwarded to him by the tax office and mailing them back to the tax office on 24 February in a self-addressed envelope furnished by defendants. He contends he was unaware of any problems with the listing until receiving a tax invoice indicating assessment of the late payment penalty. A request for relief was denied by the board of county commissioners. The taxes were thereafter paid under protest, and a claim for refund was made which was denied.

Defendants moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure based on the pleadings,

answers to interrogatories, and affidavits of W. Harvey Pardue, Tax Supervisor for Forsyth County and the City of Winston-Salem, and several employees of his office. The affiants stated that no property tax listing was received by them from, in the name of, or on behalf of plaintiff for the year 1978 on the Hanes Mall property.

By its order entered 17 November 1980, the trial court granted summary judgment in favor of the defendants and dismissed the action. Plaintiff appealed.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by Grover G. Wilson and Michael L. Robinson, for plaintiff appellant.

P. Eugene Price, Jr., and Jonathan V. Maxwell for defendant appellee County of Forsyth.

Ronald G. Seeber for defendant appellee City of Winston-Salem.

MORRIS, Chief Judge.

Plaintiff assigns error to the trial court's granting of summary judgment, contending that there exist genuine issues as to material facts concerning liability for the late listing penalty.

In effect, the question presented by this assignment is whether G.S. 105-311 controls when the tax supervisor's office is not in possession of and denies receipt of a listing submitted by mail. The second paragraph of G.S. 105-311(b) provides in pertinent part:

> For the purpose of this Subchapter, abstracts submitted by mail shall be deemed to be filed as of the date shown on the postmark affixed by the United States postal service. If no date is shown on the postmark, or if the postmark is not affixed by the United States postal service, the abstracts shall be deemed to be filed when received in the office of the tax supervisor. In any dispute arising under this Subchapter, the burden of proof shall be on the taxpayer to show that the abstract was timely filed.

Plaintiff argues that the statute is inapplicable under the facts, but that the common law is apposite. He contends that subsection (b) of G.S. 105-311 is determinative of timeliness when

there is acknowledged receipt of a mailed listing, but that when receipt is gainsaid, it would be impossible to show by tangible means when or whether the listing was received. Plaintiff suggests that if the statutory burden of proof applied whenever the tax supervisor's office denied receipt of the listing or possession of the envelope said to contain the listing, a taxpayer would be foreclosed from proving timely receipt whenever the tax supervisor or his employees mishandled or lost the evidence. It thus could not have been the intent of the legislature to effect application of the statute of facts such as those at bar, says plaintiff.

Defendants, on the other hand, contend that G.S. 105-311 is completely dispositive of the case under consideration. Defendants argue that listings submitted by mail are deemed filed as of the date on the postmark, and that if there is no postmark, the statute provides that abstracts are deemed to be filed when received in the office of the tax supervisor. They assert that the tax listing must be actually received in the tax office to be considered filed, and that since they did not receive a listing, dismissal was proper.

We believe that the superior court improperly granted summary judgment in favor of defendants. Tax statutes are to be construed strictly against the taxing authority. *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505 (1952), citing *Sabine v. Gill, Comr. of Revenue*, 229 N.C. 599, 51 S.E. 2d 1 (1948); *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E. 2d 754 (1948); *State v. Campbell*, 223 N.C. 828, 28 S.E. 2d 499 (1944).

> [I]t is part of the law of North Carolina, as it is generally elsewhere, that in cases of doubt, taxing statutes are construed most strongly against the government and in favor of the taxpayer.

Davenport v. Ralph H. Peters and Co., 386 F. 2d 199, 209 (4th Cir. 1967). Thus, where a taxing statute is susceptible of two constructions and the legislative intent is problematic, the uncertainty should be resolved in favor of the taxpayer. *Salvation Army v. State*, 144 Mont. 415, 396 P. 2d 463 (1964).

Statutes imposing penalties are similarly strictly construed in favor of the one against whom the penalty is imposed and are never to be extended by construction. *C. D. Utility Corporation v.*

Maxwell, 189 So. 2d 643 (1966). G.S. 105-311 is not, of course, a penalty statute *per se*. However, G.S. 105-312 entitled "Discovered property; appraisal; penalty" virtually incorporates G.S. 105-311 in subsection a(2):

> The phrase "failure to list property" shall include . . . the omission to list property during a regular listing period. . . ."

Subsection (h) imposes a penalty of ten percent of the amount of the tax. Whether in the case *sub judice* there was an omission to list property during a regular listing period so as to allow imposition of a penalty under G.S. 105-312 is determined by G.S. 105-311(b).

It is not manifest that G.S. 105-311(b) applies to situations where the receipt of a listing is denied by the taxing authority. The second paragraph of subsection (b) addresses the issue of timeliness as revealed by a postmark or lack thereof, on abstracts submitted by mail. Defendants read the paragraph fractionally when they assert that lack of a postmark in the record and denial of receipt combine to negate, via G.S. 105-311, any issue of timeliness in the present case. The paragraph, read as an integrated whole, indicates that G.S. 105-311 applies only to situations where an abstract has actually been received and the envelope is available for scrutiny. Indeed, the first sentence says that abstracts submitted by mail will be deemed to be filed "as of the date shown on the postmark. . .", presupposing the existence of a mark cancelling the postage. If no date is shown on the postmark, or if the postmark is not affixed, the statute says that the abstract "shall be deemed to be filed when received." Defendants emphasize the word "received". We find, however, that "when" is the crucial word, and that it refers to a time, not a contingency, necessarily requiring receipt as a prerequisite to application of the statute. We hold, therefore, that for G.S. 105-311 to apply, there must be conclusive evidence of the existence of an envelope. The statute merely creates logical preferences for the determination of timeliness where there has been delivery to the tax supervisor by mail. "It is axiomatic" wrote Justice Barnhill in *Watson Industries v. Shaw, Comr. of Revenue*, supra, p. 210, ". . . that a provision in a statute must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit."

Since a penalty statute is to be strictly construed, the courts will not interject conditions omitted by the legislature or enlarge its scope by implication. *Bachus v. Swanson*, 179 Neb. 1, 136 N.W. 2d 189 (1965). We are thus forced to read the statute narrowly because of its incorporation into G.S. 105-312, a penalty statute. The import of G.S. 105-311

> may not be extended by construction. Such a statute may not be applied to situations or parties not fairly or clearly within its provisions.
>
> In construing a penalty statute nothing will be recognized, presumed, or inferred that is not expressed, unless necessarily or unmistakeably implied in order to give the statute full operation. (Citations omitted.)

Johnson Fruit Company v. Story, 171 Neb. 310, 313, 106 N.W. 2d 182, 185 (1960). Likewise, "[i]n the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out." *Gould v. Gould*, 245 U.S. 151, 153, 62 L.Ed. 211, 213, 38 S.Ct. 53, 53 (1917). Thus, we refuse to extend the import of G.S. 105-311 to encompass the facts of this case. Resort must be had to the common law on the issue of receipt.

Moreover, to hold that the statute obviates the common law in this situation would preclude the plaintiff from proving timely receipt based solely upon defendants' denial, a result likely beyond legislative design. Even were we to find ambiguity in the intent, we would be compelled to resolve that uncertainty in favor of plaintiff taxpayer. *Salvation Army v. State, supra.*

There is consonance in the cases regarding the proposition that evidence of the deposit in the mails of a letter, properly stamped and addressed, will warrant a finding that it was received in due course by the addressee. *Willis v. Davis Industries*, 280 N.C. 709, 186 S.E. 2d 913 (1972); *Supply Co. v. Motor Lodge*, 277 N.C. 312, 177 S.E. 2d 392 (1970); *Petroleum Corp. v. Oil Co.*, 255 N.C. 167, 120 S.E. 2d 594 (1961). When the addressee introduces evidence that the mailing was not in fact received, such testimony simply raises a conflict in the evidence on which it is the function of the jury to pass. *Daves v. Insurance Co.*, 3 N.C. App. 82, 164

S.E. 2d 195 (1968), *cert. denied*, 275 N.C. 137; *Carden v. Sons and Daughters of Liberty*, 179 N.C. 399, 102 S.E. 610 (1920); *Trust Co. v. Bank*, 166 N.C. 112, 81 S.E. 1074 (1914). There is sufficient evidence in the record to require that the issue of receipt be decided by a jury.

Reversed and remanded.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. JERRY DAVID GUY

STATE OF NORTH CAROLINA v. RICHARD H. YANDLE, A/K/A FRED WILLIAMS

No. 8120SC229

(Filed 6 October 1981)

1. Searches and Seizures § 23— sufficiency of affidavit for warrant

An affidavit was sufficient to support the issuance of a warrant to search a Cadillac and apartment where it alleged: a home was broken into and property was stolen therefrom at approximately 4:00 p.m.; the victim and a neighbor saw a 1977 silver Cadillac leaving the yard of the home; at 4:15 p.m. an officer found the car matching that description parked by an apartment; the hood of the car was hot, the keys were in the ignition, and ski masks, gloves, a pistol and a screwdriver were visible inside the car; the neighbor identified the Cadillac as the same one she had seen at the victim's home; and when an officer approached the apartment, he was denied admission.

2. Criminal Law § 92.1— consolidation of charges against two defendants

The trial court properly consolidated the trials of two defendants charged with the same offenses of breaking and entering and larceny. G.S. 15A-926(a).

3. Criminal Law § 42.5— connection between defendant and stolen goods

A sufficient connection between defendant and guns stolen during a break-in was established to permit admission of the guns into evidence against defendant where a pillow case containing the stolen guns was found in a waste basket only five or six feet from where defendant was standing, and defendant had silver certificates stolen during the same break-in in his pocket.

4. Searches and Seizures § 39— execution of warrant—detention of persons

Officers had the right to detain defendant and another person who were in an apartment while the apartment was being searched pursuant to a warrant. G.S. 15A-256.

5. Arrest and Bail § 3.5; Searches and Seizures § 8— probable cause for warrantless arrest—search incident to arrest

Officers had probable cause to arrest defendant when stolen guns were found in a waste basket only five or six feet from where defendant was standing in an apartment and defendant was one of only two people in the apartment, and a search of defendant's person during which stolen silver certificates were discovered was lawful as an incident to his valid arrest.

6. Burglary and Unlawful Breakings § 5.4— presumption from possession of recently stolen property

The State's evidence in a prosecution for breaking and entering and larcency was sufficient to be submitted to the jury under the theory of possession of recently stolen property where it tended to show that defendant was in the possession of stolen silver certificates a few hours after the breaking and entering.

7. Burglary and Unlawful Breakings § 6.5— instructions on possession of recently stolen property

The trial court's instruction that the jury must find every element of possession of recently stolen goods, including awareness and control of the stolen goods, in order to find defendant guilty of breaking and entering and larceny incorporated in substance defendant's requested instructions on constructive possession and proximity to stolen goods.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 14 August 1980 in Superior Court, UNION County. Heard in the Court of Appeals 14 September 1981.

Defendant Yandle was indicted on charges of breaking or entering, felony larceny, and receiving stolen property. The jury found the defendant guilty of felonious breaking or entering and felonious larceny.

The State's evidence tended to show that on 11 March 1980, the home of Mr. and Mrs. James Reid of Matthews, N.C. was broken into and robbed. At approximately 3:30 p.m. Mrs. Reid returned to her home. She saw a gray car pulled up against the back steps of her house. It then sped away across her front yard. A neighbor of the Reids', Mrs. Wells, described the speeding car as a gray-silver late model Cadillac two-door sedan with a Landau roof, occupied by two and possibly three persons. Approximately fifteen minutes later, the police found a car matching Mrs. Wells' description parked by an apartment at 1951 Stallings Road. The hood of the car was hot, and inside the car, in plain sight, were several ski masks, gloves, a pistol and a screwdriver. Mrs. Wells identified the Cadillac as the same one she had seen at the Reid's

house. The police then obtained a search warrant for the car and the apartment at 1951 Stallings Road. A search of the automobile trunk revealed the stolen clocks, weapons, and a jewelry box. The automobile was registered in the name of co-defendant Jerry Guy's wife. Only two persons were in the apartment when the police executed the search warrant: Carolyn Norman and the defendant. A blue pillowcase containing the Reids' stolen guns was found stuffed in a wastebasket five to six feet from where the defendant was standing. The defendant was arrested and searched. Nineteen silver certificates, including a one dollar silver certificate bearing the marking "Hawaii", were found in the defendant's pocket. Mr. Reid had owned such a bill.

Defendant presented no evidence.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Loflin & Loflin, by Thomas F. Loflin, III, for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns error to the trial court's denial of his motion to suppress all evidence obtained from the search of the Cadillac and the apartment. Defendant contends that the officers lacked probable cause to believe that the stolen property was located at the place to be searched. The affidavit supporting the search warrant stated that at approximately 4:00 p.m. on 10 March 1980, the Reids' home was broken into and robbed. Mrs. Reid and Mrs. Wells saw a 1977 silver Cadillac two-door sedan leaving the Reid's yard. At 4:15 p.m., Deputy J. R. Cox found a car matching that description at 1951 Stallings Road. The hood of the Cadillac was hot; the keys were in the ignition; and ski masks, gloves, a pistol and a screwdriver were visible inside in the automobile. Mrs. Wells identified the Cadillac as the same one she had seen at the Reids'. When Deputy Cox approached the apartment, he was denied admission. These facts were sufficient to establish probable cause, and the trial judge properly denied defendant's motion to suppress the evidence which the search revealed. *See Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), *Giordenello v. U.S.*, 357 U.S. 480, 2 L.Ed. 2d

1503, 78 S.Ct. 1245 (1958). *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971).

[2] Defendant's second assignment of error is that the trial court improperly granted the State's motion for consolidation of trials of Jerry David Guy and defendant Yandle. Both defendant and Guy were indicted on charges of breaking or entering and larceny arising out of the 11 March 1980 break-in of the Reids' home. A motion to consolidate trials of defendants charged with offenses arising from the same occurrence is addressed to the sound discretion of the trial judge. *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858 (1971), *State v. Phifer*, 290 N.C. 203, 225 S.E. 2d 786 (1976), *cert. denied*, 429 U.S. 1123, 51 L.Ed. 2d 573, 97 S.Ct. 1160 (1977), *State v. Wheeler*, 34 N.C. App. 243, 237 S.E. 2d 874 (1977), *State v. Travis*, 33 N.C. App. 330, 235 S.E. 2d 66, *cert. denied*, 293 N.C. 163, 236 S.E. 2d 707 (1977). Consolidation of trials is appropriate where two or more persons are indicted for the same offense. G.S. 15A-926(a), *State v. Jones*, supra. We find no abuse of discretion and this assignment is overruled.

[3] In support of defendant's fifth and sixth assignments of error, he contends that the trial court erred in allowing the admission into evidence of the stolen goods found in the apartment against defendant without establishing a link between the stolen goods and defendant, and further erred by refusing to give a limiting jury instruction that the goods were admissible only against co-defendant Guy, and not against defendant Yandle. The evidence tended to show that two or three people were in the Cadillac leaving the Reids' home. Some of the stolen items were found in that Cadillac, which was parked at 1951 Stallings Road. Defendant was arrested only five or six feet from the wastebasket in which the pillowcase containing stolen weapons was found. Defendant had stolen bills stuffed in his pocket. These facts established a connection between defendant and the goods found in the wastebasket. It was reasonable to assume that defendant had knowledge of or control over the weapons found in the pillowcase. *State v. Carr*, 21 N.C. App. 470, 204 S.E. 2d 892 (1974). The trial judge acted properly in admitting the stolen weapons into evidence against defendant, and refusing his requested limiting instruction.

The next assignment of error which we address is whether the trial court properly denied defendant's motion to suppress the evidence found in a search of defendant's person. We find that the search and the court's denial was proper.

[4, 5] The officers had the right to detain Carolyn Norman and defendant on the premises while the apartment was being searched pursuant to a warrant. G.S. 15A-256. *Michigan v. Summers*, 452 U.S. --- , 69 L.Ed. 2d 340, 101 S.Ct. 2587 (1981), *State v. Brooks*, 51 N.C. App. 90, 275 S.E. 2d 202 (1981), *State v. Watlington*, 30 N.C. App. 101, 226 S.E. 2d 186 (1976). Following a *voir dire* on defendant's motion to suppress, the trial judge made the following findings of fact: the officers searched the apartment, found a blue pillowcase containing items belonging to Mr. and Mrs. Reid, then arrested and searched defendant and found stolen bills on his person. The trial judge's findings of fact are binding on appeal if supported by competent evidence, even though there is evidence in the record to the contrary. *In re Gardner*, 39 N.C. App. 567, 251 S.E. 2d 723 (1979). *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971), *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977). Sheriff McQuirt's testimony on direct examination differed from his testimony on *voir dire*, as to whether the defendant was searched before or after the stolen goods were found in the apartment search. On *voir dire*, Sheriff McQuirt testified that the stolen weapons were found in a pillowcase only five or six feet away from defendant, when defendant was one of only two people in the apartment. These circumstances support the trial judge's findings and supplied the probable cause for defendant's arrest. *See* G.S. 15A-401(b)(2)(a), *State v. Mathis*, 295 N.C. 623, 247 S.E. 2d 919 (1978), *State v. Rudolph*, 39 N.C. App. 293, 250 S.E. 2d 318 (1979). Once defendant had been arrested, the police were entitled to search him pursuant to a valid arrest. *Chimel v. California*, 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034, *reh. denied*, 396 U.S. 869, 24 L.Ed. 2d 124, 90 S.Ct. 36 (1969). *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973), *State v. Hardy*, 299 N.C. 445, 263 S.E. 2d 711 (1980). Thus, the silver certificates were found in a lawful search of defendant's person. We find no error in the court's refusal to suppress the fruits of the search.

[6] In his tenth assignment, defendant contends that the trial judge erred in denying his motions to dismiss. From the evidence, the jury could reasonably infer that defendant's possession of the

stolen bills so soon after the burglary made it unlikely that he had acquired them honestly. *See State v. Jackson*, 274 N.C. 594, 164 S.E. 2d 369 (1968). Under the doctrine of possession of recently stolen goods, there was more than enough evidence to send this case to the jury. This assignment is overruled.

The final assignment of error we address is whether the trial judge erred in refusing to give the jury three instructions requested by the defendant. Defendant made a specific written request for jury instructions. G.S. 1-181, *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973), *State v. Robinson*, 40 N.C. App. 514, 253 S.E. 2d 311 (1979). While the trial judge had the duty to explain the law arising from the evidence in the case in substance, he was not required to tender defendant's instructions verbatim. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976), *State v. Beach*, 283 N.C. 261, 196 S.E. 2d 214 (1973). The judge's charge on the doctrine of "recent possession" adequately explained the law as requested by defendants. *See State v. Jackson*, supra.

[7] Neither did the trial judge err in refusing to give defendant's requested charges on constructive possession and proximity to stolen goods. The defendant was found with stolen goods on his person. The jury was instructed that they must find every element of possession of recently stolen goods, including awareness and control of stolen goods, in order to find defendant guilty. This instruction incorporated, in substance, defendant's requested charges. The jury instructions were correct on the whole, and do not constitute reversible error. *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), *State v. McCall*, 31 N.C. App. 543, 230 S.E. 2d 195 (1976). This assignment is overruled.

We have carefully examined defendant's other assignments of error, and find them to be without merit.

Defendant was given a fair trial, free from prejudicial error.

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

DUKE POWER COMPANY, PETITIONER v. REBECCA R. SMITH, WHITMAN E. SMITH JR. AND WIFE, KATHRYN LeS. SMITH; AND REBECCA SMITH AND WHITMAN E. SMITH, JR., TRUSTEE OF THE W. E. SMITH RESIDUARY TRUST CREATED UNDER ITEM 5 OF THE LAST WILL AND TESTAMENT OF W. E. SMITH, RESPONDENTS

No. 8120SC120

(Filed 6 October 1981)

Eminent Domain § 6.2— condemnation—exclusion of evidence of comparable sales—no error

In an action to determine damages caused by the condemnation of an easement through respondents' farmland, it was not error to exclude evidence of comparable sales even though there was little difference in zoning and in the availability of water and sewer as there was a large difference in the size of the tract sold and the tract in question. Further, there was no evidence the previous sales were voluntary sales and the defendants failed to include in the record on appeal what the sales price would have been had the trial court allowed the witness to testify regarding the "comparable" sales.

APPEAL by respondents from *Walker, Judge.* Judgment signed 2 October 1980 in Superior Court, STANLY County. Heard in the Court of Appeals 4 September 1981.

The petitioner, Duke Power Company, instituted a condemnation proceeding under N.C.G.S. 40-2(3) for an easement and right-of-way over 495.21 acres of land owned by respondents. At the time of the taking this undeveloped tract of farmland was located approximately seven-tenths of a mile east of the Albemarle city limits. The sixty-eight-foot-wide easement extends approximately 8,300 feet through rolling hills, woodlands, fields and pastures to include 12.9 acres or three percent of the land.

Exercising their statutory right to a jury trial on the issue of damages under N.C.G.S. 40-20, respondents presented evidence that the highest and best use of the property would be residential or commercial development. These witnesses estimated damages from the taking ranging from $90,000 to $500,000. Petitioner's witnesses estimated damages at a maximum of $10,320, based on a highest and best use as farmland.

Respondents sought to introduce evidence of comparable sales involving two nearby tracts of land. After hearing arguments of the parties on voir dire, the court found that

neither tract was sufficiently similar to respondents' property to be considered a comparable sale. From a judgment on a verdict of $15,000, respondents appeal.

David L. Grigg and William I. Ward, Jr., for petitioner appellee.

D. D. Smith for respondent appellants.

MARTIN (Harry C.), Judge.

Respondents assign as error the trial court's exclusion of evidence of comparable sales. The first, an eighty-acre tract, was sold to the Industrial Park a year and a half before the date of the trial. The trial court found that this eighty-acre tract was not a comparable sale because it was "different in nature and in zoning and in having water and sewer available." However, there was uncontroverted evidence that with respect to the contour and nature of the land, the two properties were similar. Of greater significance is the fact that the zoning change which brought the eighty-acre tract within the Albemarle city limits occurred subsequent to its sale. The property was supplied with water and sewerage subsequent to the sale. Industrial and commercial development began subsequent to the sale.

The court also excluded evidence of the 1980 sale of a seventy-five acre Rummage tract located approximately one mile from respondents' property. Since the sale, this tract has also been included within the Albermarle city limits. The trial judge considered both the difference in zoning and the anticipated availability of water and sewerage in making his determination.

The price paid at voluntary sales of land if similar in nature, location and condition to the condemnee's land is admissible and of considerable probative force in determining the value of land taken. *Power Co. v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980); *State v. Johnson*, 282 N.C. 1, 191 S.E. 2d 641 (1972); *Redevelopment Comm. v. Panel Co.*, 273 N.C. 368, 159 S.E. 2d 861 (1968).

> Where the value of a particular parcel of realty is directly in issue, the price paid at voluntary sales of land similar in nature, location, and condition to the land involved in the suit is admissible as independent evidence of the value of the land

> in question, if the sales are not too remote in time. Whether two properties are sufficiently similar to admit the sales price of one as circumstantial evidence of the value of the other is a question to be determined by the trial judge, usually upon *voir dire.*

Power Co. v. Winebarger, supra at 65, 265 S.E. 2d at 232.

Upon a voir dire hearing to determine the admissibility of evidence offered on the basis of being comparable sales, the party offering such evidence has the burden of satisfying the presiding judge of its competency. He must offer sufficient evidence of similarity between the land sold and the subject property to enable the trial judge to determine in his discretion whether the properties are comparable. Differences in the size of the properties being compared is a factor to be considered. *State v. Johnson, supra. See* 5 Nichols' The Law of Eminent Domain § 21.31[3] (1969). He must further show that the sale was a voluntary, arm's length transaction. *Highway Commission v. Pearce,* 261 N.C. 760, 136 S.E. 2d 71 (1964).

In the present case where witnesses' testimony concerning value of the land varied considerably, there is little doubt that evidence of comparable sales would have assisted the jury in its determination of damages. Sales of these tracts were not remote in time. *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265 (1964). Both tracts are located within a short distance of respondents' property.

Although the trial judge found that both the eighty-acre and the seventy-five acre tracts were not comparable because of the differences in zoning and in the availability of water and sewerage, the evidence does not support this reason. These differences did not exist at the time of the sales in question. However, the finding that the tracts were not comparable is supported in the record by the difference in size of the tracts, the subject tract being 495.21 acres and the sales tracts being eighty acres and seventy-five acres respectively. This is a sufficient difference to support the discretionary ruling of the trial judge. *Johnson, supra.*

The record in this case also fails to disclose whether the sales of these two tracts of land met the requirements of an "actual

sale by a seller willing but not obliged to sell, to a buyer willing but not obliged to buy." *Highway Comm. v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974). In order to be admissible as evidence of a comparable sale, there must be a showing of a voluntary sale on the open market, rather than a forced sale. *Johnson, supra; Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964); *Pearce, supra.*

The burden is on the appellants to show prejudicial error. *In Re Gamble*, 244 N.C. 149, 93 S.E. 2d 66 (1956); 1 Strong's N.C. Index 3d Appeal and Error § 49.1 (1976) (and cases cited therein). Respondents have failed to include in the record on appeal what the sales price would have been had the trial court allowed the witness to so testify. *Redevelopment Comm. v. Panel Co., supra; Highway Commission v. Pearce, supra; Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959). Respondents leave the significance of the absence of the testimony to conjecture. The answers are necessary for the purpose of appellate review in determining whether prejudicial error has occurred. *Pearce, supra.*

The decision to admit evidence of comparable sales is within the sound discretion of the trial judge and will not be disturbed absent a showing of abuse. *Redevelopment Comm. v. Panel Co., supra; Highway Commission v. Conrad*, 263 N.C. 394, 139 S.E. 2d 553 (1965). Upon the record before us, we find no prejudicial error in the exclusion of the testimony.

Respondents next contend that the trial court erred in overruling their motion to set aside the verdict as being against the weight of the evidence; in denying their motion for a new trial; and in signing the judgment. We have reviewed the record carefully and find no error.

Both parties had an opportunity to present testimony as to the value of the property in question and the damages to which they believed respondents were entitled. The law provides that:

> The jury should take into consideration, in arriving at the fair market value of the land taken, all the capabilities of the property, and all the uses to which it could have been applied or for which it was adapted, which affected its value in the market at the time of the taking and not merely the condi-

tion it was in and the use to which it was then applied by the owner.

Barnes v. Highway Commission, supra at 387-88, 109 S.E. 2d at 227. We find that Judge Walker, in his charge to the jury, fairly and adequately summarized the evidence and instructed that the measure of damages should reflect the highest and best use of the property as presented by the evidence. The trial court's refusal to set aside a verdict in a condemnation proceeding will not be disturbed on appeal where there is no showing that the court abused its discretion.

No error.

Judges MARTIN (Robert M.) and BECTON concur.

IN THE MATTER OF: THOMAS A. TRULOVE, JR., P.E. No. 3130

No. 8110SC478

(Filed 6 October 1981)

1. **Professions and Occupations § 1— charges against professional engineer—time for hearing**

The requirement of G.S. 89C-22(b) that charges against a professional engineer shall be heard by the State Board of Registration for Professional Engineers and Land Surveyors within three months after the date on which they were "referred" means that the charges must be heard within three months after they were "preferred" as described in G.S. 89C-22(a).

2. **Professions and Occupations § 1— charges against professional engineer—mandatory hearing time**

The requirement of G.S. 89C-22(b) that the State Board shall conduct a hearing within three months after charges are preferred against a professional engineer is mandatory, not directory, since the proceeding is penal in nature.

3. **Professions and Occupations § 1— charges against professional engineer—no waiver of mandatory hearing time**

Respondent engineer did not waive the requirement that a hearing be held within three months after charges are preferred against a professional engineer by failing to raise such issue before the State Board since subject matter jurisdiction cannot be waived and may be presented at any time.

In re Trulove

4. Professions and Occupations § 1— charges against professional engineer—insufficiency of notice

Notice to a professional engineer that charges against him involved gross negligence, incompetence or misconduct resulting from his noncompliance with certain statutes and administrative regulations in the preparation and sealing of certain plans was insufficient to support suspension of his license for misconduct in placing his seal on engineering work not prepared under his direction and for gross negligence in sealing the work of another in order to procure planning board approval when he knew that the plans did not conform to the State Building Code. G.S. 105A-23(b).

APPEAL by Respondent, North Carolina State Board of Registration for Professional Engineers and Land Surveyors, from *Preston, Judge.* Judgment entered 23 February 1981, WAKE County Superior Court. Heard in the Court of Appeals 4 September 1981.

On 28 December 1979, William T. Steuer, Sr., filed a complaint against Thomas A. Trulove, Jr. (Trulove), with the North Carolina State Board of Registration for Professional Engineers and Land Surveyors (Board). The complaint alleged that Trulove had violated Chapter 89C of the North Carolina General Statutes by "affixing his seal to plans which were not prepared by him or under his direct supervision."[1] The complaint included no other allegations against Trulove. The Board held a hearing on the complaint over nine months later (on 10 October 1980) and concluded on 15 October 1980 that Trulove was guilty of misconduct in placing his seal on engineering work not prepared under his direction and was guilty of gross negligence in sealing the work of another in order to procure planning board approval when he knew that the plans did not conform to the State Building Code. The Board suspended Trulove's license for one year.

Trulove appealed and petitioned for judicial review. The superior court reversed the Board's Order because the Board did not hear the charge within three months of the time it was referred to the Board and because the Board did not give Trulove proper notice of the charge as required by G.S. 150A-23.

1. The Complaint consisted of an affidavit and twenty-one drawings bearing the name "Harrington Homes", which were drawn by C. B. Jones and sealed by Trulove with the statement: "Plans reviewed and approved as designed."

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., for respondent appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., and Randall A. Underwood, for petitioner appellee.

BECTON, Judge.

I

We determine first whether the superior court erred in concluding that the Board did not hear the charge within the time frame required by G.S. 89C-22(b). The resolution of this issue turns on our construction of G.S. 89C-22 which provides, in relevant part:

Discpilinary action—charges; procedure.

(a) Any person may *prefer* charges of fraud, deceit, gross negligence, incompetence, misconduct, or violation of the rules of professional conduct, against any individual registrant or against any corporation holding a certificate of authorization. Such charges shall be in writing and shall be sworn to by the person or persons making them and shall be filed with the secretary of the Board. [Emphasis added.]

(b) All charges, unless dismissed by the Board as unfounded or trivial, shall be heard by the Board within three months after the date on which they shall have been *referred.* [Emphasis added.]

The trial court determined that since the charge was "referred" to the Board on 28 December 1979 when the Board received the complaint of Steuer and since the charge was not heard until 10 October 1980, the Board had not complied with G.S. 89C-22(b).

The Board contends alternatively (1) that charges are first "preferred" for investigation and then "referred" to the Board after investigation for hearing and that it, consequently, complied with the requirement of G.S. 89C-22(b) that the charges against Trulove be heard within three months after it was "referred"; (2) that if the court finds that the three months period starts to run when the charges are first preferred under G.S. 89C-22(a), then

the time requirement is directory, not mandatory; and (3) that Trulove did not raise the time requirement issue before the Board, and, therefore, he waived that issue.

A.

[1] Although the Board's administrative rules and regulations set forth in 21 North Carolina Administrative Code 53.1301(b) and (c) suggest a two-step procedure—prefer (investigation), then refer (adjudication)—we note that the Board's administrative rules and regulations became effective after the relevant amendment to G.S. 89C-22. Administrative regulations must be drafted to comply with statutory grants of power and not vice-versa. *In re Peoples*, 296 N.C. 109, 250 S.E. 2d 890 (1978), *cert. denied* 442 U.S. 929, 61 L.Ed. 2d 297, 99 S.Ct. 2859 (1979).

A plain reading of G.S. 89C-22 makes it clear that the phrase in subsection (b), "within three months after the date at which they shall have been referred," could only have reference to the point in time when charges are preferred as described in subsection (a). We find nothing in the statute which allows the Board to conduct both investigatory and adjudicatory proceedings while maintaining a separation between the two proceedings. The statute neither mentions nor provides for a two-step procedure whereby "prefer" means the filing of notarized complaints and "refer" means the transmittal of complaints from one arm of the Board (review committee) to the full Board.

We note, and the Board candidly concedes, that G.S. 89C-22 was based upon Section 20 of the Model Law prepared by the National Council of Engineering Examiners which is identical in every respect to G.S. 89C-22, except that the Model Law uses the word "prefer" in both subsections (a) and (b). While we cannot legislate and say that a typographical error was obviously made, we nevertheless, construing the statute as a whole, think the legislature intended that "prefer" and "refer" apply to the same act. As Trulove notes in his brief, the statute protects both the public and registered engineers. It requires the Board to act promptly to dispose of complaints in order to discipline negligent or incompetent engineers before they do additional harm to the public. At the same time, the statute ensures that charges against engineers will be disposed of in a timely manner to prevent unnecessary harm to the business and professional reputation of an

accused engineer. To allow the Board's review committee to consider a charge filed by an individual for one, two or more years and then refer the matter to the Board which could hold the hearing within three months would completely emasculate G.S. 89C-22(b).

B.

[2] G.S. 89C-22(b) states that the Board "shall" conduct a hearing within three months. This requirement is mandatory and must be strictly followed, especially since the proceeding in this case is penal in nature. *Compare Parrish v. Real Estate Licensing Board*, 41 N.C. App. 102, 105, 254 S.E. 2d 268, 270 (1979), in which this Court stated: "[i]n administrative proceedings, statutory procedures which are mandatory must be strictly followed, especially in proceedings that are penal in nature." The word "shall," as used in G.S. 89C-22(b), has generally been held to be mandatory, not directory. For example, in *State v. Johnson*, 298 N.C. 355, 361, 259 S.E. 2d 752, 757 (1979) our Supreme Court said:

> In this jurisdiction, it is a well-established rule of statutory construction that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must adhere to its plain and definite meaning. . . . As used in statutes, the word "shall" is generally imperative or mandatory. Black's Law Dictionary 1541 (4th rev. ed. 1968).

C.

[3] As subject matter jurisdiction cannot be waived and may be presented at any time, we summarily reject the Board's argument that Trulove failed to raise the time-requirement argument before the Board. *In re Peoples; Jackson, Long, Johnson, Evans, Swann v. Bobbitt*, 253 N.C. 670, 117 S.E. 2d 806 (1961); *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 92 S.E. 2d 673 (1956). The Board failed to hear the charges against Trulove within three months from the time it was filed with the Board; therefore, the Board acted without subject matter jurisdiction in hearing and ruling on the claim, and the trial court properly vacated the Board's action.

II

[4] In its 15 October 1980 Order, the Board concluded that Trulove was guilty of:

> 1. Misconduct in placing his seal on engineering work not prepared under his responsible charge, in violation of Rule 2(C) of the Rules of Professional Conduct promulgated by the Board under the provisions of G.S. 89C-20.
>
> 2. Gross negligence in sealing the work of another knowing at said time that the plans were not in conformity with the State Building Code in order to procure Planning Board of Topsail Beach approval of inadequate and incomplete plans.

While it is true that the Board's findings of fact are sufficient to support its conclusions of law, the superior court, nonetheless, correctly vacated the Board's order because neither the facts as found nor any sufficient factual allegations were ever provided Trulove *prior* to his hearing. G.S. 150A-23(b) provides that "[t]he parties shall be given a reasonable notice of a hearing, which notice shall include: (1) a statement of the date, hour, place and nature of a hearing; (2) a reference to the particular sections of the statutes and rules involved; and (3) a short and plain statement of the factual allegations.

The Board sent Trulove a notice stating the following:

> WHEREAS, a notarized complaint has been executed and forwarded to the Board of Registration by Mr. William T. Steuer, President, Southeastern Chapter, Professional Engineers of North Carolina, as to a set of plans for the Queens Grant Condominium project for Island Development Corporation, dated on various dates from April 4, 1979 to September 26, 1979, each sheet containing the words "Harrington Homes" in the title block, and bearing your seal and signature. The allegation of the complaint relates to whether you are guilty of gross negligence, incompetence or misconduct in the practice of your profession by violation of the provisions of G.S. 89C-3(10), G.S. 89C-16(c), or the Standards of Professional Conduct promulgated under G.S. 89C-10, and contained in Regulation .0701(c)(3) of Title 21 of the North Carolina Administrative Code, Chapter 56 (21 NCAC 56.0701

(c)(3)), concerning the preparation and sealing of the aforementioned "Harrington Homes" plans.

Trulove was notified only that the charges against him involved gross negligence, incompetence or misconduct resulting from his noncompliance with G.S. §§ 89C 3(10)[2] (89C-16(c)[3], and 21 N.C. Admin. Code 56.0701(c)(3)[4]. Thus, the Board gave Trulove absolutely no notice that he was being charged with knowingly sealing nonconforming plans or that he was being charged with sealing the work of others for the purpose of procuring planning board approval of the plans, knowing that the plans were not in compliance with the North Carolina State Building Code. The Board's failure to give Trulove a short and plain statement of the factual allegations in accordance with G.S. 150A-23(b)(3) was a sufficient basis for the superior court to vacate the Board's order. *Cf. Parrish v. Real Estate Licensing Board,* in which this Court vacated an administrative board's decision saying, "the notice did not adequately apprise the respondent of the charges against him so as to enable him to prepare his defense." 41 N.C. App. at 105-106, 254 S.E. 2d at 270.

The judgment appealed from is

Affirmed.

Judge MARTIN (R. M.) and MARTIN (H. C.) concur.

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2. G.S. 89C-3(10) does no more than define "Responsible Charge" as "direct control and personal supervision, either of engineering work or of land surveying, as the case may be."

3. G.S. 89C-16(c) states in relevant part that "[i]t shall be unlawful for a registrant to affix, or permit his seal and signature or facsimile thereof to be affixed to any drawings, specifications, plans or reports after the expiration of a certificate or for the purpose of aiding or abetting any other person to evade or attempt to evade any provision of this Chapter."

4. 21 N.C. Admin. Code, 56.0701(c)(3) states: "The engineer and land surveyor shall not affix his signature and/or seal to any engineering or land surveying plan or document dealing with subject matter to which he lacks competence by virtue of education or experience, nor to any such plan or document not prepared under his direct supervisory control."

INTERCRAFT INDUSTRIES CORP. v. KAREN M. MORRISON AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8110SC68

(Filed 6 October 1981)

Master and Servant § 108.1— unemployment compensation—absence caused by failure to find child care—not willful misconduct

Defendant was not disqualified from receiving unemployment benefits where she was discharged after a series of ten absences, the tenth of which was caused by her inability to find child care for Saturday work which was mandatory overtime. The employer had the burden of establishing claimant's discharge resulted from misconduct, and the employer failed to meet its burden.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 12 September 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 1 September 1981.

Plaintiff (employer) appeals from a judgment affirming a decision by defendant Employment Security Commission (commission) that defendant Karen M. Morrison (claimant) is not disqualified for unemployment compensation benefits.

Pope, McMillan, Gourley and Kutteh, by William H. McMillan, for plaintiff appellant.

T. S. Whitaker, Attorney for Employment Security Commission of North Carolina, by V. Henry Gransee, Jr., Staff Attorney, for defendant appellees.

WHICHARD, Judge.

The issue is whether the commission properly concluded that claimant's absence from work due to inability to secure child care, while unexcused and in violation of employer's policy, nevertheless did not constitute such "misconduct connected with [her] work," G.S. 96-14(2), as to disqualify her for unemployment compensation benefits. We hold that it did.

Claimant commenced work with employer on 4 September 1979. Employer's policy permitted a maximum of six days absence in a twelve month period. The seventh absence resulted in "oral

warning"; the eighth, in "written warning"; the ninth, in "final written warning"; and the tenth, in "termination."

On 22 January 1980, pursuant to this policy, employer notified claimant in writing that if she incurred one further charged absence in the next thirty days, she would subject herself "to further discipline and/or discharge." On 15 February 1980 employer notified claimant in writing that on 7 February 1980 she "had another charged absence," and that if she incurred still another within thirty days her employment would be terminated. On 16 February 1980, a Saturday, claimant was absent from work. Her "absentee report," filed with employer's Employee Relations Office, stated under the heading "Explanation," "No Babysitter." She testified at the commission's hearing on her claim that her husband was a truck driver and that she "couldn't work on Saturday because [she] didn't have a babysitter." When asked if "[i]t was just a matter where [she] simply couldn't find child care," she responded, "Yes, I just couldn't." Evidence for the employer tended to establish that Saturday work was mandatory overtime if the employer posted notice by the preceding Thursday that Saturday was to be a work day. Claimant's evidence indicated that she did not see the posted notice on this occasion, but that her supervisor did discuss it with her.

The commission made the following pertinent findings of fact:

2. Claimant was discharged from this job for being absent on February 16, 1980, a scheduled day of overtime work. She was absent because she had no child care that day. The absence was not excused.

3. The claimant had been warned, and was aware, that ten (10) unexcused absences within a twelve-month period would result in her discharge. The absence on February 16, 1980, was her tenth unexcused absence.

These findings are supported by competent evidence and thus are conclusive on appeal. G.S. 96-4(m); G.S. 96-15(i); *In re Thomas*, 281 N.C. 598, 189 S.E. 2d 245 (1972); *In re Abernathy*, 259 N.C. 190, 130 S.E. 2d 292 (1963); *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 275 S.E. 2d 553 (1981); *In re Cantrell*, 44 N.C. App. 718, 263 S.E. 2d 1 (1980). The question, then, as noted above, is whether these findings support the commission's conclusion that

claimant was not disqualified from unemployment compensation benefits by "misconduct connected with [her] work." G.S. 96-14(2).

This court has approved the following definition of "misconduct" as it relates to unemployment compensation statutes:

> "* * * [T]he term 'misconduct' [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in *deliberate* violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an *intentional* and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. * * *"

In re Collingsworth, 17 N.C. App. 340, 343-344, 194 S.E. 2d 210, 212-213 (1973), *quoting Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941) (emphasis supplied). This court has also found the following rule persuasive:

> [W]e must evaluate both the reasonableness of the employer's request in light of all the circumstances, and the employee's reasons for noncompliance. *The employee's behavior cannot fall within "wilfull misconduct" if it was justifiable or reasonable under the circumstances,* since it cannot then be considered to be in wilfull disregard of conduct the employer "has the right to expect." In other words, *if there was "good cause" for the employee's action, it cannot be charged as wilfull misconduct.*

Cantrell, 44 N.C. App. at 722, 263 S.E. 2d at 3, *quoting McLean v. Board of Review*, 476 Pa. 617, 620, 383 A. 2d 533, 535 (1978) (emphasis supplied). Thus, while "[a] claimant's deliberate and unjustifiable refusal to report to work . . . constitutes misconduct sufficient to disqualify claimant from receiving benefits," *Cantrell*, 44 N.C. App. at 723, 263 S.E. 2d at 4, benefits are properly awarded if there was good cause for the claimant's action, rendering the conduct justifiable or reasonable under the circumstances.

The commission found here that claimant's absence was due to her inability to obtain child care for the day of mandatory overtime. The finding supports a conclusion that "good cause" existed

for the absence, which rendered it justifiable and reasonable under the circumstances. The finding, therefore, supports the conclusion that the absence which occasioned claimant's dismissal did not amount to wilful misconduct connected with her work, under the test articulated in *Cantrell.* 44 N.C. App. at 722, 263 S.E. 2d at 3. Although the commission found that the employer did not excuse claimant's absence and that claimant knew her tenth unexcused absence could result in her discharge, these findings did not dictate a conclusion that the discharge was for misconduct. An absence which an employer refuses to excuse does not necessarily constitute misconduct as that term has been defined by this court for purposes of determining disqualification for unemployment compensation benefits.

It is immaterial that the commission made no finding as to what, if anything, claimant did to obtain child care or as to whether she advised her employer that she had a problem in that respect. The employer, as the party attempting to deny unemployment compensation benefits, has the burden of establishing that a claimant's discharge resulted from misconduct. The employer here did not produce evidence regarding claimant's efforts to obtain child care or to advise the employer of her problem. Nor did it cross examine claimant in this respect. Under these circumstances, the commission correctly concluded that the employer had not met its burden of showing that claimant's discharge resulted from misconduct; and claimant's unchallenged testimony that she "simply couldn't find child care" was sufficient to support the finding which underlies the commission's conclusion that claimant was not discharged for misconduct connected with her work.

Affirmed.

Judge HILL concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

The Commission based its conclusion that claimant was not disqualified to receive unemployment benefits upon its finding that "[s]he was absent because she had no child care that day."

The Commission concedes that the employer's work rules relating to the termination of the claimant's employment for ten unexcused absences is *reasonable*, and the Commission found as a fact that the claimant was advised on Thursday that she was expected to work "mandatory overtime" on Saturday; and the Commission further found that her absence on Saturday was unexcused. The Commission made no finding whatsoever as to what, if anything, the claimant did to obtain "child care" or that she advised or notified her employer that she had any problem. In my opinion, the absence of such findings is most material. The employer had carried its burden when it proved to the satisfaction of the Commission that the claimant had violated a reasonable rule of the employer with respect to unexcused absences. If the Commission, as it did, was going to substitute its rule or excuse for that of the employer, the least the Commission could have done was to support such a conclusion by findings of fact as to what, if anything, the claimant did to justify her conduct in not coming to work. The Commission accepted the claimant's excuse and thereby substituted its decision for that of the employer as to whether the absence was "unexcused." In my opinion the decision of the Commission, and the opinion of the majority, effectively guts the reasonable work rules of the employer. The ruling of the Commission, and the decision of the majority affirming that ruling, announces that any employee can violate the reasonable work rules of his or her employer by simply stating after the fact that he or she was unable to obtain "child care." Under the circumstances of this case, all an employee has to do is simply announce that he or she was unable to get a babysitter for the day he or she was supposed to work. While the decision rendered today by the majority is a victory for one female claimant, it will cause employers to think twice before employing women with little children who might need child care. I vote to reverse.

MARTHA C. COBB v. F. GORDON COBB

No. 8126DC170

(Filed 6 October 1981)

1. **Divorce and Alimony § 21.6; Husband and Wife § 13— separation agreement incorporated in divorce decree—property settlement provisions—enforcement by contempt**

The property settlement provisions of a separation agreement incorporated by a reference in a divorce decree are enforceable by contempt proceedings.

2. **Divorce and Alimony § 21.5— contempt for failure to make payments—necessity for finding of willfulness**

The trial court erred in ordering that defendant be imprisoned for contempt upon his failure to make payments required by a separation agreement and divorce decree within 30 days where the court found that defendant's failure to make the payments due was not willful as of the date of the hearing, since the court must make a specific finding that defendant had the ability to pay yet willfully refused to do so before it can order defendant imprisoned for nonpayment.

APPEAL by defendant from *Black, Judge.* Judgment entered 13 February 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 17 September 1981.

Plaintiff sought an order requiring defendant to appear and show cause why he should not be held in contempt of court for his failure to comply with a judgment for divorce entered on 22 November 1978. The court overruled defendant's motion to dismiss, and, thereafter, entered an order dated 13 January 1981 from which defendant appeals.

Plaintiff and defendant were married to each other on 28 December 1954, and lived together as husband and wife until their separation on 25 January 1977. On 24 July 1978, the parties executed a valid separation agreement. By the terms of this agreement, defendant agreed to pay plaintiff monthly child support. He also agreed to pay plaintiff a total sum of $62,400.00, representing defendant's obligation to free plaintiff's property from any of defendant's business indebtedness. Defendant agreed to pay the sum in monthly amounts of $450.00 until 1 December 1983.

On 22 November 1978, the court granted plaintiff and defendant an absolute divorce. The judgment for divorce incorporated by reference the separation agreement which the parties had signed 24 July 1978.

In October 1980, plaintiff moved the court for an order directing defendant to show cause why he should not be held in contempt for failure to comply with the divorce judgment entered 22 November 1978. Specifically, she alleged that defendant had failed and refused to pay monthly child support as he was obligated to do. She also alleged that defendant had failed and refused to pay the monthly sums of $450.00 to which he had agreed by the terms of the separation agreement incorporated in the divorce judgment.

On 23 October 1980, the court directed a show cause order to defendant. Pursuant to Rule 12(b)(1) of the Rules of Civil Procedure, defendant moved to dismiss the hearing on the order on the ground of lack of jurisdiction. Such motion was heard on 17 December 1980. The court overruled defendant's motion to dismiss. In an order dated 13 January 1981, the court found that subsequent to the entry of the order to show cause, defendant had paid plaintiff an amount equalling the arrearage owed for child support payments. The court found that defendant had failed, however, to pay amounts other than child support which were due under the separation agreement and judgment. The court concluded that the separation agreement had been effectively incorporated in the judgment of divorce, and therefore all of its terms were enforceable by contempt proceedings.

Based on its findings and conclusions, the court ordered defendant to pay plaintiff within thirty days the sum of $9,900.00 in arrearage for payments due other than child support. Failure of defendant to pay the arrearage within thirty days would constitute contempt for which defendant would be confined.

Boyle, Alexander, Hord and Smith, by Robert C. Hord, Jr., for plaintiff appellee.

Cocke and McKinney, by William B. Cocke, Jr., for defendant appellant.

VAUGHN, Judge.

[1] The issue presented is whether the property settlement provisions of the separation agreement incorporated by reference in

the divorce decree are enforceable by contempt proceedings. We hold that they are and affirm that part of the order.

A separation agreement which is merely approved by the court does not assume the status of a judicial decree. It exists only as a contract between the parties, and is therefore not enforceable by contempt proceedings nor capable of modification except with the consent of both parties. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964).

A separation agreement, however, which is incorporated by reference into a judgment, becomes part of the judicial decree. In such a case, the court adopts the agreement of the parties as its own determination of the parties' rights and obligations. The terms of the separation agreement accordingly rest on both contract and a court order. *Id.* at 70, 136 S.E. 2d at 243.

The terms of the separation agreement in the present case were clearly incorporated into the divorce judgment of 22 November 1978. The court concluded that "the law permits the Separation Agreement between the parties to be made a part of the Judgment in this case. . . ." It ordered that the separation agreement be "incorporated by reference herein in this Judgment as a part of this ordering clause in the same manner and to the same extent as if set forth verbatim in this Judgment and is considered to be a condition of this Judgment." Therefore, all terms of the separation agreement entered into between plaintiff and defendant on 24 July 1978, became part of the court's judicial decree.

By incorporating the terms of a separation agreement in a divorce decree, the court facilitates enforcement of the separation agreement's terms. Courts, however, recognize some distinction between alimony provisions and property settlement provisions of an incorporated separation agreement. It is well established that the alimony provisions are enforceable by contempt. *Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978); *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). The court may also modify the incorporated alimony provisions if changed circumstances warrant. *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980). Determinations of property rights contained in an incorporated separation agreement, however, are beyond the power of the court to modify without the consent of both parties. *Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99 (1968). Defendant

argues that because the court lacks jurisdiction to modify incorporated property settlements, it also lacks jurisdiction to enforce such terms by its contempt power.

Defendant bases his argument in part on language found in *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964). In that opinion, Justice Sharp stated, ". . . absent special circumstances, any judgment which awards alimony, notwithstanding it was entered by the consent of the parties, is enforceable by contempt proceedings should the husband wilfully fail to comply with its terms. If the judgment can be enforced by contempt, it may be modified and vice versa." 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964). Defendant submits that the logical extension of the *Bunn* decision is that if a judgment cannot be modified, it cannot be enforced by contempt. Therefore, he argues, property settlement provisions of a separation agreement incorporated into a divorce decree which cannot be modified, cannot be enforced by contempt. We disagree with defendant's interpretation of *Bunn*. The phrase "vice versa" does not mean the negative of what was previously stated. "Vice versa" means "with the order changed." Webster's Third New International Dictionary 2549 (1968). In *Bunn*, the Court did not address the question presented by this case.

There is a rationale for applying the court's modification powers differently to a property settlement and an alimony award. A property settlement is a division of property and property interests. A judgment which determines property rights creates vested rights in the parties which cannot be divested. Alimony, however, is payment for the support of the defendant spouse. Alimony awards, therefore, must necessarily be capable of modification as the financial affairs of both parties change.

We see no rationale, however, for treating differently property and alimony provisions of an incorporated separation agreement as far as the court's contempt powers are concerned. Both provisions are part of the court order. In their pleadings, both parties joined in the prayer that the terms of the deed of separation be "made subject to the orders of this court." The court was not, of course, required to enter the judgment as requested. The court did, however, enter the judgment as prayed for, and it would demean the court to allow defendant to successfully argue that the court cannot enforce those portions of the decree that defendant might elect to ignore, whether they be for the payment

of alimony or other considerations that might have prompted the joint prayer for divorce and judicial settlement of the affairs arising out of the marriage the parties were asking the State to dissolve.

We dismiss defendant's argument that enforcement by contempt violates North Carolina's constitutional provision against imprisonment for a debt. N.C. Const. art. 1, § 28. The court is not imprisoning defendant for his inability to pay a debt for his wilful disobedience of the order he and his wife asked the court to enter.

[2] We agree with defendant, however, that the court did not make the necessary findings of fact to support its judgment of imprisonment upon defendant's failure to make payment within thirty days. A failure to obey a court order cannot be punished by contempt proceedings unless the disobedience is wilful. Thus, the court must find as a fact that defendant possessed the means to comply with the order of the court during the period when he is held to be in default. *Mauney v. Mauney,* 268 N.C. 254, 257, 150 S.E. 2d 391, 393 (1966).

In its order of 13 January 1981, the court made the following finding of fact: "The Defendant has failed to pay amounts due under the Separation Agreement and judgment other than child support, *but such failure is not wilful as of the date of this hearing.*" (Emphasis added). Before the court can order defendant imprisoned for nonpayment, it must make a specific finding that defendant had the ability to pay yet wilfully refused to do so. The order is, consequently, modified by striking that part ordering defendant's imprisonment in the event he should fail to pay the arrearage within 30 days of the order. In the event defendant has failed to comply with the order, the court may proceed in accordance with this opinion.

Modified and affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. CONSTANCE LOCKLEAR

No. 8112SC171

(Filed 6 October 1981)

1. **Criminal Law § 73.2— testimony not hearsay—evidence of state of mind**

In a case in which defendant was convicted of voluntary manslaughter, it was not error to permit a witness to testify she heard deceased tell defendant: "I don't love you and I want a divorce because I am going to marry [the witness]" as the witness testified to what she actually heard the deceased say and because it was offered to show the deceased's state of mind.

2. **Homicide § 21.7— denial of motion to dismiss—sufficiency of the evidence**

Where the evidence indicated defendant and deceased were living apart, deceased had told defendant he was going to marry someone else, deceased was killed in defendant's home, defendant testified deceased was killed after a struggle over a rifle; however, the house was clean and neat, defendant's appearance was neat and medical testimony indicated deceased was shot while sitting in a chair, the court did not err in denying defendant's motion to dismiss a second degree murder charge and all lesser included offenses.

3. **Criminal Law § 115— failure to instruct on involuntary manslaughter—no error**

Where the only evidence other than that tending to prove intentional homicide was defendant's testimony relating to her claim of self-defense, it was not error for the court to fail to instruct on involuntary manslaughter as the evidence did not support its submission.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 1 October 1980 in Superior Court, HOKE County. Heard in the Court of Appeals 1 September 1981.

Defendant was charged in a bill of indictment with second degree murder of her estranged husband, Henry Locklear, and was convicted of voluntary manslaughter. Defendant appeals, contending the trial judge erred in admitting hearsay evidence, in denying defendant's motion to dismiss the charge and lesser included offenses for insufficiency of the evidence, and in failing to charge the jury on the lesser included offense of involuntary manslaughter. We affirm the decision of the trial court.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Assistant Public Defender John G. Britt, Jr., for defendant appellant.

HILL, Judge.

Defendant raises three assignments of error. Our review of this case is limited to those issues raised in the parties' briefs on appeal. *See* Rule 28(a), North Carolina Rules of Appellate Procedure.

[1] Defendant, Constance Locklear, moved *in limine* to exclude any statements made by the deceased to the effect that he wanted a divorce from her. The motion was denied. Later Betty Diahl, a girlfriend of the deceased, was permitted to testify that the deceased told defendant "I don't love you and I want a divorce because I am going to marry her [Betty Diahl]." Defendant objected, and in her first assignment of error contends the statement was hearsay. Defendant's first assignment of error is without merit and is overruled.

"Evidence, oral or written, is 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." 1 Stansbury's N.C. Evidence § 138, p. 458 (Brandis rev. 1973). "If a statement is offered for any purpose other than that of proving the truth of the matter stated, it is not objectionable as hearsay." *Id.* at § 141, p. 467. Moreover, the hearsay rule does not preclude admission of extra-judicial statements offered to show state of mind in another person. *State v. Black*, 230 N.C. 448, 53 S.E. 2d 443 (1949); *State v. Brooks*, 15 N.C. App. 367, 190 S.E. 2d 338 (1972).

The probative force of the testimony of Betty Diahl did not depend upon the competency and credibility of anyone other than the witness; the witness testified as to what she actually heard the deceased say. *See State v. Robbins*, 275 N.C. 537, 169 S.E. 2d 858 (1969). In addition, the testimony of Betty Diahl was not offered to prove the truth of the statement made by the deceased. Rather, it was offered to show his state of mind. The testimony therefore was properly admitted.

[2] At the close of the State's evidence, defendant moved for dismissal of the charge of murder in the second degree and all lesser included offenses. The trial judge denied the motion, and the jury returned a verdict of voluntary manslaughter. In her second argument, defendant contends there was no substantial

evidence that she intentionally performed the act which caused the death of her husband. We affirm the ruling of the trial judge.

> When the motion for nonsuit calls into question the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of 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); *quoted in State v. Mosley*, 33 N.C. App. 337, 342, 235 S.E. 2d 261, 264 (1977).

Defendant and her deceased husband were having marital difficulties. The husband was living with his girlfriend, Betty Diahl. The day before the husband was shot, he confronted defendant on the way to his mother's house, and in the presence of his girlfriend, his sister, and her boyfriend, told defendant he was going to divorce her and marry Betty Diahl. Defendant had told her husband she wanted him to come back home a short time before he was killed.

The shooting occurred at defendant's home while she and the deceased were alone. Immediately following the shooting, defendant went to a neighbor's house and told the neighbor she had shot her husband. At this time defendant did not characterize the shooting as accidental.

Although defendant testified that the deceased was shot unintentionally during a struggle over the rifle, the police officers testified there were no signs of a struggle when they arrived at the house, no articles were knocked over, and the floor was clean. Further, defendant was neatly dressed, there were no marks on her body, and her clothes were not soiled.

The body of the deceased was found partially in and partially out of a chair. There were no signs of blood anywhere except in the chair. The spent shell casing also was found near the chair.

The State's medical testimony established that the path of the bullet passed through the top of the deceased's skull and downward through the brain. Dr. Butts testified the nature of the

wound and the path of the bullet would be consistent with the theory that the deceased was shot while sitting in the chair in which he was found.

When the direct and circumstantial evidence in the present case is considered in the light most favorable to the State, and the State is given every reasonable inference arising therefrom, such evidence is sufficient to survive defendant's motion for dismissal of the charge and all lesser included offenses. Thus, the trial judge did not err in submitting the case to the jury to determine whether defendant intentionally shot her husband.

[3] Finally, we find no error by the trial judge in failing to charge the jury on the lesser included offense of involuntary manslaughter. Involuntary manslaughter is "the unlawful and unintentional killing of another human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony . . . or from the commission of some act done in an unlawful or culpably negligent manner . . ." *State v. Everhart*, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1977). *See also* 6 Strong's N.C. Index 3d, Homicide, § 6.1, p. 537. Intent is not an issue as it relates to involuntary manslaughter. "The crux of that crime is whether an accused unintentionally killed his victim *by wanton, reckless, culpable use of a firearm or other deadly weapon.*" *State v. Wrenn*, 279 N.C. 676, 683, 185 S.E. 2d 129, 133 (1971). (Emphasis added.) Thus, when there is evidence that a killing is unintentional but a defendant's culpable negligence caused the death, the jury must be instructed on involuntary manslaughter. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969).

We have found plenary evidence to warrant instructions to the jury regarding intentional homicide in the case *sub judice.* The only evidence we find otherwise is defendant's testimony that the deceased left her on the couch in her house, went outside and got his rifle out of his car. Observing this, defendant arose from the couch and got behind the door. Deceased then came inside, pointed his rifle toward the couch containing defendant's pillow and covers, and said, "Well, this is it." Defendant said something, or made a noise, and her deceased husband turned and pointed the rifle at her chest. The two struggled and rolled around. Defendant testified that she did not know how her hus-

band was shot. After the rifle went off, the deceased fell back in the chair by the door. Defendant stated she did not intentionally shoot her husband and did not mean to cause his death; she was trying to save her life by getting the gun from the deceased without it being fired.

Defendant's testimony related to her claim of self-defense. Other than the testimony that defendant did not intend to kill the deceased, there is no evidence of the crux of involuntary manslaughter, an unintentional killing *by a wanton, reckless, culpable use of a firearm.* Even so, defendant does not contend that the deceased died as a result of her culpable negligence. Since the evidence does not support submission of a charge of involuntary manslaughter, defendant's final assignment of error is overruled.

In the trial below, we find

No error.

Judge HEDRICK concurs in result only.

Judge WHICHARD concurs.

ROBERT L. THOMAS, ADMINISTRATOR OF THE ESTATE OF JOYCE THOMAS, DECEASED v. ERNEST EDWARD POOLE, JR., AND GUY R. RANKIN SECURITY SERVICE CORPORATION, T/A VANGUARD SECURITY SERVICE

No. 8014SC1059

(Filed 6 October 1981)

Courts § 2.4; Trial §§ 6.1, 6.2— service of process—waiver of objection by stipulation—attempted withdrawal of stipulation

The corporate defendant waived its right to assert the defense of insufficiency of service of process by a stipulation in a proposed pretrial order duly signed by counsel for plaintiff and defendant that all parties were properly before the court and that the court had jurisdiction of the parties and subject matter. Furthermore, defendant's filing of a purported withdrawal of such stipulation was ineffective since the proper method to withdraw or repudiate a stipulation is by motion in the cause on notice to the opposite party, and since defendant failed to allege that the stipulation was inadvertently or mistakenly made, that it was made by counsel without authority, or that there was any other just cause for withdrawal.

Thomas v. Poole

APPEAL by defendant from *Lee, Judge.* Order entered 15 September 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 31 August 1981.

This is an action for wrongful death. Joyce Thomas, employed as a switchboard operator by Lincoln Hospital, Durham, North Carolina, was unintentionally shot and killed on 7 February 1975, by defendant Poole. Poole was employed as a security guard by Guy R. Rankin Security Service Corporation, trading as Vanguard Security Service.

In the complaint plaintiff named as defendants, in addition to Poole and corporate defendant, Guy Rankin individually and Dwight Dunlap, another security guard employed by Rankin Security. Dwight Dunlap had used defendant Poole's gun and had added a sixth bullet to the five Poole usually kept in the gun. Plaintiff alleged that Dunlap was negligent because he returned the gun to Poole without telling Poole about the sixth bullet.

In their answer, corporate defendant and Rankin pleaded that the court lacked jurisdiction over them and that service of process was insufficient, and moved that the action be dismissed. Corporate defendant was served with a copy of the complaint and summons by service upon Ann Dickinson, secretary to Guy Rankin, President of corporate defendant.

On 15 December 1978, a proposed final pre-trial order that had been signed by the parties was filed with the Clerk.

On 6 December 1978, defendants Rankin, Dunlap, and corporate defendant filed motions for summary judgment. Plaintiff appealed to this Court the order granting summary judgment on 22 January 1979 in favor of the defendants. On 19 February 1980, this Court affirmed the summary judgments in favor of defendants Rankin and Dunlap, but reversed the summary judgment in favor of corporate defendant. *Thomas v. Poole*, 45 N.C. App. 260, 262 S.E. 2d 854, *cert. denied*, 300 N.C. 202, 269 S.E. 2d 628 (1980).

On 4 September 1980, corporate defendant filed a purported withdrawal of the stipulation in the final pre-trial order that all parties were properly before the Court and that the Court had jurisdiction of the parties.

After a hearing on 15 September 1980, corporate defendant's motion to dismiss the complaint on the ground of insufficiency of

service of process was denied. From the order denying said motion, corporate defendant appeals.

Hedrick, Feerick, Eatman, Gardner & Kincheloe by Hatcher Kincheloe for plaintiff appellee.

Spears, Barnes, Baker & Hoof by Alexander H. Barnes for defendant appellant.

CLARK, Judge.

In determining whether the trial court erred in denying the corporate defendant's motion to dismiss the complaint on the ground of insufficiency of service of process, we elect first to direct our attention to the question of waiver of the defense. We think it is clear that corporate defendant waived its right to assert the defense of insufficiency of service of process by the jurisdiction stipulation contained in the proposed pre-trial order which was duly signed and filed by counsel for plaintiff and defendant on 15 December 1978. The first stipulation contained in this pre-trial order reads as follows: "It is stipulated that all parties are properly before the Court and that the Court has jurisdiction of the parties and subject matter."

The courts in this State look with favor upon stipulations designed to simplify, shorten or settle litigation and save costs to the parties. *R.R. Co. v. Horton*, 3 N.C. App. 383, 165 S.E. 2d 6 (1969). Parties may establish by stipulation any material fact that has been in controversy between them. Where the stipulations of plaintiff and defendant have been entered of record, and there is no contention that the attorney for either party was not authorized to make such stipulations, the parties are bound and cannot take a position inconsistent with the stipulations. *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966); *Moore v. Humphrey*, 247 N.C. 423, 101 S.E. 2d 460 (1958). Where facts are stipulated, they are deemed established as fully as if determined by a jury verdict. The stipulations are judicial admissions and are therefore binding in every sense, preventing the party who agreed to the stipulation from introducing evidence to dispute it and relieving the other party of the necessity of producing evidence to establish an admitted fact. *Smith v. Beasley*, 298 N.C. 798, 259 S.E. 2d 907 (1979); *Realtors, Inc. v. Kinard*, 45 N.C. App. 545, 263 S.E. 2d 38, *cert. denied*, 300 N.C. 375, 267 S.E. 2d 677 (1980). The stipulation entered into on 15 December 1978 between the parties acknowledged that all parties were properly before

the court and that the court had jurisdiction over the parties. There has been no allegation presented that the attorneys for corporate defendant were unauthorized to enter into such a stipulation. The stipulation was valid between the parties as a judicial admission and was clearly intended by them to be a partial settlement of some of the issues to be presented at trial. This stipulation was a submission to the jurisdiction of the court and therefore prevents corporate defendant from now asserting as a defense the insufficiency of service of process. Though the stipulations were contained in a "Pre-trial Order" which was never effective as a final pre-trial order under G.S. 1A-1, Rule 16(7) because never approved and signed by a trial judge, the stipulations were nevertheless judicial admissions and binding on the parties.

The corporate defendant filed on 4 September 1980 a "Withdrawal of Stipulation" providing that it "withdraws that stipulation . . . to the effect that all parties are properly before the Court and that the Court has jurisdiction of the parties." Corporate defendant did not allege that the stipulation was inadvertently or mistakenly made, or that it was made by counsel without authority, or that there was any other just cause for withdrawal.

A party to a stipulation who desires to withdraw or repudiate it should seek to do so by motion in the cause on notice to the opposite party. And delay in asking for relief may defeat the right to withdraw or set aside. *Napoli v. Philbrick*, 8 N.C. App. 9, 173 S.E. 2d 574 (1970); *R.R. Co. v. Horton, supra*; 83 C.J.S. Stipulations § 30 (1953).

We find that the corporate defendant's attempt to withdraw the stipulation was ineffective. Having so found, it is not necessary to determine if corporate defendant waived its lack of jurisdiction defense by delay in requesting a hearing for a period of more than four years and seven months after raising the issue in its answer and after this Court had ruled on the appeal from the summary judgment.

The order of the trial court denying the motion to dismiss for insufficiency of service is

Affirmed.

Chief Judge MORRIS and Judge WELLS concur.

STATE OF NORTH CAROLINA v. RANDY CONARD

No. 8127SC313

(Filed 6 October 1981)

1. **Criminal Law § 41 — testimony sufficiently probative to justify admission**

Testimony that an officer on two occasions found two color televisions in the home of a person to whom defendant was to have sold a stolen television set was sufficiently probative to justify admission.

2. **Criminal Law § 75.2 — inculpatory statement of defendant — no error in admission where no motion to suppress and no basis for objection**

The trial court had statutory authority to deny defendant's objection and to admit an inculpatory statement of defendant's made while he was in custody and without counsel where defendant did not move to suppress before trial, defendant did not move to suppress at trial, and his general objection was not accompanied by any allegation of a legal basis for suppressing the evidence. G.S. 15A-971 *et seq.*

3. **Burglary and Unlawful Breakings § 5.9 — testimony of accomplice — sufficient to deny motion to dismiss**

Testimony of an accomplice that he and defendant cut the siding off a grocery store, "went in and took some TV's and stereos and speakers and microwave ovens and such," and transported them to defendant's house, and that they had no authority to do it was evidence which alone was sufficient to withstand a motion to dismiss in a prosecution for felonious breaking or entering and larceny.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 24 October 1980 in Superior Court, GASTON County. Heard in the Court of Appeals on 22 September 1981.

Defendant was charged in a proper bill of indictment with felonious breaking or entering and felonious larceny. Upon his plea of not guilty, the jury returned a verdict of guilty on the counts of felonious breaking or entering and felonious larceny. From judgments sentencing defendant to concurrent ten year terms in prison, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney James W. Lea, III, for the State.

Kellum Morris, Assistant Public Defender, for defendant appellant.

HEDRICK, Judge.

At trial, the State presented evidence tending to show that several items including some RCA portable television sets had been stolen from a grocery store, and that the theft had been perpetrated by the defendant and one Gary Godfrey. The State had also presented evidence tending to show that one of the stolen television sets was sold by the defendant to one Larry Willis.

[1] Defendant assigns as error the trial court's denial of a motion to strike certain testimony offered by the State. The objected-to testimony was given by Detective R. F. Moore and stated that on two separate occasions Detective Moore found two RCA color television sets at the home of Larry Willis. Defendant argues that no proper foundation was laid for Detective Moore's testimony, and that the testimony is too tenuous to be admitted to raise an inference that the televisions found at Mr. Willis' home were ones stolen from the grocery store. This concern, however, goes to the weight of the evidence and not its admissibility. *See State v. Hunnicutt*, 44 N.C. App. 531, 261 S.E. 2d 682, *disc. rev. denied*, 299 N.C. 739, 267 S.E. 2d 666 (1980). Evidence is relevant if it has any logical tendency to prove a fact in issue in the case, and in a criminal case every circumstance calculated to throw light upon the supposed crime is admissible and permissible. *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973). Detective Moore's testimony is sufficiently probative to justify admission into evidence and we therefore overrule this assignment of error.

[2] Defendant also assigns as error the court's admission into evidence of an inculpatory statement made by the defendant during in-custody interrogation and in the absence of counsel. Defendant argues that the court committed prejudicial error in admitting the statement without establishing that he understood and waived his constitutional rights.

G.S. § 15A-974 provides that one ground for the suppression of evidence is that the exclusion of such evidence "is required by the Constitution of the United States or the State of North Carolina." The exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. § 15A-974 is a motion to suppress evidence which complies with the procedural requirements of G.S. § 15A-971 *et seq. State v. Satterfield*, 300 N.C.

621, 268 S.E. 2d 510 (1980); *State v. Joyner*, 54 N.C. App. 129, 282 S.E. 2d 520 (1981); *State v. Drakeford*, 37 N.C. App. 340, 246 S.E. 2d 55 (1978); G.S. § 15A-979(d). Those procedural requirements state that the motion to suppress must be made before trial unless (1) the defendant did not have a reasonable opportunity to make the motion before trial, or (2) the defendant is allowed to make the motion during the trial because he did not receive timely notice of the State's intention to use such evidence, or (3) the defendant is allowed to make the motion during the trial after a pretrial determination and denial of the motion and a later showing that additional facts pertinent to the motion have been discovered by the defendant which he could not have reasonably discovered before the pretrial denial of the motion. G.S. § 15A-975; *State v. Drakeford, supra.* Furthermore, these procedural requirements state that the judge may summarily deny the motion to suppress evidence if the motion does not allege a legal basis for the motion. G.S. § 15A-977(c)(1), (e); *State v. Satterfield, supra; State v. Joyner, supra.* The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of G.S. § 15A-971 *et seq.*; failure to carry that burden waives the right to challenge evidence on constitutional grounds. *State v. Drakeford, supra.*

In the present assignment of error, defendant seeks to challenge the admission of evidence on constitutional grounds. The exceptions upon which this assignment of error is based refer this Court to two general objections lodged by defendant during trial. There is nothing in the record, however, to indicate that defendant has sustained his burden of showing why he should be entitled to make a motion to suppress during trial rather than before trial as is generally required by G.S. § 15A-975. Further, defendant made no motion to suppress, and his general objection was not accompanied by any allegation of a legal basis for suppressing the evidence. "It follows therefore that the trial judge had statutory authority to summarily deny defendant's objection. G.S. 15A-977(c)." *State v. Satterfield, supra* at 625, 268 S.E. 2d at 514.

Furthermore, the record discloses unequivocally that before the defendant made the statement he had been advised repeatedly of his constitutional rights, he understood those rights, he had

been taken before a judge and found not to be entitled to appointed counsel, and he thereafter understandingly and voluntarily signed a waiver of his rights and understandingly and voluntarily made the statement. This assignment of error has no merit.

[3] Defendant's final assignment of error is that the court committed error in denying defendant's motion to dismiss at the close of all the evidence. When considering the sufficiency of the evidence to survive a motion to dismiss, the evidence is considered in the light most favorable to the State and the question for the court's determination is whether there is a reasonable basis upon which the jury might find that the offenses charged in the indictment had been committed and that the defendant was a perpetrator of the offenses. *State v. Hyatt*, 32 N.C. App. 623, 233 S.E. 2d 649, *disc. rev. denied*, 292 N.C. 733, 235 S.E. 2d 786-787 (1977).

The evidence presented by the State in the present case, even excluding the contested confession by the defendant of his participation in the offenses charged, was sufficient to allow submission of the case to the jury. The State presented testimony by one Gary Godfrey that he [Godfrey] and the defendant cut the siding off of Bradshaw's Grocery in North Belmont and "went in and took some TV's and stereos and speakers and microwave ovens and such" and transported them to the defendant's house, and that they had no authority to break into the building and carry off the articles. This evidence alone is sufficient to withstand a motion to dismiss. This assignment of error is therefore overruled.

We hold defendant had a fair trial free from prejudicial error.

No error.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. MIKE PEELE

No. 8120SC265

(Filed 6 October 1981)

1. **Jury § 6.2— jury selection—disallowance of questions concerning reasonable doubt—harmless error**

Any error of the court in refusing to permit defense counsel to question prospective jurors by using the words "not fully satisfied or entirely convinced" to describe reasonable doubt was harmless since such a limitation did not prevent defense counsel from making sufficient inquiries to exercise intelligently his jury challenges.

2. **Criminal Law § 69— telephone conversation—identity of defendant as caller**

Even if a witness's opinion that a voice she heard over the telephone was that of defendant was based on the caller's identification of himself as defendant rather than recognition of the caller's voice by the witness, testimony as to the telephone conversation was admissible where there was ample circumstantial evidence that defendant was, in fact, the caller in question.

3. **Larceny § 1.1— instruction on asportation**

The trial court in a larceny prosecution did not err in instructing the jury that movement of a jewelry box a few feet from the top of a dresser to beneath a bed would satisfy the element of asportation.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 12 November 1980 in Superior Court, RICHMOND County. Heard in the Court of Appeals 15 September 1981.

Defendant was charged in a bill of indictment with felonious breaking or entering, felonious larceny and felonious receiving stolen goods. The State's evidence tended to show that the residence of Thaddius Ussery was forcibly entered on 14 June 1980. A jewelry box was moved from a dresser and placed under a bed in the same room. A pistol was found to be missing from a drawer in a bedside table. The forcible entry apparently occurred between 3:30 p.m. when Mrs. Ussery left the house and 5:00 p.m. when the Usserys' daughter, Angela, returned home. Angela noticed a blue Volkswagen parked in the driveway as she returned. Realizing that the back door of the house was open, and that she did not recognize the car, she noted the first three letters of the license tag (RLN) and drove to a neighboring house for help. She told two children in the yard that she thought someone was breaking into the Ussery house and the children returned with her. Miss Ussery observed a blue Volkswagen like the one

she had seen in her driveway, license number RLN446, driving down the street as she returned. Miss Ussery followed this car until it pulled over a short distance later. She recognized the driver, the defendant here, as an acquaintance. Defendant told Miss Ussery he had been at her house looking for her boyfriend, but that he had not gone inside. Miss Ussery returned home where she found the back door unlocked. Mrs. Ussery's jewelry box had been moved from a dresser, later to be found under a nearby bed, and a gun was missing from a nightstand drawer. Later that evening the windows in Angela's bedroom were found to have been opened. In addition, a screen on the side door had been split and the back and side doors showed signs of tampering.

When questioned that evening by a deputy sheriff, the defendant asked "What if the people get their stuff back?" A search of defendant and his car produced no evidence.

Four days later the defendant called Angela Ussery and asked her to meet him for lunch to discuss what had happened, saying he "could not afford to go through with this." Miss Ussery refused to meet with defendant.

Rodney Ammonds, Miss Ussery's boyfriend, testified that he previously had told the defendant that Miss Ussery was leaving town before 14 June. Ammonds said that some four months after the larceny he saw the defendant at a nightclub and asked him why he broke into the Ussery house. He said defendant first denied, but later admitted, the crime.

Defendant's only evidence was the testimony of a companion who witnessed the confrontation at the nightclub. This witness testified that Ammonds was drunk at the time, and that defendant's only statements to Ammonds were denials of the break-in.

The jury returned a verdict of guilty of breaking or entering and felonious larceny. Defendant was sentenced to one to five years in prison on the larceny charge and to ten years for breaking or entering. Defendant appeals.

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

Van Camp, Gill and Crumpler, by James R. Van Camp, for defendant appellant.

ARNOLD, Judge.

Defendant brings forth six assignments of error on appeal.

I.

[1] Defendant first argues that the court improperly prevented the defense attorney, during jury selection, from questioning prospective jurors using the words "not fully satisfied or entirely convinced" to describe reasonable doubt. While North Carolina law permits attorneys to inquire diligently of prospective jurors in order to assess their fitness to serve, it is within the court's discretion to control the manner and extent of such inquiry. *State v. Young*, 287 N.C. 377, 387, 214 S.E. 2d 763, 771 (1975); *State v. McDougald*, 38 N.C. App. 244, 253, 248 S.E. 2d 72, 80 (1978). It is clear from the record that the trial court would have allowed the defense attorney to question prospective jurors using the words "reasonable doubt," but would not allow substitution of words chosen by defense counsel which the judge considered to constitute an attempt to "argue the law." Such a limitation did not prevent defense counsel from making sufficient inquiries to intelligently exercise his jury challenges and any error was therefore harmless.

II.

[2] Defendant's second assignment of error concerns admissibility of the opinion of a witness that a voice she heard over the telephone was that of defendant. Defendant contends that the evidence suggests this opinion was based on the caller's identification of himself as defendant rather than recognition of the caller's voice by the witness. While it is true that representation by a caller that he is a certain person is insufficient to establish his identity, "[i]t is not always necessary to prove the identification before introducing evidence of a conversation . . ." so long as the caller's identity is shown by direct or circumstantial evidence "somewhere in the development of the case. . . ." *State v. Richards*, 294 N.C. 474, 480, 242 S.E. 2d 844, 849 (1978). In the case at bar, there was ample circumstantial evidence that the defendant was, in fact, the caller in question.

III.

[3] Defendant next challenges the court's instruction to the jury that movement of a jewelry box a few feet from the top of a

dresser to beneath a bed would satisfy a necessary element of larceny. We find the instruction proper.

As defendant concedes, movement of even a few inches is sufficient to satisfy the element of asportation to which the court's instruction apparently alluded. *State v. Carswell*, 296 N.C. 101, 249 S.E. 2d 427 (1978). The only remaining element to be satisfied is that of intent *at the time of asportation* to permanently deprive the owner of possession. 8 Strong's N.C. Index 3d, *Larceny* § 1 (1977). Such intent may be ascertained from surrounding circumstances and, absent clear insufficiency of the evidence, is properly a question for the jury.

We have examined defendant's remaining assignments of error and find them to be without merit.

In the trial of the defendant we find

No error.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. LARRY KLUTZ

No. 8126SC160

(Filed 6 October 1981)

1. **Assault and Battery § 15.6— assault with deadly weapon—instructions on self-defense**

The trial court's instructions on self-defense in a case involving assault with a deadly weapon were proper.

2. **Assault and Battery § 15— instruction on accidental shooting not required**

An instruction on the defense of accident was not required in this prosecution for assault with a deadly weapon inflicting serious injury where defendant relied on self-defense and there was no evidence of an accidental shooting.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 2 October 1980, Superior Court, MECKLENBURG County. Heard in the Court of Appeals 31 August 1981.

Defendant was convicted of assault with a deadly weapon inflicting serious injury and appeals from the entry of a judgment

imposing a term of imprisonment. Facts necessary for decision are set out in the opinion.

Attorney General Edmisten, by Associate Attorney Richard H. Carlton, for the State.

James B. Ledford for defendant appellant.

MORRIS, Chief Judge.

Defendant contends, by his assignments of error Nos. 1 through 6, that the court erred in its instructions with respect to self-defense by failing to distinguish the situation where there is an intent to kill from the situation where there is no intent to kill. Here the element of intent to kill had been dismissed by the court on defendant's motion.

[1] In *State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979), Justice Branch, now Chief Justice, after discussing the question at some length, succinctly summarized the applicable law as follows:

> In cases involving assault with a deadly weapon, trial judges should, in the charge, instruct that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm. If the weapon used is a deadly weapon per se, no reference should be made at any point in the charge to "bodily injury or offensive physical contact." If the weapon used is not a deadly weapon per se, the trial judge should instruct the jury that if they find that defendant assaulted the victim *but do not find that he used a deadly weapon*, that assault would be excused as being in self-defense if the circumstances at the time he acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from "bodily injury or offensive physical contact." In determining whether the weapon used was a deadly weapon, the jury should consider the nature of the weapon, the manner in which it was used, and the size and strength of the defendant as compared to the victim.

Id. at 565-66. In the case before us, the able trial judge used the exact language approved by the Court in *Clay*.

Additionally, in *State v. Anderson*, 230 N.C. 54, 51 S.E. 2d 895 (1949), relied on by defendant and from which he quotes extensively, Justice Ervin noted that the defense of self-defense arises where "one is without fault in provoking, or engaging in, or continuing a difficulty with another . . ." Here there was plenary evidence that defendant was not without fault. These assignments of error are overruled.

[2] Finally, defendant urges that the court should have instructed the jury that if defendant accidentally shot and injured the prosecuting witness, they should return a verdict of not guilty. Defendant relied on self-defense. We are unable to find evidence of accidental shooting and injury to entitle defendant to the instruction now urged. Nor did defendant request such an instruction.

In the defendant's trial we find no prejudicial error.

No error.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. MARVIN DAVID PENNELL

No. 7821SC616

(Filed 20 October 1981)

1. Burglary and Unlawful Breakings § 5.5— sufficiency of the evidence—forceful breaking

The evidence was sufficient for the jury to find defendant entered a building through an unlocked window, thereby forcibly breaking, where the evidence showed that officers checked the building and found no one inside before positioning themselves for a "stake-out"; that they locked the doors; that they later saw defendant in the building; that they observed muddy footprints on the outside and inside of a window ledge and on the floor nearby; and that the windows were usually kept shut and locked at all times.

2. Constitutional Law § 31— unidentifiable fingerprints destroyed—no violation of defendant's rights

Defendant's conviction was not obtained in violation of either the Jencks Act, 18 U.S.C. § 3500, or G.S. 14-221.1 when unidentifiable fingerprints lifted from the scene of the crime were thrown away as irrelevant.

3. Burglary and Unlawful Breakings § 5.10; Safecracking § 1— crimes of burglary with explosives and safecracking not identical

The elements of the crimes of burglary with explosives and safecracking are not identical for offenses committed before 1 October 1977. The predecessor to G.S. 14-89.1 provided as an essential element that the safe or vault be used for storing money or other valuables.

4. Criminal Law § 157— failure to properly prepare record—cannot benefit

Appellant has the duty to properly prepare the record on appeal, and he cannot benefit from his failure to include an indictment.

5. Burglary and Unlawful Breakings § 3— warrant and indictment for burglary with explosives—failure to specifically allege entry without consent

The language that defendant "unlawfully and willfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees," was sufficient to imply that defendant's entry was without the consent of the Board, and it was not error to fail to specifically allege entry without consent in either the warrant or indictment.

6. Criminal Law § 91.7— motion for continuance—absence of witnesses

It was not error for the court to deny defendant's motion for a continuance in order to subpoena witnesses who would testify defendant had a beard at the time of the crimes as it was an untimely oral motion violating G.S. 15A-952(b)(1), there was no indication the witnesses could be found if the trial was delayed, and three witnesses did testify defendant had a beard at the time of the alleged crimes.

7. Constitutional Law § 48— effective assistance of counsel

There was no merit to defendant's allegation he was denied effective assistance of counsel as numerous instances of alleged ineffective assistance revealed the failures of defense counsel were either nonprejudicial, speculative or justifiable strategy, and defendant's representation was not so lacking that defendant's trial became a "farce and mockery" of justice.

APPEAL by defendant from *Albright, Judge.* Judgments entered 28 January 1977 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 August 1981.

On 3 January 1977 defendant was indicted for burglary with explosives and for safecracking. The indictment, however, as to this latter offense does not appear in the record on appeal. Defendant was found guilty by a jury and sentenced to not less than

40 nor more than 60 years on the burglary with explosives conviction. Prayer for judgment was continued as to the safecracking conviction. Defendant then gave due notice of appeal. On 25 April 1977 defense counsel filed a document with this Court indicating therein that he found no grounds for appeal and requested the Court to review for any error. On 6 October 1977 this Court entered an order allowing defense counsel's 4 October motion to withdraw the record on appeal. On 21 November 1978 we dismissed the appeal noting in the dismissal order that no briefs had been submitted and that no exceptions or assignments of error appeared in the record. A petition for writ of certiorari was denied on 8 January 1979. By order of a U.S. Magistrate dated 11 December 1980, a writ of habeas corpus was issued. The Magistrate ordered that defendant's conviction be vacated and that he be released from custody unless afforded a right to direct review by the North Carolina appellate courts within sixty days. Pursuant to this order, we granted a rehearing on 5 February 1981.

The evidence in the record for the State tends to show that at approximately 11:00 p.m. on 16 November 1976 Officer McGee of the Forsyth County Sheriff's Department received information that the safe at Forsyth Technical Institute would be "blown." He immediately contacted Officer Charles Reavis (hereinafter Charles) also from the Sheriff's Department and Officer T. L. Reavis (hereinafter T. L.) from the Winston-Salem Police Department. These three officers, along with others, then devised a plan to stake out the building in which the safe was housed. T. L. positioned himself in a room next to the office containing the safe. Charles positioned himself in a classroom at the opposite end of the building. About 12:15 a.m. T. L. observed the silhouettes of two people walking down the hall and entering the office. For the next 25 minutes he heard a hammering noise coming from the office. He heard an explosion and ran into the hall. He saw a white male enter the hallway and run in the direction of the classroom where Charles was stationed. T. L. recognized the man as defendant and testified that prior to this date he knew defendant by sight only. As soon as Charles heard the explosion he opened the door to the classroom and observed an individual running down the hall. He pointed his shotgun at the man and ordered him to halt. The man ran past him and was unsuccessfully pursued by

Charles and other officers who had been stationed outside the building. Charles immediately recognized the man as defendant and testified that he had seen him on prior occasions. Charles notified the other officers of defendant's identity as soon as he fled from the building. Both officers testified that defendant was wearing a toboggan, green and yellow plaid jacket and dark pants. They observed that defendant had some facial hair but not a full beard. At the time defendant was observed by the two officers, the hallway was well lit. After giving up pursuit, the officers returned to the building and noticed that the handle had been blown off the safe and that the safe was partially open. Tools were lying on the floor nearby. A window was found unlocked in an office at the other end of the building and muddy footprints were observed on a ledge both outside and inside the window as well as on the floor. It had been raining the night before. The officers testified that when they entered the building to take their positions, they first checked to see if anyone was present. After finding no one, they locked all doors.

Other evidence for the State tends to show that around 4:30 a.m. on 17 November defendant rang the doorbell of Donna Moore's residence. He asked to use the telephone and informed her that he had been in a motorcycle accident. Her description of defendant's clothing matched that of the two officers. She observed that defendant's pants were muddy from the knees down. Miss Moore indicated that defendant had been at her home two weeks prior to 17 November.

Defendant's mother and sister testified on his behalf. Their testimony tends to show that defendant was at home until about 12:20 a.m. on 17 November 1976 and that he had a full facial beard on said date. Defendant's mother emphasized that the Institute was located approximately 10 miles from her home. Additional testimony from a Forsyth County district court judge and deputy sheriff, tended to corroborate the evidence that defendant had a full beard on the date at issue. Both men emphasized that the beard was blonde.

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Billings, Burns and Wells, by R. Michael Wells, for defendant appellant.

MORRIS, Chief Judge.

Pursuant to this Court's 4 February 1981 order defendant's counsel on appeal has submitted an amended record which includes exceptions and assignments of error. Ten of these assignments of error have been preserved on appeal.

[1] By his thirteenth assignment of error, which has been erroneously referred to as Assignment of Error No. 16, defendant argues that the trial court should have dismissed the charge of burglary with explosives because there was insufficient proof of the essential element of an alleged breaking. He emphasizes that the testimony merely shows that a window was found unlocked on the west side of the building. There was no evidence of a forceful breaking. A security officer at the Institute testified that he was told by a police officer soon after the explosion that the defendant entered the building through one of the windows on the east end. Officer T. L. Reavis admitted that he and Officer Charles Reavis did not check the windows before taking their respective positions in the building. When *all* of the evidence is considered in the light most favorable to the State and the State is given every reasonable inference to be drawn therefrom, we believe there is sufficient evidence to support the element of a breaking. Such evidence may be direct, circumstantial or both. The testimony showed that the two officers checked the building and found no one, that they locked the doors, that they later saw defendant in the building and that they observed muddy footprints on the outside and inside of a window ledge and on the floor nearby. The security officer testified that the windows were usually kept shut and locked at all times. This testimony constituted sufficient evidence from which a jury could find that defendant entered the building through an unlocked window. The North Carolina courts have held that when a person opens a closed, but not fastened window, a breaking condemned by the pertinent statute has been shown. *See State v. McAfee*, 247 N.C. 98, 100 S.E. 2d 249 (1957); *State v. Bronson*, 10 N.C. App. 638, 179 S.E. 2d 823 (1971).

In Assignment of Error No. 17 defendant argues that the trial court expressed an opinion in its jury charge by unduly emphasizing the State's contentions while downplaying those of defendant, thus requiring a new trial. We have carefully reviewed

this portion of the charge and fail to see how it could constitute an expression of opinion by the trial court. The trial court, instead, gave an accurate recapitulation of the testimony of the witnesses. At the beginning of each paragraph at issue in the charge, the court emphasized that it was charging upon either the State's or defendant's contentions. Furthermore, immediately after stating these contentions, the court informed the jury not to consider anything the court had said or done as an expression or intended expression of what their verdict should or should not be. This assignment of error is meritless.

[2] In Assignment of Error No. 16 defendant argues that his "conviction was obtained in violation of the Constitution of the United States and of North Carolina in that the State destroyed material evidence in which may have affected the outcome of the trial, to wit: the fingerprint evidence." In support of this argument defendant cites G.S. 14-221.1 and the Jencks Act, 18 U.S.C. § 3500 (1979). Neither is applicable here. The uncontested testimony indicates that none of the latent fingerprints lifted at the scene was identifiable, and all of them were, therefore, thrown away. G.S. 14-221.1 provides that the destruction of evidence relevant to any criminal offense is a felony. The fingerprints at issue were unidentifiable and, thus, irrelevant. The Jencks Act applies only to criminal prosecutions brought by the United States and to statements or reports made by government witnesses.

Defendant has also assigned error to the following portion of the jury charge:

> Now, members of the jury, if you do not find the defendant guilty of burglary with explosives, you must determine whether he is guilty of felonious breaking or entering. Felonious breaking or entering differs from burglary with explosives in that firstly, both a breaking and an entry are not necessary, either is sufficient.
>
> And, secondly, it is not necessary that the defendant open anything after he enters.

Defendant argues that this definition of felonious breaking or entering was insufficient as a matter of law, because the trial court failed to explain the essential elements of this offense. The

court's instructions on burglary with explosives and the lesser included offense of felonious breaking or entering are consistent with the pertinent Pattern Jury Instructions. N.C.P.I.—Crim. 214.65. Furthermore, prior to this portion of the charge, the court properly defined the terms "breaking" and "entering." We find no error in this portion of the charge.

[3] In Assignment of Error No. 20, defendant contends that since the indictment for safecracking should have been merged with the indictment for burglary with explosives, the trial court should arrest judgment as to the safecracking conviction. His basis for this argument is that the essential elements of both offenses are identical. We initially note that the issue here is not properly before this Court, because the record on appeal does not include the indictment for the offense of safecracking as required by App. R. 9(b)(3). The North Carolina courts have dismissed appeals from convictions when the pertinent indictments were not included in the record. *See State v. Wray*, 230 N.C. 271, 52 S.E. 2d 878 (1949); *State v. Currie*, 206 N.C. 598, 174 S.E. 447 (1934); *State v. McDraughon*, 168 N.C. 131, 83 S.E. 181 (1914). This Court, however, in its discretion and in light of defendant's later argument (that he was denied effective assistance of counsel by the failure of his attorney to include the safecracking indictment in the record), will consider the issue. Defendant has erroneously concluded that the elements of the crimes of burglary with explosives and safecracking are identical. Arguably this conclusion would be valid if defendant were being tried under G.S. 14-89.1, as it applies to offenses committed after 1 October 1977. The statute in effect, however, at the time of the alleged offenses provided as an essential element that the safe or vault be used for storing money or other valuables. Defendant's allegation that this element is "mere surplusage" was refuted by the North Carolina Supreme Court in *State v. Hill*, 272 N.C. 439, 158 S.E. 2d 329 (1968). Therein the Court indicated that evidence that defendant forced open a newly acquired safe not yet used by the owners to store money was insufficient to convict him of safecracking. They emphasized "that the evidence of the State . . . showed conclusively that one of the essential elements of the crime charged in the indictment was not present." *Id.* at 444, 158 S.E. 2d at 333.

[4] Defendant has also argued that the conviction for safecracking should be arrested, because the record on appeal does not con-

tain an indictment to support this conviction. Our courts have consistently held that the defendant appellant has the duty to see that the record on appeal is properly made up. *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262 (1965); *State v. McCain*, 39 N.C. App. 213, 249 S.E. 2d 812 (1978); *State v. Byrd*, 4 N.C. App. 672, 167 S.E. 2d 522 (1969). He cannot benefit from his own failure to properly prepare the record.

[5] As to the warrant and indictment for burglary with explosives, defendant argues that these documents are both fatally defective because they do not allege the essential element that his entry into the building was without the consent of the owners. Defendant concedes that the language of both the warrant and indictment tracks the language in the statute defining burglary with explosives. He alleges that this in itself is not sufficient unless the essential elements of the offense are included therein and cites *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913 (1969), as support. The indictment at issue alleged that:

> [O]n or about the 17th day of November, 1976, in Forsyth County Marvin David Pennell unlawfully and wilfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees, located at 2100 Silas Creek Parkway, Winston-Salem, North Carolina, which was used for the administrative building of the Institution. While inside the building, the defendant opened a safe by the use of dynamite. The defendant broke and entered the building with the intent to commit a felony therein, to wit; larceny, with the unlawful, wilful, and felonious intent to take, steal, and carry away the goods and chattels of Forsyth Technical Institute.

We conclude that this indictment is sufficient after considering the language in G.S. 14-57, Burglary with Explosives, and the North Carolina Supreme Court's reasoning in *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). In *Beaver*, the Court found that the indictment for first degree burglary was sufficient. The indictment did not allege that the breaking and entering of the dwelling were without the consent of the occupant or owner. The Court emphasized that "[t]he bill of indictment alleged all the essential elements of the offense with sufficient certainty to (1) identify the offense; (2) protect the accused from being twice put

in jeopardy for the same offense; (3) enable the accused to prepare for trial; and (4) support judgment upon conviction or plea." *Id.* at 140-41, 229 S.E. 2d at 181. For the same reasons, the indictment at issue is valid. We further agree with the State's contention that the language in the indictment, that the defendant "unlawfully and wilfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of Trustees," implies that defendant did not have the consent of the Board of Trustees.

[6] Defendant argues that the trial court abused its discretion in refusing to grant his oral motion for a continuance made at the close of the State's evidence. From the order of the court denying this motion, it appears that defendant sought the continuance in order to subpoena witnesses who would testify that he had a full beard at the time of the alleged crimes. The trial court found that no written motion had been filed as required by G.S. 15A-952(b)(1), that one of the additional witnesses desired by defendant was obtained and testified after an instanter subpoena was issued, that the two remaining witnesses sought by defendant were known to defense counsel prior to trial but that no subpoenas were issued until the first day of trial, and that the testimony of these two witnesses would only tend to be cumulative and corroborative of evidence already before the jury. This Court has recently determined that a trial court did not abuse its discretion in denying an oral motion for a continuance which was not timely made. *State v. Berry*, 51 N.C. App. 97, 275 S.E. 2d 269, *disc. review denied and appeal dismissed*, 303 N.C. 182, 280 S.E. 2d 454 (1981). We also fail to see how defendant could have been prejudiced by this denial of his motion since three witnesses, including a district court judge, testified that defendant had a beard at the time of the alleged crimes. During the sentencing phase of the trial, defendant informed the court that the two witnesses had not been present at trial because neither he nor his attorney knew where they lived. There was no indication that these witnesses would be found if the trial were delayed. This assignment of error is clearly without merit.

[7] Defendant's final assignment of error deals with the alleged denial of his constitutional right to effective assistance of counsel. He requests this Court to grant him a new trial because of this. The general rule, which has been adopted by this Court, is that

the caliber of an attorney's representation in a criminal prosecution is a denial of the constitutional rights of his client only when it is so lacking that the trial becomes a farce and mockery of justice. *State v. Roberts*, 49 N.C. App. 52, 270 S.E. 2d 559 (1980), *disc. review denied and appeal dismissed*, 301 N.C. 887, 276 S.E. 2d 286 (1981). Our examination of defendant's alleged instances of ineffective assistance of counsel reveals no such "farce and mockery." His allegations that he was denied effective assistance of counsel, due to his attorney's failure to move to quash the indictment for safecracking and to challenge the sufficiency of the indictment for burglary with explosures, are meritless in light of our prior discussions involving these indictments. Defense counsel's failure to move for a dismissal on the alleged basis that there was insufficient evidence of a breaking is clearly not prejudicial, because we earlier concluded that there was sufficient evidence to go to the jury on this essential element of burglary with explosures. Defense counsel's failure to move for discovery of the fingerprint test does not constitute ineffective assistance of counsel, because the uncontested evidence indicated the prints were unidentifiable. His failure timely to move for a continuance and his failure to subpoena the pertinent witnesses have also been shown to be non-prejudicial and justifiable. The evidence indicates that this motion was made in order to allow time to subpoena witnesses whose whereabouts were unknown to defendant and his attorney.

Defendant further alleges that his counsel was ineffective when he failed to challenge the admissibility of certain portions of Officer McGee's testimony. Officer McGee told the court and jury that two weeks prior to the alleged crimes he talked with defendant. Defendant informed him that "something big was going-down in Winston-Salem" and "I don't know where I'm going to hit it." McGee indicated that defendant had supplied him with information in the past. Defendant contends that this testimony should have been excluded because the statements could have been elicited during a "custodial interrogation." This contention is sheer speculation and unsupported.

Defendant also argues that his attorney's failure to move for a voir dire examination and suppression of his in-court identification by Officers T. L. and Charles Reavis is grounds for a new trial. T. L. Reavis testified that on the night of the alleged crimes,

he saw a white male step out into the lighted hall of the building at the Institute and look in his direction. He testified, "I was able to see his face and could recognize him. The person I saw was the defendant, Marvin David Pennell. . . . I could positively say that was Marvin David Pennell that I saw that night." Charles Reavis indicated that he observed defendant for approximately three seconds as he ran towards him in the hallway of the building. He stated, "There is no question in my mind that the gentleman that came out in that hallway and that I pursued that night is the defendant sitting there in that chair." Both officers testified that they had seen defendant on prior occasions. Their description of the clothing that defendant was wearing that night also matches that given by Miss Moore. The North Carolina Supreme Court dealt with an ineffective representation claim based on an Attorney's failure to request a voir dire examination concerning a witness' in-court identification of defendant in *State v. Mathis*, 293 N.C. 660, 239 S.E. 2d 245 (1977). The Court stated:

> The record indicates no impermissible pre-trial identification procedures. While the defendant's counsel did not request a voir dire examination of the prosecuting witness before she was permitted to identify the defendant in court as her assailant, the record indicates no basis for the belief that such an examination would have tainted her in-court identification. . . . Under these circumstances, the failure of counsel to demand a voir dire examination of the prosecuting witness, prior to her in-court identification, cannot be deemed such evidence of ineffective assistance of counsel as to warrant the granting of a new trial.

Id. at 670-71, 239 S.E. 2d at 252. This statement equally applies to the case on appeal. Defendant's further contention that his in-court identification was tainted by Officer Charles Reavis' viewing of defendant in a jail cell the day after the alleged crimes is also without merit. Charles testified that he picked defendant out "even though he was in a cell with other people." Even if the facts had indicated that this pre-trial confrontation was impermissibly suggestive, the in-court identification would still have been admissible because the officers' in-court identifications were independent in origin from the pre-trial confrontation. *See State v. Jordan*, 49 N.C. App. 560, 272 S.E. 2d 405 (1980) and cases cited therein.

Defendant's allegations, that defense counsel was ineffective because he called defendant's mother as a witness and did not properly cross-examine witnesses also must fail as grounds for granting defendant a new trial. Ineffective assistance of counsel claims are "not intended to promote judicial second-guessing or questions of strategy as basic as the handling of a witness." *Sallie v. North Carolina*, 587 F. 2d 636, 640 (4th Cir. 1978), *cert. denied*, 441 U.S. 911, 60 L.Ed. 2d 383, 99 S.Ct. 2009 (1979).

We have reviewed defendant's remaining examples of alleged ineffective assistance of counsel and do not find that he was denied constitutionally effective representation at trial. Granted, defendant's attorney at trial noted no exceptions or assignments of error in the original record on appeal. Any prejudicial effect caused by this omission has been cured by this Court's consideration of the amended record on appeal wherein newly appointed counsel has entered numerous exceptions and assignments of error. We have considered this record and the arguments of counsel and find defendant's contentions to be either meritless or non-prejudicial.

No error.

Judges CLARK and WELLS concur.

KESTER W. BUCHANAN AND ORA W. BUCHANAN v. NATIONWIDE LIFE INSURANCE COMPANY

No. 8125SC191

(Filed 20 October 1981)

1. Insurance § 18.1— life insurance—misrepresentations as to medical history—jury question

In an action to recover upon a life insurance policy in which defendant insurer contended the policy was void because insured had failed to disclose certain material medical information on the application, the trial court properly denied defendant insurer's motion for directed verdict where the evidence presented questions of fact as to whether information concerning insured's hospitalization on two occasions had been revealed to defendant through its agent and whether insured's visits to a mental health center came within the purview of questions on the application.

2. Insurance § 18.1— life insurance—misrepresentations as to medical history—instructions concerning agent's testimony—prejudicial error

In an action to recover upon a life insurance policy in which defendant insurer contended the policy was void because insured had failed to disclose certain material medical information on the application, the trial court erred in instructing the jury, prior to the reading by defendant's agent of medical questions and the answers thereto which were on the application, that "the questions as to who gave the answers to those questions you will resolve yourselves, but he will read you a question and response, but you are not to consider who gave him the response," where there was contradictory evidence as to whether the insured or her mother supplied the answers to the questions on the application, but it was undisputed that defendant's agent went over the questions on the form with the insured and that the insured adopted the answers as her own by signing the application, since such instruction would permit the jury to find erroneously that insured did not supply the answers and that she made no representations at all.

APPEAL by defendant from *Johnson, Judge.* Judgment entered 2 October 1980 in Superior Court, BURKE County. Heard in the Court of Appeals 23 September 1981.

Plaintiffs, as named beneficiaries, initiated this action against defendant to recover $20,000 on a life insurance policy. The defendant issued the policy, dated 21 February 1978, on the life of Joy B. Jones. The complaint alleged execution of the policy, payment of the premium, death of the insured on 20 May 1978, demand for payment, and defendant's refusal to pay. In addition, plaintiffs alleged wilful breach of contract and sought $100,000 in punitive damages.

Defendant answered, denied liability, and asserted that the insured had failed to disclose certain medical information and that such failure constituted a material and fraudulent misrepresentation to defendant for issuance of the policy. Defendant sought a dismissal of plaintiffs' complaint and a ruling that the life insurance policy was void *ab initio.*

The case was tried before a jury. The plaintiffs' evidence tended to show that on 6 February 1978 Frank Bowers, an agent for defendant, met with plaintiff Ora Buchanan and filled out an application for insurance on the life of Joy B. Jones, plaintiffs' daughter. Ora Buchanan supplied answers to the following questions pertaining to Mrs. Jones's health:

14. Have you ever been treated for or ever had any known indications of:

    a. Disease or disorder of brain or nervous system, kidney or genito-urinary tract, gall bladder, lungs, heart, blood vessels, liver, intestines, stomach, breasts or reproductive organs? [No.]

    b. Paralysis, recurrent dizziness, fainting spells, alcoholism, narcotic addiction, drug habituation, hallucinations, high or low blood pressure? [No.]

    c. Diabetes, sugar, albumin, blood or pus in urine, anemia or other disorders of the blood? [No.]

    d. Allergies, disorders of skin, lymph glands, cyst, tumor or cancer? [No.]

    e. Hernia, ulcer, tuberculosis, pain or discomfort in chest? [No.]

    f. Any form of rheumatism, rheumatic fever, bone, joint or back disorder or any chronic disease? [No.]

    g. Any defect of sight, speech or hearing, discharging ear, lameness, loss of limb or deformity? [No.]

15. Are you now under observation or taking treatment? [No.]

16. Other than above, have you within the past 5 years:

    a. Had any disease, disorder, injury or operation which has not been previously mentioned? [No.]

    b. Consulted or been treated by a doctor or other practitioner? (If consultation was for "check-up" or "physical exam" explain fully. Include symptoms and findings. If purpose of consultation was for employment physical, annual company physical or the like, so state. Give full names and addresses of all physicians.) [Yes.]

    c. Ever been a patient or been under treatment or observation in any hospital, clinic, asylum, sanatorium or any private or government facility performing similar services? [Yes.]

d. Ever had X-rays, electrocardiograms or other medical tests or studies? [No.]

DETAILS of "Yes" answers. (IDENTIFY QUESTION NUMBER, CIRCLE APPLICABLE ITEMS; Include diagnoses, dates, duration and names and addresses of all attending physicians and medical facilities.)

16B— Flu—Dr. A. M. Lang
1/1978—Morganton, N.C.

16C— Normal Child Birth—Dr. Wilson
3/1975—Hickory, N.C.

18. To the best of your knowledge and belief are you now in sound health? [Yes.]

According to the plaintiff Ora Buchanan, Mrs. Jones signed the application for insurance after Mr. Bowers went over it with her. Her signature appeared below a paragraph which contained the statement that "[i]t is hereby agreed and understood that . . . [a]ll statements and answers on . . . this application . . . are complete and true to the best of my knowledge and belief . . .."

Ora Buchanan further testified that at the time she paid the premium on the policy, Mr. Bowers informed her that the policy was in effect. Mrs. Jones died as a result of injuries sustained in an automobile accident and Mr. Bowers submitted a claim for plaintiffs. The defendant informed plaintiffs by letter that it was refusing payment on the policy and was returning the premium.

Defendant's evidence consisted of testimony by Dr. A. M. Lang, Sr., a family practitioner; Susan Noggle, a clinical social worker at Foothills Mental Health Center; Dr. J. Taylor Vernon, a psychiatrist at the mental health center; and Ralph Yoder, manager of defendant's life underwriting and services operations. Bowers's testimony contradicted that of Ora Buchanan. He stated that he had met with the insured on 6 February 1978 and that Mrs. Jones herself had answered the questions on the application for life insurance. Bowers testified that during their meeting Mrs. Jones had not revealed the following: that within the past five years she had been treated at Foothills Mental Health Center; that she had, within that period, been hospitalized for injuries received in an automobile accident; or that, in December 1976, she had been hospitalized with a stomach or gastric disorder.

Dr. Lang testified that he had seen Joy Jones for the first time on 12 November 1975, when she complained of emotional tension. Dr. Lang prescribed Transzene. On 21 April 1976, Mrs. Jones complained of what appeared to be an upper respiratory infection, and she was treated for bronchial cough. In July 1976, Dr. Lang prescribed Donatel as a relaxant for her spastic stomach condition. In September of that same year, Dr. Lang saw Mrs. Jones twice for minor injuries, including a mild concussion and temporary amnesia, resulting from an automobile accident. In December 1976, Mrs. Jones was hospitalized for indigestion, upper abdominal distress, and "a history of rectal bleeding," which Dr. Lang could not confirm. Mrs. Jones was seen by Dr. Lang several times after her hospitalization, but the symptoms were minor ones.

According to Dr. Vernon and Ms. Noggle, Mrs. Jones was seen at the Foothills Mental Health Center from November 1975 until January 1977. Dr. Vernon, who saw Mrs. Jones on two occasions for approximately fifteen minutes each, treated her for an "anxiety state," which in Mrs. Jones's case "pertain[ed] to a person who is aware of being tense, experiencing some personal distress, having periods of panic where she experienced trembling, some dizziness, some medicized anxiety with pains in the stomach, palpitations." Mrs. Jones was "very tentatively" diagnosed as an "hysterical personality."

Ralph Yoder, testifying for defendant, stated that had his company known of Mrs. Jones's automobile accident with concussion and amnesia, her epigastric disorder, the possibility of rectal bleeding, and her consultations at the Foothills Mental Health Center, it would have delayed acceptance of Mrs. Jones's life insurance policy. Further investigation, including a medical examination, would have been conducted.

At the close of the evidence, the trial court submitted the following issues to the jury:

> 1. Did the Plaintiffs' daughter, Joy B. Jones, in her application for the insurance policy in controversy represent that she had not consulted or been treated by a doctor or other practitioner in the past five (5) years other than the ones described in the application?
>
> ANSWER: ~~Yes~~ (HLH) No.

(1a) Was said representation false?

ANSWER: No.

2. Did the Plaintiffs' daughter, Joy B. Jones, in her application for the insurance policy in controversy represent that she had not ever been a patient or been under treatment or observation in any hospital, clinic, asylum, sanatorium or any private or government facility performing similar services in the past five (5) years other than the ones described in the application?

ANSWER: No.

(2a) Was said representation false?

ANSWER: No.

3. What amount if any, are the Plaintiffs entitled to recover of the defendant?

ANSWER: $20,000.00

From judgment for plaintiffs, defendant appeals.

Powell & Settlemyer, by Douglas F. Powell, for plaintiff appellees.

Patton, Starnes & Thompson, by Thomas M. Starnes, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant first assigns as error the trial court's denial of its motion for directed verdict. Plaintiffs, by proving the execution and delivery of the policy of life insurance, payment of the premium, and death of the insured, established a prima facie case, and the burden shifted to the defendant to prove that the insured made misrepresentations which voided the policy. *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952); *Willetts v. Insurance Corp.*, 45 N.C. App. 424, 263 S.E. 2d 300, *disc. rev. denied*, 300 N.C. 562 (1980). For a directed verdict in favor of the party with the burden of proof to be proper under these circumstances, there must be no conflict in the evidence, or the material facts must be admitted by the adverse party. *Hodge v. First Atlantic Corp.*, 10 N.C. App. 632, 179 S.E. 2d 855, *cert. denied*, 278 N.C.

701 (1971). *See also Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979).

In dispute was the evidence bearing on issues 1 and 2, which were submitted to the jury without objection. With respect to the first issue, the insurance application which was introduced at trial indicated only that insured, Mrs. Jones, had consulted with Dr. Lang in Morganton in January 1978 and that she had had a normal childbirth under Dr. Wilson in Hickory. However, Ora Buchanan testified that she had informed Bowers of Mrs. Jones's overnight hospitalization after the automobile accident. Bowers's testimony disputed this, and the application contained no reference to the accident. Mrs. Buchanan also testified that she had told Bowers that her daughter was hospitalized and under the care of Dr. Lang in December 1976 for what she believed to be the flu. According to Mrs. Buchanan, Bowers had misunderstood her and had erroneously entered the date as January 1978. Thus Mrs. Buchanan's testimony presented a question of fact as to whether that information had been revealed to defendant through its agent.

In *Jones v. Insurance Co.*, 254 N.C. 407, 119 S.E. 2d 215 (1941), it was stated that an insured is not responsible for false answers in an application for insurance if the insured is justifiably ignorant of the untrue answers, has no actual or implied knowledge of their falsity, and has been guilty of no bad faith or fraud. In *Jones*, a judgment allowing defendant's motion for nonsuit was affirmed based on the *insurer's* lack of knowledge, actual or constructive, of the falsity of the statements appearing in the application. *See also Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 830 (1939); *Inman v. Woodmen of the World*, 211 N.C. 179, 189 S.E. 496 (1937).

We find the present case distinguishable on its facts and more appropriately decided under the law stated in *Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574 (1960). In *Chavis*, whether responsibility for the false answers was attributable to the insured or to the agent of the company was in dispute. The defendant contended that the insured had concealed from its agent the fact that she was under treatment for a disease (cancer) from which she died within four months of the date of the policy. The Court held that defendant's assignment of error based on the

trial court's refusal to nonsuit could not be sustained. "[T]he credibility of the evidence to support the defendant's defense was a matter for the jury." *Id.* at 852, 112 S.E. 2d at 576. *See also Heilig v. Insurance Co.*, 222 N.C. 231, 22 S.E. 2d 429 (1942); *Cato v. Hospital Care Association*, 220 N.C. 479, 17 S.E. 2d 671 (1941).

We turn next to defendant's contention that any knowledge of the agent concerning the falsity of the representations would not be imputed to Nationwide. *Inman, supra.* Upon this question defendant has misapplied the law. We are not concerned here with knowledge of false representations made by an insured, but knowledge of facts which, if made, would have provided true and complete answers to the questions propounded in the application.

> [A]n insurance company cannot avoid liability on a policy issued by it by reason of any facts which were known to it at the time the policy was delivered, and that any knowledge of an agent or representative, while acting in the scope of the powers entrusted to him, will, in the absence of fraud or collusion between the insured and the agent or representative, be imputed to the company. . ..

Cato, *supra*, at 484, 17 S.E. 2d at 674. *See also Heilig, supra.*

With respect to the insured's undisclosed visits to the Foothills Mental Health Center, we believe that a jury could have found that these visits were not within the ambit of the second issue. At the mental health center the insured was a "client" of social workers. She had been seen by a psychiatrist for two short counseling sessions. In summary, the evidence adduced at trial contained conflicts concerning whether the insured had seen any doctor or had been treated at any clinic other than the ones insured had disclosed to defendant's agent. Defendant's motion for directed verdict on the issues submitted to the jury were, therefore, properly denied.

[2] Defendant next contends that the trial court erred in instructing the jury as to the manner in which evidence elicited by defendant was to be considered. The record shows that before Bowers began testifying about the questions which appeared on the insured's application for insurance, the judge gave the following instruction, to which defendant took exception:

> Members of the jury, he is going to read you the questions that he asked and he is going to read you the responses that were given, and the questions as to who gave the answers to those questions you will resolve yourselves, but he will read you a question and response, but you are not to consider who gave him the response.

This instruction was clearly erroneous, and a review of the trial court's final instructions to the jury reveals no charge which corrected the court's error. The evidence clearly established that the insured, Joy B. Jones, signed the application. While there was contradictory evidence as to whether the insured or Mrs. Buchanan supplied the answers to the questions on the application form, there was no dispute about the fact that Mr. Bowers went over the questions on the form with the insured. By signing the application, she adopted the answers as her own. *Jones, supra.*

The trial judge's instruction quoted hereinabove failed to inform the jury about this aspect of the law, and his later instructions omitted any reference as to the effect of the insured's signing the application. In reviewing the issues concerning the insured's representations, the jury could have found erroneously that insured did not supply the answers and that she made no representations at all. We cannot find that this error was harmless; therefore, we find it necessary to remand this case for a new trial.

We have reviewed the additional assignments of error brought forth by the defendant, but as they are unlikely to recur at a new trial, we shall not address them.

New trial.

Judges MARTIN (Robert M.) and BECTON concur.

TOWN OF HUDSON v. MARTIN-KAHILL FORD LINCOLN MERCURY, INC. AND NORTH CAROLINA NATIONAL BANK

No. 8125SC213

(Filed 20 October 1981)

Garnishment § 1; Taxation § 37— taxes on bulk sale—garnishment of bank account—constitutionality of statutes

Statutes enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing, G.S. 105-366 and -368, do not violate due process or equal protection rights of the taxpayers as guaranteed by the Constitutions of the United States and the State of North Carolina.

APPEAL by defendant from *Owens, Judge.* Judgment entered 11 February 1981 in Superior Court, CALDWELL County. Heard in the Court of Appeals 25 September 1981.

We are asked in this case to test the constitutionality of N.C.G.S. 105-366 and -368. Together these sections enabled the plaintiff taxing authority to garnish defendant taxpayer's bank account for taxes due on a bulk sale. The trial court found for the plaintiff, holding that the statutory provisions were constitutional and ordering the defendant garnishee to pay the amount due.

Pursuant to an agreement dated 24 September 1979, and a bill of sale dated 3 January 1980, the defendant, Martin-Kahill Ford Lincoln Mercury, Inc. (hereinafter Martin-Kahill), purchased an automobile dealership from Ray Skidmore Ford, Inc. The sale of assets was not in the ordinary course of business, but rather constituted the sale of a major part of the stock of goods, materials, supplies, and fixtures as defined by Schedule E of the Revenue Act as set forth in N.C.G.S. 105-366.

In violation of N.C.G.S. 105-366(d)(1)(a), the seller failed to give notice of the sale to the tax collector at least forty-eight hours prior to the date of the sale. Within thirty days of the sale, the seller had not paid the taxes as is required under N.C.G.S. 105-366(d)(1)(b). In violation of N.C.G.S. 105-366(d)(2), the defendant purchaser failed to withhold from the purchase price an amount of money sufficient to pay the taxes due or to become due on the transferred property until the seller produced either a receipt showing that the taxes had been paid or a certificate that no

taxes were due. Thus the defendant, as purchaser, became personally liable for the amount of unpaid taxes.

On 19 May 1980,[1] the tax department for the Town of Hudson served a complaint and notice of attachment and garnishment on Martin-Kahill and on North Carolina National Bank, as garnishee, pursuant to N.C.G.S. 105-368(a) and (b). Martin-Kahill exercised its statutory right under N.C.G.S. 105-368(d) and (f) by serving an answer in which it raised numerous defenses, including the constitutional violations considered on this appeal. On 2 July 1980, the Town of Hudson filed with the clerk of superior court a tax collector's objections to defendant's statement of defense, together with copies of the other pleadings and a request for judgment. The case was heard on 11 February 1981.

Bruce W. Vanderbloemen for plaintiff appellee.

Cagle and Houck, by Joe N. Cagle, for defendant appellant.

MARTIN (Harry C.), Judge.

It is Martin-Kahill's contention that the garnishment of its bank account at North Carolina National Bank, without prior notice or hearing, violated its due process and equal protection rights as guaranteed by the constitutions of the United States and the state of North Carolina.

Defendant has cited numerous federal cases as authority for the proposition that a fundamental requirement of due process in any proceeding is "notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 313, 94 L.Ed. 865, 873 (1950). We are also cited to that line of cases which holds that to meet due process requirements a hearing must be afforded before a citizen is deprived of any significant property interest. *North Georgia Finishing v. Di-Chem*, 419 U.S. 601, 42 L.Ed. 2d 751 (1975); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 40 L.Ed. 2d 406 (1974); *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 23 L.Ed. 2d 349 (1969).

1. A second complaint and notice of garnishment was served on defendant on 28 May 1980 to correct plaintiff's oversight in failing to include with the first notice a copy of the applicable statutes as required by N.C.G.S. 105-368 (b)(5).

However, under certain circumstances federal and state statutes permitting the seizure of property without a prior hearing have been held constitutional. *Mackey v. Montrym*, 443 U.S. 1, 61 L.Ed. 2d 321 (1979); *Dixon v. Love*, 431 U.S. 105, 52 L.Ed. 2d 172 (1977); *Commissioner v. Shapiro*, 424 U.S. 614, 47 L.Ed. 2d 278 (1976); *Mitchell, supra; Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 75 L.Ed. 1289 (1930); *Enterprises, Inc. v. Dept. of Motor Vehicles*, 290 N.C. 450, 226 S.E. 2d 336 (1976); *Kirkpatrick v. Currie, Comr. of Revenue*, 250 N.C. 213, 108 S.E. 2d 209 (1959); *Properties, Inc. v. Ko-Ko Mart, Inc.*, 28 N.C. App. 532, 222 S.E. 2d 267, *disc. rev. denied*, 289 N.C. 615 (1976). These cases distinguish themselves because the statutory procedures afforded adequate safeguards when considered in the context of the governmental interests involved. Thus, in resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the governmental entity seeking the remedy. *Goss v. Lopez*, 419 U.S. 565, 42 L.Ed. 2d 725 (1975). Our cases have consistently recognized that the government's interest in collecting its revenues weighs heavily in favor of summary proceedings. *Shapiro, supra; Fuentes, supra; Phillips, supra.*

Focusing our attention now on the present case, we note initially that the statutory scheme provided under N.C.G.S. 105-366 and -368 is designed, in pertinent part, to assist local tax collectors in the recovery of property taxes due as a result of bulk sale transactions. These provisions outline in detail the procedures to be followed by buyers, sellers, and the taxing authority:

> § 105-366. Remedies against personal property.—(a) . . . All tax collectors shall have authority to proceed against personal property to enforce the collection of taxes as provided in this section and in G.S. 105-367 and 105-368. . . .
>
> (b) Remedies after Taxes are Due.—[T]he tax collector may levy upon and sell or attach the following property for failure to pay taxes:
>
> . . . .
>
> (5) The stock of goods or fixtures of a wholesale or retail merchant . . . in the hands of a purchaser or transferee thereof, or any other personal property of the purchaser or transferee of such prop-

erty, if the taxes on the goods or fixtures remain unpaid 30 days after the date of the sale or transfer, but in such a case the levy or attachment must be made within six months of the sale or transfer.

§ 105-368. Procedure for attachment and garnishment.—(a) [T]he tax collector may attach wages and other compensation, rents, bank deposits, the proceeds of property subject to levy, or any other intangible personal property in the circumstances and to the extent prescribed in G.S. 105-366(b), (c), and (d). . . .

(b) To proceed under this section, the tax collector shall serve or cause to be served upon the taxpayer and the person owing or having in his possession the wages . . . sought to be attached a notice as hereinafter provided, which notice may be served by any deputy or employee of the tax collector . . .

. . . .

(d) If the garnishee has a defense or setoff against the taxpayer, he shall state it in writing under oath, and, within 10 days after service of the garnishment notice, he shall send two copies of his statement to the tax collector by registered or certified mail. . . .

If the tax collector does not admit the defense or setoff, he shall set forth in writing his objections thereto and send a copy thereof to the garnishee within 10 days after receipt of the garnishee's statement, or within such further time as may be agreed on by the garnishee, and at the same time the tax collector shall file a copy of the notice of garnishment, a copy of the garnishee's statement, and a copy of the tax collector's objections thereto in the appropriate division of the General Court of Justice of the county in which the garnishee resides or does business, where the issues made shall be tried as in civil actions.

. . . .

(f) The taxpayer may raise any defenses to the attachment or garnishment that he may have in the manner provided in subsection (d), above, for the garnishee.

Defendant validly points out that the proceedings contemplated by these statutory provisions are, for the most part, extra-judicial in nature and afford neither a pre-garnishment nor post-garnishment hearing until the parties appear before a superior court judge, perhaps months after the initial complaint and notice of attachment is sent to the taxpayer. Defendant is also cognizant of the fact that had it complied with the mandate set out in subsection (d)(2), N.C.G.S. 105-366, there would have been no personal liability on its part. Defendant must surely be held to a knowledge of the law, and by failing to withhold an amount sufficient to pay the taxes due, has contributed to its own losses.

We believe that underlying this statutory scheme is a sound public policy justification. The seller of a business is not always readily accessible to the taxing authority once the sale has been consummated. As between two "innocent" parties, it is not the tax collector but the buyer, by failing to protect himself, who should bear the burden. The extent of the burden is defined by the taxing authority's need to promptly and effectively secure its revenues. It includes what the federal government and our own legislature have recognized as the inevitable delay occasioned by a pre-seizure hearing. *Shapiro, supra.*

It is also clear that the statute provides for ultimate judicial determination of the taxpayer's liability. Where "adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." *Phillips, supra,* at 595, 75 L.Ed. at 1296. The taxing authority is as anxious as the taxpayer to effect a speedy and final resolution of the matter and, with the cooperation of the taxpayer, judicial inquiry will be afforded as soon as the court system permits. Moreover, N.C.G.S. 105-368(g) provides that "[i]f, before or after judgment, adequate security is filed for the payment of the taxes, penalties, interest, and costs, the tax collector may release the attachment or garnishment."

In making our determination with respect to whether defendant's due process rights have been violated by the application of N.C.G.S. 105-366 and -368, we have looked not solely to those provisions authorizing garnishment of defendant's bank accounts, but

to the entire statutory scheme out of which the necessity for plaintiff's actions arose. We find that the statute is constitutional on its face and as applied.

Defendant's equal protection argument is tenuous. It alleges that because N.C.G.S. 105-368 does not supply guidelines or standards by which the tax collector is permitted to choose the method or means of collection, there is opportunity for arbitrary decision making which could result in invidious discrimination. Defendant fails to delineate for us the existence or identity of a classification, without which we are unable to test its allegation. The statute does not classify on its face—no one group is singled out for different treatment. Nor can we say that the purpose and effect of the statute is classification. Defendant has offered no evidence of discriminatory purpose or impact in the application of any of the options open to the tax collector under N.C.G.S. 105-368. *Arlington Heights v. Metro. Housing Corp.*, 429 U.S. 252, 50 L.Ed. 2d 450 (1977); *Washington v. Davis*, 426 U.S. 229, 48 L.Ed. 2d 597 (1976); *State v. Avery*, 299 N.C. 126, 261 S.E. 2d 803 (1980); *State v. Hough*, 299 N.C. 245, 262 S.E. 2d 268 (1980). In fact, as defendant has neither stated nor proved that it has been injured by the alleged discriminatory impact of the statute, we seriously question its standing to raise the equal protection issue on this appeal. *Warth v. Seldin*, 422 U.S. 490, 45 L.Ed. 2d 343 (1975); *Sierra Club v. Morton*, 405 U.S. 727, 31 L.Ed. 2d 636 (1972).

As contemplated by the statutory scheme in N.C.G.S. 105-366 and -368, it is within the tax collector's sound discretion to choose when, from whom and what remedial measures are necessary to collect taxes due as a result of a bulk sale. This is a permissible delegation of authority. *See Hospital v. Davis*, 292 N.C. 147, 232 S.E. 2d 698 (1977). Absent a showing of actual or potential abuse of discretion resulting in a discriminatory impact on this or other taxpayers, defendant's equal protection argument is without merit.

For the above stated reasons we hold that N.C.G.S. 105-366 and -368 are constitutional and the judgment below is affirmed.

Affirmed.

Judges MARTIN (Robert M.) and BECTON concur.

STATE OF NORTH CAROLINA v. CHESTER WALLACE

No. 8114SC287

(Filed 20 October 1981)

1. **Criminal Law § 117— jury instructions on prior convictions—failure to link limiting instruction to all prior convictions**

The trial court committed reversible error when it instructed the jury it could not consider the defendant's prior *non*-larceny related convictions as substantive evidence of his guilt, but failed to instruct the jury with respect to defendant's larceny-related convictions. If the trial court undertakes to name or list the previous convictions, it must state every category of prior convictions supported by the evidence so that the jury will know the limiting instruction applies to all the prior convictions contained in the record.

2. **Constitutional Law § 74— cross-examination and rebuttal of alibi defense—no violation of right against self-incrimination**

Where defendant on cross-examination testified that, when he was first questioned concerning the crime charged, he told the officer of his alibi defense, his constitutional right against self-incrimination was not violated by either the cross-examination or by the rebuttal testimony of the officer concerning defendant's failure to have mentioned his alibi defense when he was questioned following his arrest. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense . . . ."

APPEAL by defendant from *Martin, Judge.* Judgment entered 11 December 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 18 September 1981.

Defendant was convicted of common law robbery and sentenced to two years in prison as a committed youthful offender. At trial, the prosecuting witness, Catherine Sims, testified that as she was leaving the Durham Seafood Market, defendant ran into her, grabbed her purse, and fled. Mrs. Sims also testified that she had seen and had recognized defendant, who was sitting on a stoop in front of the seafood market, before she went into the seafood market, but that she did not know his name. Detective Thomas Hester testified that on 12 February 1980, over a month after the purse-snatching, he showed Mrs. Sims seven photographs and that Mrs. Sims picked out the picture of the defendant as the person who took her purse.

Defendant testified that he hurt his knee playing basketball on the day Mrs. Sims was robbed. Both he and his mother presented alibi evidence that he was at home nursing his hurt

knee at the time of the robbery. The defendant further testified, on cross examination, that he told the arresting officer that his leg was hurt and that he had not been able to move at the time of the robbery.

Detective Hester testified on rebuttal for the State that defendant did not mention hurting his leg and was not limping when he was arrested.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Appellate Defender Project for North Carolina, by Adam Stein and James H. Gold, for defendant appellant.

BECTON, Judge.

The issues on appeal are whether the court erred in admitting testimony of what defendant did or did not tell the arresting officer concerning his alibi defense, whether the court erred in failing to instruct the jury on eye-witness identification testimony, and whether the court erred in its jury instructions by failing to tell the jury about defendant's prior larceny-related juvenile convictions.

I

[1] Having determined that the defendant is entitled to a new trial because the trial court failed to mention that the defendant's prior larceny-related convictions could *not* be considered as substantive evidence, we address the issues in reverse order. Defendant testified on direct examination that he had been convicted of misdemeanor assault, driving a motorbike without a helmet, and malicious injury to personal property. On cross examination, the defendant testified that as a juvenile, he had been convicted of taking a bicycle and breaking and entering. Defendant also gave testimony suggesting that he had been convicted of at least three other larceny-related crimes as a juvenile.[1]

1. In an effort to further impeach the defendant with his prior juvenile convictions, the State, on cross examination, asked the question, and received the answer that follow:

Q. And you have in fact been convicted of stealing something at least three times when you were under 16?

With reference to the defendant's prior convictions, the trial court gave the following instructions to the jury:

> There has also been evidence in this case through the defendant that at an earlier time the *defendant has been convicted of misdemeanors of assault and injury to property and traffic offenses.* I instruct you that you may consider this evidence for one purpose only. If considering the nature of those offenses you believe that the fact that he may have been convicted of them bears upon his truthfulness, then you may consider it together with all of the other facts and circumstances bearing upon his truthfulness in deciding whether you will believe or disbelieve his other testimony at this trial. Except as it may bear on this decision, it may not be considered by you in any other manner. It is not evidence of his guilt or innocence in this case, and you may not convict him in this case based upon something that he may have done in the past. [Emphasis added.]

Defendant argues that this instruction was misleading and incomplete because the trial court, in listing the defendant's prior convictions, failed to mention that the defendant had been previously convicted of larceny-related offenses.

The State concedes that a defendant can be impeached with his juvenile convictions.[2] The State also implicitly concedes, by quoting *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1951), that the following is a correct statement of the law in North Carolina. "[W]hen the trial court undertakes to instruct upon [a subordinate feature of the case], it then becomes [it's] duty, without special re-

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A. Naw. I was with some people that stole something, and they said "You were with them," and I said "Yes, I was with them at the time."

I do not deny that I was convicted. I was there so I said that I did it. [Emphasis added.]

2. The State concedes that under prior G.S. 7A-287, now repealed, a juvenile's conviction was considered a conviction for impeachment purposes. *State v. Alexander*, 279 N.C. 527, 535, 184 S.E. 2d 274 [280] (1971). Under new Article 54, Chapter 7A, N.C. General Statutes, apparently the same result will occur in that, while total expunction of a juvenile's criminal record can occur, G.S. 7A-677(b) provides that in court proceedings "the juvenile may be ordered to testify with respect to whether he was adjudicated delinquent." Accordingly, the State will not argue that a juvenile conviction is not considered as a conviction for impeachment purposes. State's Brief, pp. 11-12.

quest, to expound and explain correctly the law applicable to its different phases." *Id.* at 579, 64 S.E. 2d at 869. Having made these concessions, the State asserts, without argument, (1) that "[t]he failure to mention the juvenile convictions is an omission of fact, not of law;" (2) that the factual omission "is not considered material" since it was "to a collateral aspect of the case rather than to a substantive feature" of the case; and (3) "that there was no need for the court to mention each conviction when instructing as to the law." We disagree with the State.

First, the trial court not only made a factual omission, but it also failed to give a complete and correct instruction on the applicable law as is required by numerous cases. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954); *State v. Bridgers; State v. Hale*, 231 N.C. 412, 57 S.E. 2d 322 (1950); *State v. Moore*, 185 N.C. 637, 116 S.E. 161 (1923); *State v. Jones*, 35 N.C. App. 388, 241 S.E. 2d 523 (1978); *State v. Adams*, 11 N.C. App. 420, 421, 181 S.E. 2d 194, 195 (1971). In *State v. Hale*, a breaking or entering and larceny case, the following instructions were given the jury:

> Now the court charges you that the State has offered two witnesses in this case who are accomplices within the meaning of the law. . . . The State insists and contends . . . that their testimony is supported by other facts and circumstances in the case, and that their testimony is not unsupported and does not go to your hands for your consideration as unsupported testimony of an accomplice. . . . Our Court has said this as to the law on accomplices: 'The unsupported testimony of an accomplice, while it should be received by the jury with caution, if it produces convincing proof of the defendant's guilt, is sufficient to sustain a conviction.' That is as to the unsupported testimony of accomplices.
>
> . . . Now, when the testimony is unsupported, the court charges you that it is your duty to scrutinize such testimony carefully and with care, great care, to see whether or not they are telling you the truth.

Id. at 413, 57 S.E. 2d at 323. Hale took exception to the last sentence of the instructions quoted above contending that it carried "the clear inference that if such testimony be supported . . . it is not to be so scrutinized." *Id.* For failure of the trial court to give a complete and correct instruction of the applicable law, the

Hale court ordered a new trial, saying: "The charge is susceptible of the interpretation, and we think the jury must have so understood it, that if the testimony of the accomplices were supported by the evidence of Ann Lumley, as the State contended, the rule of scrutiny would not apply." *Id.* at 414, 57 S.E. 2d at 323. In the case *sub judice*, since the trial court undertook to give instructions on defendant's prior convictions, it was obligated to tell the jury that the larceny convictions could not be considered as substantive evidence.

Second, the State incorrectly uses the terms "substantive feature of the case" and "substantive evidence" interchangeably and, therefore, erroneously concludes that the "factual omission" was collateral and that it need not be mentioned. Certain types of evidence, although a subordinate feature of a case, can be considered as "substantive evidence." For example, in *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954) and *State v. Jones*, 35 N.C. App. 388, 241 S.E. 2d 523 (1978), our Courts held that character evidence, although a subordinate feature of a case, is considered not only as it bears on credibility but also as substantive evidence on the question of guilt or innocence. In *Wortham*, the North Carolina Supreme Court ordered a new trial because the trial court instructed the jury that it could consider evidence of the defendant's good character as bearing on his credibility without additionally instructing that such evidence could also be considered as substantive evidence on the issue of guilt or innocence. This Court in *Jones* found reversible error when the trial court instructed the jury that character evidence offered on the defendant's behalf could be considered as substantive evidence without additionally instructing that it could also be considered as bearing on defendant's credibility. In neither *Wortham* nor *Jones* was the trial court required to give any instructions on character evidence, a subordinate feature of the case. New trials were ordered in each case, however, because the trial court failed to give a complete and correct instruction on the applicable law resulting in harm to the defendants.

Also, it should be remembered that there are circumstances, not appearing in this case, when prior criminal acts may be considered by a jury as substantive evidence. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); 1 Stansbury's N.C. Evidence § 92 (Brandis rev. 1973). *See* N.C.P.I.—Crim. 104.15 (1970).

In this case, by only listing the offenses that were *dissimilar* to the offense with which the defendant was charged (common law robbery) the trial court may have left, albeit unintentionally, the impression that the defendant's prior larceny convictions could be considered as substantive evidence of his guilt because he was being tried for stealing a purse. As pointed out by the defendant, Chief Justice Warren Burger, while a judge on the Federal Court of Appeals, noted the danger of prejudice that arises in admitting evidence of a prior conviction which is for substantially the same conduct for which the defendant is on trial:

> A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time."

Gordon v. United States, 383 F. 2d 936, 940 (D.C. Cir. 1967). The facts in this case are more compelling than the facts in *Gordon*. Here, the court specifically instructed the jury that it could not consider the defendant's prior *non-larceny* related convictions as substantive evidence of his guilt, but failed similarly to instruct the jury with respect to defendant's larceny-related convictions.

For the benefit of the trial bench and bar, it should be stated that the trial judge is not required to name or list the prior convictions of a defendant in charging the jury on how they shall consider such evidence. It would be proper for the trial judge to commence this instruction: "Evidence has been produced tending to show that defendant has previously been convicted of [a] [several] criminal charge[s]." If the trial court undertakes to name or list the previous convictions, however, it must, at least, state every category of prior convictions supported by the evidence so that the jury will know that the limiting instruction applies to all the prior convictions contained in the record. Fairness to the defendant may indicate that the trial judge should not list the prior convictions, especially if defendant has a long prior criminal record.

It can be argued that the failure to list the larceny convictions in the limiting instruction could be interpreted by the jury

to mean that there is no credible evidence in the case that defendant has been previously convicted of larceny. However, the jury could reason that the limiting instruction only applied to the named criminal convictions, leaving the jury cast adrift without guidance as to how to consider the prior larceny convictions, or even to infer that they should be treated as substantive evidence.

The failure by a trial judge, in giving the limiting instruction, to name or list all of the prior convictions supported by the evidence does not necessarily result in prejudicial error. Whether prejudicial error results depends upon the facts and circumstances of each case. To warrant a new trial it should be made to appear that the error complained of was material and prejudicial to defendant's rights and that a different result would have likely ensued. *State v. Sanders*, 276 N.C. 598, 174 S.E. 2d 487 (1970), *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971).

The State's case rested entirely on the identification of a single witness, and the defendant presented an alibi defense. The error here cannot be considered harmless. *See State v. Jones.* The defendant is, therefore, entitled to a new trial.

II

Defendant next contends that the trial court erred in failing to instruct the jury on eyewitness identification testimony even though he failed to request such an instruction. As defendant is free to request an appropriate eyewitness identification testimony instruction at his retrial, it is not necessary to discuss this assignment of error.

III

[2] The issue we now discuss is likely to arise again at retrial. Defendant phrases it thusly: "The defendant's right against self-incrimination was violated by the cross examination of the defendant and the rebuttal testimony of Detective Hester concerning the defendant's alleged failure to have mentioned his alibi defense when he was questioned following his arrest." We disagree.

This is not a case in which the State uses an accused's silence at the time of his arrest or interrogation to impeach him even

though the accused was given *Miranda* warnings. Clearly, that would be a violation of the due process clause of the Fourteenth Amendment. *See Doyle v. Ohio*, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976). As stated in *State v. Lane*, 301 N.C. 382, 384, 271 S.E. 2d 273, 275 (1980), it would be "fundamentally unfair to impeach defendants concerning their post-arrest silence after they had been impliedly assured through the *Miranda* warning that their silence would not result in any penalty." In this case, defendant testified, asserting an alibi defense. On cross examination, defendant was asked whether he had told the arresting officer of his alibi. Significantly, defendant replied that he specifically told the arresting officer of his alibi. Thus, it is not defendant's silence but his "non-silence" that is important here.[3]

We do not believe defendant's constitutional right against self-incrimination was violated on the facts of this case. Even if we thought otherwise, we are compelled by our factual analysis to resolve this issue against defendant. *State v. Lane*, on which defendant relies, is distinguishable. In *Lane*, the defendant was charged with the sale of heroin. After his arrest and while the indictments were being read to him, the defendant stated, "Hell, I sold heroin before, but I didn't sell heroin to this person." At trial, the defendant offered an alibi defense that he was in a different city at the time of the alleged sale. On cross examination, he was asked whether he had related his alibi defense to police prior to trial. In *Lane*, the Court noted that a prior statement is admissible for impeachment purposes if the prior statement fails to mention a material circumstance presently testified to which would have been natural to mention in the prior statement. The *Lane* Court held, however, that it would *not* be natural for the defendant to have mentioned his alibi defense when he denied having made the heroin sale at the time the indictment was read to him, and that the cross examination was, therefore, improper.

> The indictment charged that on 4 April 1979, some twenty-one days prior to the date of the reading of the indictment, defendant sold heroin to police officer Walker. It was natural

3. Although the record suggests that defendant "signed a waiver of his *Miranda* rights," we do not suggest that a defendant's silence can be used against him when, although he signs a waiver of his *Miranda* rights, he nevertheless decides to exercise his constitutional right to remain silent.

> for defendant to know whether he had sold drugs to a named person and spontaneously to deny having done so. In our opinion it would not be natural for a person, particularly under the circumstances present in this case, to know where he was on a given date some twenty-one days prior thereto. It is a matter of common knowledge that the average person cannot, *eo instanti*, remember where he was on a given date one, two or three weeks in the past without some investigation and substantiation from sources other than his ability of instant recall.

301 N.C. at 386, 271 S.E. 2d at 276. The *Lane* Court found that the cross examination of the defendant left a strong inference with the jury that the defendant's alibi defense was an after-the-fact creation. That problem is not present in the case *sub judice*. Here, the defendant testified that when he was first questioned—approximately 35 days after Ms. Sims' purse was stolen—he told the officer of his alibi defense. That ends the *Lane* inquiry, since, according to defendant's testimony, his alibi *did* flow "naturally" during interrogation.

Granted, the credibility of the defendant was damaged by the rebuttal testimony. That was the price he had to pay for his assertion.

> Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by the use of his earlier conflicting statements.

Harris v. New York, 401 U.S. 222, 225-26, 28 L.Ed. 2d 1, 4-5, 91 S.Ct. 643, 645-46 (1971).

For the reasons set forth in Part I of this opinion, we grant defendant a

New trial.

Judge MARTIN (R. M.) and Judge MARTIN (H. C.) concur.

RICHARD L. HYDER AND WIFE, GRACE A. HYDER, v. DAVID A. WEILBAECHER, M.D.

No. 8128SC143

(Filed 20 October 1981)

1. Negligence § 6; Physicians and Surgeons §§ 16, 18— res ipsa loquitur applicable—wire left in patient's body

Where the plaintiff established, by credible proof, circumstances by which a reasonable mind might infer an 8-½ inch wire was left in the feme plaintiff's body as a result of a cut-down procedure performed by defendant surgeon, they were entitled to a res ipsa loquitur instruction as defendant failed to offer some explanation, which as a matter of law, destroyed the probative force of the circumstances.

2. Physicians and Surgeons § 16— res ipsa loquitur—instructions to jury

It was error for the trial judge to charge that: "If an object such as a wire causes an injury and is shown to be under the exclusive control of the defendant and the incident is such as in the ordinary course of things does not happen if the party having it under his control uses the proper care" and fail to add: "it furnishes or would be some evidence, in the absence of explanation of the defendant, that the accident arose from want of care" when instructing on the doctrine of res ipsa loquitur as the instruction omitted a reference to defendant's burden of explanation and the inference to be drawn therefrom.

3. Physicians and Surgeons § 18— foreign substance left in patient—instruction on standard of care—expert testimony not necessary

In a case where an 8-½ inch wire was left in a patient, it was error to instruct the jury that they could find the standard of care for a physician "through evidence presented by practitioners who were called as expert witnesses" as expert testimony was not necessary to establish the standard of care on the facts presented.

4. Physicians and Surgeons § 14— burden of proof in malpractice action—instruction improper

The trial court's instructions in a medical malpractice action were defective where they directed the jury to find against the plaintiffs if they failed to prove only one of three requirements defendant was obligated to comply with

in rendering professional services. Instructing on only one requirement instead of all three was prejudicial error as plaintiffs would be entitled to recover if they proved defendant failed to comply with any one of the three requirements.

APPEAL by plaintiffs from *Thornburg, Judge.* Judgment entered 12 June 1980 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 September 1981.

This appeal arises out of a medical malpractice action in which plaintiffs, Mrs. Grace Hyder and her husband, allege that a thin gauge stainless steel wire was negligently left in Mrs. Hyder's body following surgery. On 6 October 1975 the defendant, Dr. David Weilbaecher, performed a laparotomy (exploratory surgery on the abdomen) on Mrs. Hyder. Because of the poor condition of Mrs. Hyder's veins at the time of surgery, it was necessary to perform a "cutdown procedure" in order to insert the catheter or intravenous line. That is, rather than merely inserting a needle into a vein, Dr. Weilbaecher was required to make an incision over Mrs. Hyder's right jugular vein, and after lifting it, to manually thread an I.V. line through a small incision in the vein itself. Mrs. Hyder alleges that the catheter contained within it a thin stainless steel wire which was left in her body after the line was removed. The defendant doctor denied that the I.V. line which he inserted contained such a wire.

Testimony tended to show that prior to 6 October 1975, Mrs. Hyder had undergone one other cutdown procedure, performed by another surgeon; and that over the course of her illness several catheters had been inserted for I.V. purposes.

Subsequent to the 6 October 1975 operation, Mrs. Hyder began to complain of chest and abdominal pains. She was hospitalized in November of 1975 and again in December. In April 1976 she began to experience abdominal swelling. In May 1976 the defendant doctor performed a second operation, at which time he removed an 8-½ inch steel wire which was embedded in Mrs. Hyder's liver.

The incision created by this second operation did not heal properly. Mrs. Hyder underwent surgery again in February of 1978 at North Carolina Baptist Hospital in Winston-Salem. The surgeon removed adhesions or scarring in Mrs. Hyder's abdominal cavity, conceivably related to the May 1976 surgery.

As a result of her medical problems, Mrs. Hyder has been unable to work. She has lost weight and cannot function effectively at home. Her husband has incurred medical bills amounting to $43,000.

From a jury verdict in defendant's favor, plaintiffs appeal.

Roberts, Cogburn and Williams, by Landon Roberts, and Long, McClure, Parker & Payne, by Robert B. Long, Jr., for plaintiff appellants.

Dameron and Burgin, by Charles E. Burgin, for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiffs' assignments of error relate solely to exceptions taken to several portions of the trial court's instructions to the jury. As the doctrine of res ipsa loquitur is applicable to the facts of the case and critical to an understanding of the alleged errors in the jury charge, we will first review the law in this area.

A surgeon is not ordinarily an insurer of the success of his operation, and in malpractice actions there is generally no presumption of negligence in the failure to successfully effect a remedy. *Starnes v. Taylor*, 272 N.C. 386, 158 S.E. 2d 339 (1968); *Pendergraft v. Royster*, 203 N.C. 384, 166 S.E. 285 (1932). There is, however, an exception to this rule. When the facts of the case manifest such obvious lack of skill and care, they may afford in themselves an inference of negligence, thereby invoking the doctrine of res ipsa loquitur. The doctrine of res ipsa loquitur has been recognized to apply in actions for malpractice where a surgeon has left a foreign object or substance in a patient's body after an operation. *Mitchell v. Saunders*, 219 N.C. 178, 13 S.E. 2d 242 (1941); *Pendergraft, supra.* A surgeon is under a duty to remove all harmful and unnecessary foreign objects at the completion of the operation. Thus the presence of a foreign object raises an inference of lack of due care. If the facts of the case justify the application of the doctrine of res ipsa, the nature of the occurrence and the inference to be drawn supply the requisite degree of proof to carry the case to the jury without direct proof of negligence. *Young v. Anchor Co.*, 239 N.C. 288, 79 S.E. 2d 785 (1954). The effect of the doctrine of res ipsa, while not relieving

the plaintiff of the burden of proof, is significant. It enables the plaintiff to make out a prima facie case by furnishing some evidence, an inference, of want of care. *Mitchell, supra.*

[1] Turning now to the present case, the threshold question is whether plaintiffs offered sufficient evidence at trial to invoke the doctrine of res ipsa loquitur. We have examined the record carefully, focusing our attention primarily on defendant's contention that an 8-½ inch wire was present in Mrs. Hyder's body prior to the cutdown procedure performed on 6 October 1975. There is some merit to defendant's position inasmuch as Mrs. Hyder underwent a similar cutdown procedure on 6 August 1975. However, numerous X rays were taken of Mrs. Hyder's chest and abdominal area between 6 August and 6 October. Based on these X rays there is ample credible testimony from the physician who performed the first procedure, as well as from the hospital radiologist, that no foreign object, specifically an 8-½ inch wire, was then present in Mrs. Hyder's body. Between 6 October and 17 November no X rays were taken. The 17 November X rays and those taken subsequently show the radiopaque marker of the wire first within the upper chest area, then later in the abdominal area, and finally embedded in the liver. We are satisfied that defendant's evidence does not rebut these findings.

Where the plaintiffs have established, by credible proof, circumstances from which a reasonable mind might infer that the wire entered as a result of the 6 October cutdown, they are entitled to a res ipsa instruction unless defendant offers some explanation which as a matter of law destroys the probative force of these circumstances. A defendant's evidence in explanation has been held not to rebut the presumption arising under the doctrine of res ipsa, but merely to raise an issue for the determination of the jury. Moreover, where a defendant's negligence appears to be the more probable explanation of the injury, the plaintiff need not exclude all other persons who might possibly be responsible. *See Mitchell, supra. See also Mondot v. Vallejo General Hospital,* 152 Cal. App. 2d 588, 313 P.2d 78 (1957); *Johnson v. Ely,* 30 Tenn. App. 294, 205 S.W. 2d 759 (1947). We conclude that the presence of an 8-½ inch stainless steel wire embedded in Mrs. Hyder's liver, allegedly there as the result of a cutdown procedure performed by defendant, is so inconsistent with the exercise of due

care as to raise an inference of lack of care. Plaintiffs were therefore entitled to an instruction on the law of res ipsa loquitur.

[2] In his charge to the jury, the trial judge instructed in part on the doctrine of res ipsa as follows:

> [I]f an object such as a wire causes an injury and is shown to be under the exclusive control of the defendant and the incident is such as in the ordinary course of things does not happen if the party having it under his control uses the proper care, (the principle of *res ipsa loquitor [sic]*, which means the thing speaks for itself, in such a case carries the question of negligence to the jury). [Parentheses ours.]

Plaintiffs take exception to this instruction in that it fails to include the following statement, which would appear before the material enclosed in parentheses: *it furnishes or would be some evidence, in the absence of explanation of the defendant, that the accident arose from want of care. Lea v. Light Co.*, 246 N.C. 287, 98 S.E. 2d 9 (1957); *Pendergraft, supra.* We agree that the trial judge erred in the omission of this statement.

The trial court's incomplete instruction deprived plaintiffs of the full advantage of the law upon which they rightfully relied. An instruction on res ipsa must include sufficient information to apprise the jury of the theory and significance of the doctrine. Of particular significance is the fact that the burden is on the defendant to come forward with an explanation of the events giving rise to the inference of lack of care. Absent an explanation satisfactory to the jury, it is incumbent upon them to consider defendant's acts as some evidence of lack of care. *Mitchell, supra.* We hold that plaintiffs were prejudiced by the trial judge's error in omitting from his instructions a reference to defendant's burden of explanation and the inference to be drawn therefrom.

[3] Plaintiffs next take exception to the trial court's instruction that the only way the jury could properly find the standard of care for a physician on the facts of the case was "through evidence presented by practitioners who were called as expert witnesses." Plaintiffs contend that expert testimony is not necessary to establish the standard of care on these facts. We agree.

"Although no inference of the doctor's negligence usually arises upon proof of injury or other adverse consequence from treatment or medication, some results are so far out of the ordinary as to permit the jury, without the aid of experts, to find negligence." Byrd, *Proof of Negligence in North Carolina*, 48 N.C.L. Rev. 452, 465 (1970). Expert testimony is not necessary when the result is so inconsistent with care or when "the judgment of the reasonableness of what the doctor has done is clearly within the competence of the layman . . .." *Id. See also Pendergraft, supra.*

The facts of this case gave rise to the inference that the defendant doctor did not exercise due care. By imposing an external standard established by expert testimony, the trial court essentially negated this inference to plaintiffs' prejudice.

[4] Plaintiffs also except to that portion of the trial judge's final mandate which appeared as follows:

> Even if you find that a wire segment was found in the plaintiff's body several months after the cutdown procedure, but plaintiff has failed to satisfy you by the greater weight of the evidence that *defendant failed to exert his best judgment, skill and ability*, it would be your duty to answer the first issue [negligence] NO. [Emphasis supplied.]

The defect in this instruction is that it directed the jury to find against the plaintiffs if they failed to prove only *one* of the three requirements defendant was obligated to comply with in rendering professional services to Mrs. Hyder.

> A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular, and such failure is the proximate cause of injury and damage, he is liable.

Hunt v. Bradshaw, 242 N.C. 517, 521-22, 88 S.E. 2d 762, 765 (1955) (citations omitted). The trial court only instructed on the third requirement. Plaintiffs would be entitled to recover if they proved defendant failed to comply with *any one* of the three requirements. Plaintiffs were entitled to such instruction in the final mandate, and the court's failure to so charge is prejudicial error.

Defendant points out that the language used in the trial judge's final mandate (quoted above) parallels that approved of in *Pendergraft*. In *Pendergraft*, however, the *defendant* appealed, alleging as error the trial court's charge to the jury upon the doctrine of res ipsa loquitur. In commenting on that portion of the charge to which we now refer, the Court found it "as favorable to defendant as could be asked for under the authorities." 203 N.C. at 397, 166 S.E. at 291. There is nothing in the case to suggest that had the plaintiff taken exception, the Court would have similarly approved the language.

This case involved a highly complex and lengthy trial in which plaintiffs were entitled to rely upon the doctrine of res ipsa loquitur. We note that after an hour of deliberation the jury returned for clarification of the definition of negligence. At this time the trial judge repeated the erroneous instructions. Under these circumstances we must find that plaintiffs are entitled to a new trial.

New trial.

Judges MARTIN (Robert M.) and BECTON concur.

STATE OF NORTH CAROLINA v. ARTHUR HAWLEY, JR., JOHN DAVID LEE, JR., FRANKLIN EUGENE COOK

No. 8111SC368

(Filed 20 October 1981)

1. Burglary and Unlawful Breakings § 5.8— felonious breaking and entering and larceny—sufficiency of evidence

In prosecutions for felonious breaking and entering and felonious larceny, defendants' motions for nonsuit and judgment notwithstanding the verdict

were properly denied where the State's evidence tended to show that items were missing from a couple's home without their permission; that a neighbor observed three long-haired white males flee from the couple's home; that the neighbor observed the clothes of the three and observed one of the three kick off a pair of flip flops; that an officer and bloodhound arrived; that the bloodhound smelled the flip flops and the couple's residence and led the officer through woods and fields to a trailer park; that one of the residents saw two long-haired males enter one of the trailers; that eventually the three defendants came out of the trailer wearing clothing similar to that described by the neighbor; and that one of the defendants told police he entered the couple's home because he needed money.

2. **Criminal Law § 44— evidence pertaining to use of bloodhounds—proper foundation**

Admission of testimony relating to bloodhounds was not error when the bloodhound was trained, a cross between a bloodhound and a coon hound, had a 90% success rate in tracking humans, and was put on the trail after smelling shoes left at the scene of the crime; however, as the exception only challenged the court's conclusion and not its findings the reviewing court only had to determine its conclusion was supported by its findings.

3. **Criminal Law § 96— withdrawal of evidence**

Where the court granted defendants' motions to strike and instructed the jury to disregard any statement by the officer regarding a pair of flip flops belonging to defendant Cook, the incompetent evidence was properly withdrawn from the jury's consideration and motions for a mistrial were properly denied.

4. **Criminal Law § 102.5— instruction to disregard a portion of witness's statement—assumption jury considered only admissible portion**

Where the court instructed the jury to disregard a portion of a witness's statement, it is assumed the jurors have sufficient intelligence and character to comply and consider only the admissible portion in subsequent questions and answers of the witness.

5. **Criminal Law § 76.7— inculpatory statement properly admitted**

Where evidence on voir dire tended to show that defendant was advised of his rights, understood them, signed a waiver of them, was coherent during questioning and did not appear confused, the court's finding that defendant's inculpatory statement was voluntary was supported by the evidence.

APPEAL by defendants from *Cornelius, Judge.* Judgments entered 6 November 1980 in Superior Court, HARNETT County. Heard in the Court of Appeals on 24 September 1981.

Defendants were each charged in proper bills of indictment with felonious breaking and entering and felonious larceny. Upon pleas of not guilty, defendants received a joint trial by jury. The jury returned verdicts finding each defendant guilty on the

counts of felonious breaking and entering and felonious larceny. From judgments sentencing each defendant to prison for not less than four nor more than six years, defendants appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

L. Randolph Doffermyre, III, for defendant appellant Hawley.

O. Henry Willis, Jr., for defendant appellant Lee.

Samuel S. Stephenson, for defendant appellant Cook.

HEDRICK, Judge.

[1] Defendants assign as error the court's failure to grant their timely motions for judgment as of nonsuit and for "judgment notwithstanding the verdict." In ruling upon a defendant's motion to dismiss or for judgment as in the case of nonsuit, the trial court is limited *solely* to the function of determining whether a reasonable inference of the defendant's guilt of the crime *may* be drawn from the evidence. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). The evidence in the present case was sufficient to enable the jury to draw a reasonable inference that the defendants were guilty of the offenses charged.

The State's evidence tended to show the following:

The home of Gary and Louise Williams had been broken into and rummaged through on the morning of 10 September 1980 at around 10:00 a.m. At 10:05 a.m., Louise Williams arrived at her house and observed that an air conditioning unit had been pushed out of a window in her house and that a pillow case containing her jewelry box, necklaces, and other items was outside and underneath the window of her house. Missing from the residence was a coin collection worth $700 to $1,000 and a class ring worth $200. Neither Gary nor Louise Williams had given anyone permission to enter their home or to take items therefrom. At about 10:00 that same morning, the Williams' neighbor, Richard Gore, spotted a white male with long hair looking around the corner of the Williams' home, and when Gore drove up to the Williams' house, he observed three long-haired white males flee from the Williams' yard into a corn field located behind the Williams' home. The three ran towards a trailer park located on Highway

82 known as Hamilton's Trailer Park, and Gore observed one of the three kick off a pair of flip flop shoes. Gore also observed that one of the three had on a yellow t-shirt, another had on a blue t-shirt, and another had on a red t-shirt. Office Donald McLamb arrived at the Williams' residence shortly after 10:00 a.m. and requested a bloodhound. At some time between 11:15 and 11:30 that morning, Mr. Wallance Allen arrived at the Williams' home and brought with him a bloodhound named Murf. Mr. Allen is an employee with the Department of Correction and his duties include the training and running of bloodhounds; Murf is a cross between a bloodhound and a black and tan coon hound with a 90% success rate in tracking humans. Officer McLamb and Mr. Allen found two pairs of flip flop shoes lying in the Williams' backyard. Murf, after smelling the flip flops and smelling around the Williams' residence, then led Officer McLamb and Mr. Allen through the corn field behind the Williams' house, through some woods and fields, and eventually to a vacant trailer in Hamilton's Trailer Park. Two sets of barefoot tracks and a set made by someone wearing tennis shoes were observed on the route along which the bloodhound led his handlers. In addition, Officer McLamb and Mr. Allen found a sock along the trail, and Gary Williams later identified the sock as one of a pair he had in his dresser drawer. After searching the vacant trailer to which Murf led him, Officer McLamb proceeded to another trailer 40 to 50 feet away. Betty Lou Hair, a resident of the trailer park, heard dogs barking at around 10:30 that morning and observed two white, long-haired males running through the trailer park and enter a trailer after someone opened the door and yelled for them to come in. When Officer McLamb approached the second trailer, he had been informed of what Ms. Hair had seen. Officer McLamb knocked on the trailer door and when a young woman answered, McLamb advised her that he was looking for two individuals in reference to a break-in and that he had information that they were in the trailer; Officer McLamb did not gain admission into the trailer. While Officer McLamb was engaged in conversation with a sheriff outside the second trailer, defendants Hawley and Cook came out. Officer McLamb then went back to the trailer and advised the young woman that he was looking for a third person; again he was not granted permission to enter. As Officer McLamb was leaving, the third defendant, Lee, emerged from the trailer. Defendants Cook and Hawley were barefooted and had scratches

around their ankles, and defendant Cook had on tennis shoes. Defendant Hawley had on a red t-shirt and defendant Cook had on a blue t-shirt. Later, defendant Cook stated to two investigating officers that he entered the Williams' house because he needed money.

The defendants offered no evidence.

The circumstantial evidence presented, considered in the light most favorable to the State, was sufficiently substantial to support a reasonable inference of defendants' guilt and hence to withstand defendants' motions to dismiss. This assignment of error is therefore overruled.

[2] Defendants also assign as error the court's admission into evidence of testimony offered by the State pertaining to the use of a bloodhound to investigate the crime. Defendants argue that the State did not provide a proper foundation for the bloodhound's reliability and that admission of the State's testimony about the bloodhound was prejudicial error.

Evidence about the trailing of a suspect by a properly trained bloodhound is admissible, but there must first be a preliminary showing (1) that the bloodhound is of pure blood and of a stock characterized by acuteness of scent and power of discrimination, or if his family tree is not pure, that the bloodhound has pedigreed himself by past performance; (2) that the bloodhound has been accustomed and trained to pursue the human track; (3) that the bloodhound has been found by experience reliable in such pursuit; and (4) that in the particular case the bloodhound was put on the trail of the guilty party, which was pursued and followed under such circumstances and in such a way as to afford substantial assurance, or permit a reasonable inference of identification. *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965); 1 Stansbury's N.C. Evidence § 87 (Brandis rev. 1973).

The trial judge has the duty of determining any preliminary questions of fact upon which the admissibility of evidence depends. *State v. Whitener*, 191 N.C. 659, 132 S.E. 603 (1926); 1 Stansbury's N.C. Evidence § 8 (Brandis rev. 1973). A trial court's findings of face are conclusive if supported by any competent evidence even if there is evidence to the contrary that would support different findings, *State v. Saults*, 299 N.C. 319, 261 S.E. 2d

839 (1980). Hence, the finding of a trial judge upon a preliminary question of fact upon which the admissibility of evidence depends is not subject to reversal on appeal if it is fairly supported by the evidence. *Gila Valley, Globe, & Northern Railway Co. v. Hall*, 232 U.S. 94, 58 L.Ed. 521, 34 S.Ct. 229 (1913).

In the present case, the trial judge properly conducted a *voir dire* examination to determine whether the bloodhound had sufficient "expertise." At the end of the hearing, the judge made extensive findings of fact consistent with the State's abundant evidence that Murf the bloodhound was sufficiently expert. At any rate, defendants' assignment of error purports to be based on "Defendant Hawley's Exception No. 2," "Defendant Lee's Exception No. 2," and "Defendant Cook's Exception No. 1." Those exceptions challenge only the court's conclusion of law that the bloodhound evidence was admissible. Such a challenge, therefore, does not address the validity of the court's findings of fact but is limited to whether the court's conclusions of law are supported by its findings of fact. *Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980). We have reviewed the court's ruling on the admission of the evidence and have determined that it is amply supported by the court's extensive findings of fact. This assignment of error is therefore overruled.

[3] Defendants present as another assignment of error the trial court's denial of defendants' motions for mistrial after Officer McLamb testified that he found a shoe at the scene of the crime which belonged to defendant Cook.

"[A] motion for mistrial in cases less than capital is addressed to the trial judge's sound discretion, and his ruling thereon (without findings of fact) is not reviewable without a showing of gross abuse of discretion." *State v. Daye*, 281 N.C. 592, 596, 189 S.E. 2d 481, 483 (1972). Furthermore, when incompetent evidence is withdrawn from the jury's consideration by appropriate instructions from the trial judge, any error in admission of the evidence is ordinarily cured; this rule of law is based on the assumption that jurors have sufficient intelligence and character to comply with the cautionary instructions. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976).

In the present case, there was no abuse of discretion in denying defendants' motions for mistrial. The trial judge promptly

granted defendants' motions to strike Officer McLamb's testimony that he found a shoe belonging to defendant Cook at the Williams' house. Furthermore, the trial judge instructed the jury to disregard any statement by Officer McLamb with regard to any pair of flip-flops that may belong to Mr. Cook. This assignment of error is therefore overruled.

[4] Defendants also assign as error the court's admission into evidence of certain testimony by State's witness Detective Strickland. The objected-to testimony referred to an exchange between Detective Strickland and one Kimberly Norris, the young woman who met Officer McLamb at the door of the second trailer from which the defendants emerged. The relevant portions of the testimony are excerpted as follows:

Q. What did you say to her at that time?

A. I asked for any articles that Mr. Cook, Mr. Hawley or Mr. Lee might have left at the trailer that morning, such as clothing and articles from the B & E.

OBJECTION — Mr. Doffermyre.

OBJECTION — Mr. Willis.

OBJECTION — Mr. Stephenson.

COURT: Sustained. Members of the jury disregard any statement of the witness about a B & E.

Q. Is that what you told her, sir?

A. Sir?

Q. Is that what you said to her?

A. Yes.

OBJECTION — Mr. Doffermyre.

OBJECTION — Mr. Willis.

OBJECTION — Mr. Stephenson.

MR. DOFFERMYRE: We object again and move to strike again.

COURT: Denied.

Exception — Mr. Doffermyre.

DEFENDANT HAWLEY'S EXCEPTION NO. 5

Exception — Mr. Willis.

DEFENDANT LEE'S EXCEPTION NO. 4

Exception — Mr. Stephenson.

DEFENDANT COOK'S EXCEPTION NO. 4

Mrs. Norris obtained two pair of trousers and one small pull-over shirt. . . .

Defendant argues Mrs. Norris' acts in obtaining two pairs of trousers and a shirt in response to Detective Strickland's request for "clothing and articles from the B & E" amounted to a non-verbal assertion by her that "these dungaree trousers are clothing from the B & E." Defendant contends that testimony about Mrs. Norris' acts therefore constituted inadmissible hearsay.

Crucial to the disposition of this assignment of error is the fact that the trial judge issued a cautionary instruction that the jury "disregard any statement of the witness about a B & E." Since it is assumed that jurors have sufficient intelligence and character to comply with cautionary instructions of the trial judge, *State v. Covington, supra,* it may be assumed that the jury deleted from its consideration Detective Strickland's mention of the B & E and considered his testimony only insofar as he stated, "I asked for any articles that Mr. Cook, Mr. Hawley or Mr. Lee might have left at the trailer that morning, such as clothing and articles. . . ." Hence, even if his subsequent testimony about Mrs. Norris responding by obtaining two pairs of trousers and a shirt constituted technical hearsay, the admission of such testimony was not prejudicial error requiring a new trial since it did no more than corroborate already ample evidence that the defendants had been in the second trailer. "[T]he rule is that the admission of incompetent evidence will not be held prejudicial when its import is abundantly established by other competent testimony." *Bullin v. Moore,* 256 N.C. 82, 85, 122 S.E. 2d 765, 767 (1961). This assignment of error is therefore overruled.

[5] Defendant Cook notes as another assignment of error the court's admission into evidence of an inculpatory statement made

by the defendant during in-custody interrogation and in the absence of counsel. Defendant Cook argues that he was induced by fear and trickery into making the statements and that his statements were, therefore, involuntary.

A trial judge's finding upon *voir dire* that an accused freely and voluntarily made an inculpatory statement will not be disturbed on appeal when the finding is supported by competent evidence even when there is conflicting evidence. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

In the present case, the trial judge properly conducted a *voir dire* hearing to determine the admissibility of defendant Cook's inculpatory statements. The State presented evidence on *voir dire* which tended to show that defendant Cook was advised of his Miranda rights, stated that he understood his rights, signed a waiver of those rights, was coherent during the questioning, and did not appear confused. The State also presented evidence tending to show that no promises or threats were made to the defendant. The defendant, on the other hand, presented evidence on *voir dire* tending to show that the questioning officers tried to place him in fear.

At the conclusion of the *voir dire* testimony, the trial judge made extensive findings of fact consistent with the evidence presented by the State. The trial judge then concluded as a matter of law that defendant Cook was in full understanding of his constitutional rights and that he freely, knowingly, intelligently, and voluntarily waived his rights and made the inculpatory statement.

The court's findings of fact were amply supported by competent evidence offered on *voir dire*, and the conclusions of law were supported by the findings of fact. This assignment of error must therefore be overruled.

We hold defendants had a fair trial free from prejudicial error.

No error.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. TRACY THOMAS PECK

No. 8130SC203

(Filed 20 October 1981)

Searches and Seizures § 33— "plain view" rule—evidence seized from passenger of vehicle

It was not error for the court to deny defendant's motion to suppress evidence of drugs found on defendant's person where the State's evidence tended to show that defendant was a passenger in a car which had been lawfully stopped; that the officer talked to defendant and detected a faint odor of alcohol, observed defendant's pupils were dilated, his eyes were red, there was mucous on the corner of his mouth, and he was "kind of cotton mouthed"; that the officer asked defendant if he had "dope"; that defendant stuck his hand in his pants and the officer grabbed his hand and jerked it out of his pants; that when the officer grabbed his hand, the corner of a plastic bag was revealed; and that the officer seized the bag as being in "plain view."

Judge WELLS dissenting.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 2 October 1980, in Superior Court, JACKSON County. Heard in the Court of Appeals 2 September 1981.

Defendant appeals from a plea of guilty after the denial of his motion to suppress evidence. He was charged with possession of a Schedule I controlled substance, and was given a suspended sentence of five years imprisonment.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Thomas W. Jones for defendant appellant.

MORRIS, Chief Judge.

G.S. 15A-979(b) gives the right of appeal from a plea of guilty following the denial of a suppression motion. In interpreting the statute, the Supreme Court in *State v. Reynolds,* 298 N.C. 380, 397, 259 S.E. 2d 843, 853 (1979), through Justice Carlton for a unanimous court on this question, held that "when a defendant intends to appeal from a suppression motion denial pursuant to G.S. 15A-979(b), he must give notice of his intention to the prosecutor and the court before plea negotiations are finalized or he will waive the appeal of right provisions of the statute." The dissent

(in part and on other grounds) by Justice Exum referred to the necessity of notice that the defendant was "pleading guilty conditionally under G.S. 15A-979(b)" because the "legislature did not intend for a defendant to have it both ways", noting that "the state is entitled to rely on a negotiated plea, nothing else appearing, as being a full and final settlement of the entire matter." Supra, at 405, 259 S.E. 2d at 857. Here, the record states that "the defendant in open court gave notice of appeal to the North Carolina Court of Appeals, pursuant to G.S. 15A-979(b)." This appears after the sentence was imposed and execution thereof suspended for five years and the defendant placed on probation under the usual rules of probation and certain special conditions. Transcript of plea in this case leaves unanswered the question, "Have you agreed to plead as a part of a plea bargain?" We assume that the plea entered was not the result of a plea bargain and answer the issue raised by the appeal.

The evidence for the state on defendant's motion to suppress is summarized as follows:

Officer Cruzan, a North Carolina State Highway Patrolman, went to the campus of Western Carolina University in response to a call from Security Officer Shelton for assistance. Officer Shelton had stopped a vehicle and had the driver of the vehicle under arrest for "no driver's license". He was the only security officer on duty at the time and had orders not to leave campus unless he absolutely had to. He had noticed dust flying and "tires squealing" and stopped the car to check the reason for the way the driver was operating the car. The two officers learned that the driver's license had been revoked. Officer Cruzan asked Officer Shelton whether he had checked the passenger in the vehicle. Upon receiving a response in the negative and a suggestion that the passenger appeared to be intoxicated, Officer Cruzan went to the passenger side of the car, opened the door, and started to talk to the defendant, who was seated in the car. Defendant stated "I'm feeling sick." The officer suggested that he should step outside if he was going to "throw up". Defendant replied, "I'm not going to throw up. I just don't feel good." Whereupon the officers squatted beside defendant and said: "Son, do you have dope in here or on you?" Defendant "leaned back and stuck his left hand down in the front of his pants." When defendant did that, Officer Cruzan grabbed his hand and jerked it out of

his pants. At that time, when he took defendant's hand from his trousers, he could see the corner of a plastic bag. Officer Cruzan got defendant out of the car reached in his pants and pulled out a plastic bag containing a white powdery substance. He then advised defendant of his constitutional rights and proceeded to search the vehicle. When Officer Cruzan first saw defendant, he detected a faint odor of alcohol and observed that defendant's pupils were dilated, his eyes were red, there was mucous on the corner of his mouth, and he was "kind of cotton mouthed". He had no reason to believe that defendant was going for a weapon.

Some 20 to 30 minutes elapsed from the time Officer Shelton called for assistance to the time Officer Cruzan arrived on the scene. During all this time, the driver was seated in Officer Shelton's car.

The defendant offered into evidence the affidavit given in support of the motion to suppress and was tendered for cross examination. The statements in his affidavit are summarized as follows: When Officer Cruzan asked him to step out of the vehicle he said that he "did not feel too well." The officer then told him to get out of the car whereupon he said to the officer. "I don't want to get out, I don't feel like it, I'm sick." The officer then "suddenly and abruptly" opened the door and grabbed the defendant, pushing him against the seat. He then "began to try to force his hand and arm down the pants of" the defendant, at the same time pulling and grabbing him in an attempt to get him out of the car. The officer did pull defendant out of the car and pushed him up against the side of the vehicle, still "trying to force his hand and arm down into" defendant's pants. "Suddenly and abruptly" the officer pulled a bag out of defendant's pants, seized it and its contents, and took it into his possession.

The court made findings of fact and concluded: (1) the officer was in a place where he had a right to be; that he had a duty to secure the car of the person under arrest and to check the passenger therein; (2) the revelation of the white powder material in a plastic bag is not the fruit of an unlawful search and seizure; and (3) the seizure was of materials in plain view after the officer removed the arm of Mr. Peck from his trousers. The court further concluded:

There is no evidence to support the conclusion that Mr. Cruzan was using his position, or the fact that the car was stopped, for the purpose of making an otherwise unlawful search and discovery of contraband materials. On the contrary, the grabbing of the passenger's arm, which was being thrust into the belt of his trousers is a prudent action on the part of the investigating officer and is not unreasonable even if there was a search and seizure; the seizure of the plastic material from the person of Mr. Peck was fortuitous and unplanned and is not an unreasonable seizure.

Defendant does not except to any conclusion of law. He excepts to only one finding of fact—Finding of Fact No. 8—"whereupon Officer Cruzan observed, for the first time, a corner of a plastic bag containing a white powder, and the powder was subsequently seized and the defendant moved to suppress as being an unlawful search and seizure." Defendant argues that the court found as a fact that the officer observed the contents of the plastic bag. It is clear that the court finds only that the officer "observed a corner of a plastic bag." The bag did contain a white powder, as it was later determined and this phrase used by the court merely describes the bag. Nowhere does the court find that the officer at that time observed the contents of the plastic bag. The finding is clearly supported by the evidence.

Defendant contends further that the court's conclusions of law are erroneous and that the evidence establishes an illegal search and seizure. We disagree.

The court concluded that "the seizure was of materials in plain view after the officer removed the arm of Mr. Peck from his trousers." We agree that the plain view doctrine is applicable and that all the elements are present. "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. Harvey*, 281 N.C. 1, 11, 187 S.E. 2d 706, 713 (1972). The four elements of the "plain view doctrine" were enunciated by the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971). First, the officer must have had a prior justification for an intrusion. This element is interpreted to mean simply that the officer had legal justification to be at the

place where he sees evidence in plain view. *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979). There can be no serious question but that the officer's presence at the scene was lawful. He had been called to assist the security officer. The driver of the car was seated in the security officer's car. The officer had inquired whether the passenger had been checked. The security officer told the officer that he had not checked the passenger but that he appeared to be intoxicated. Whereupon the officer went to the passenger side of the car, opened the door, and began a conversation with the passenger. As Justice Brock noted in Thompson, supra, at 705, 252 S.E. 2d at 778, quoting from *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. 1972), "No one is protected by the Constitution against the mere approach of police officers in a public place." Here, the driver of the car in which defendant was a passenger was under arrest. Clearly, the officer was justified in going to the car to talk with the passenger. Defendant told the officer that he felt sick, and the officer suggested that defendant should get out of the car if he was going to "throw up". Defendant replied that he wasn't going to throw up, that he just didn't feel good. The officer had already observed that defendant's pupils were dilated, his eyes were red, there was mucous in the corner of his mouth, and he was "cotton mouthed". Defendant's condition would certainly indicate to any person possessing any knowledge of the use of contraband that defendant had recently used drugs. The officer squatted by the car and said, "Son, do you have any dope in here or on you?" Defendant's response was to lean back and stick his left hand down in the front of his pants. It was then that the officer grabbed his hand and jerked it out of his pants. When he took defendant's hand from his trousers, the officer saw the corner of a plastic bag. Given defendant's condition—dilated pupils, mucous in the corner of his mouth, and his "cotton mouthed" speech—and his actions, it is obvious that an experienced police officer would reasonably suspect that defendant was attempting to hide contraband. Additionally, the widespread use of plastic and glassine bags for the transportation of contraband is as well known to police officers as the use of fruit jars was for the transportation of illicit liquor.

The second element set out in *Coolidge*, inadvertent discovery, is not so clearly defined in *Coolidge*. We do not think

definition is needed here. Certainly, when the officer approached the defendant here he did not anticipate finding contraband.

The reason for the third requirement—that the evidence must be immediately apparent—is to prohibit a general exploratory search from one object to another until something is eventually found which may incriminate the defendant. "[T]he issue is not whether the object is contraband, but whether the discovery under the circumstances would warrant a man of reasonable caution in believing that an offense has been committed or is in the process of being committed, and that the object is incriminating to the accused." *State v. Wynn*, 45 N.C. App. 267, 270, 262 S.E. 2d 689, 692 (1980), citing *U.S. v. Truitt*, 521 F. 2d 1174 (6th Cir. 1975). Clearly, the circumstances here supported the officer's belief that defendant possessed contraband and that he was attempting to hide evidence which would incriminate him.

The fourth element enunciated in *Coolidge* is that the evidence must be in plain view. "Plain view does not require unobstructed sight, but only as much sight as is necessary to give a reasonable man the belief that there is evidence of criminal activity present." *State v. Wynn*, supra, at 270, 262 S.E. 2d at 692. When Officer Cruzan removed defendant's hand from his pants and saw the corner of a plastic bag, he would have been derelict in his duty had he not gotten defendant out of the car and obtained the plastic bag which was in plain view when he removed defendant's hand from his pants.

The trial court correctly denied defendant's motion to suppress and the judgment is

Affirmed.

Judge CLARK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I begin my analysis of this case with the conclusion that Officer Cruzan's accusatory question: ". . . [Do] you have dope in here or on you?" constituted a "seizure" invoking defendant's Fourth Amendment rights. *United States v. Mendenhall*, 446 U.S.

544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980). We may take judicial notice of the fact that Cruzan, a State Highway Patrolman, was in uniform and armed. The accusation directed by him at defendant was sufficient to give rise to a reasonable apprehension by defendant that he was at least being detained for investigation. Officer Cruzan's initial intrusion into defendant's privacy was justified only if Cruzan could reasonably suspect that criminal activity was afoot requiring an investigation of defendant's conduct. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968). *See also Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980); *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979); *State v. McZorn*, 288 N.C. 417, 219 S.E. 2d 201 (1975); *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). The dispositive question then is whether at the time he began his investigation, Cruzan had reasonable grounds to suspect that defendant was illegally in actual or constructive possession of a controlled substance, the crime for which he was arrested and indicted. At the time Cruzan accused defendant of possession, defendant had been sitting quietly in the car for twenty or thirty minutes, was physically ill, and showed symptoms of being either ill or under the influence of some drug or narcotic substance. I do not believe that defendant's statements that he was sick, combined with his physical appearance, gave rise to a reasonable suspicion that defendant illegally possessed a controlled substance, and therefore I would hold that the original intrusion of defendant's privacy rights was invalid. Cruzan's observation of the corner of the plastic bag flowed from this initial invalid intrusion. I cannot agree that Cruzan's right to be where he was, i.e., at the side of the stopped car, gave him the right to initiate a warrantless search for controlled substances.

I would hold that the incriminating evidence seized by Cruzan should have been suppressed and that defendant is therefore entitled to a new trial.

STATE OF NORTH CAROLINA v. THOMAS CARR

No. 8114SC336

(Filed 20 October 1981)

1. **Criminal Law § 111.1— references to indictment during remarks and charge to jury**

N.C.G.S. 15A-1221(b) does not prevent the judge from making references to the bill of indictment during remarks or the charge to the jurors. The statute proscribes the *reading* of the indictment to the prospective jurors or the jury.

2. **Criminal Law § 71— "large amount of money"—shorthand statement of fact**

A witness's testimony that the day after the robbery defendant had an unusual or large amount of money was admissible as a shorthand statement of fact derived from the witness's own experience and was relevant as a foundation for a series of questions concerning defendant's reaction to the witness's inquiry about the money.

3. **Conspiracy § 5.1; Criminal Law § 79— conspiracy—declaration of coconspirators**

A statement by one of the robbers that he was going to pick up defendant at the airport was competent as a statement of a coconspirator made in furtherance of the plan to commit the robbery even though defendant was not formally charged with criminal conspiracy.

4. **Jury § 9— replacement of juror with alternate**

There was no abuse of discretion in replacing a juror with an alternate juror upon an explained absence of the original juror.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 6 November 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 23 September 1981.

Defendant was tried and convicted on a lawful bill of indictment charging him with armed robbery.

The state's evidence indicated that on 19 January 1980 George Ferrell, assistant manager of Byrd's Low Mart in Durham, took a money bag from the store to a night deposit box at Planter's National Bank. The bag contained over $9,000. At the bank two men demanded the money bag. One man pointed a pistol at Ferrell; the other was armed with a rifle. Under this threat, Ferrell gave up the bag to the men, and one of them also took his wallet. Michael Anthony Brown testified that he was involved in the robbery, that defendant was one of the men who

robbed Ferrell, and that defendant was armed with a .32-caliber pistol. After the robbery, defendant split the money between the participants. Defendant was later arrested and identified as one of the robbers.

Attorney General Edmisten, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Loflin & Loflin, by Thomas F. Loflin, III, for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant first contends the court erred in reading a part of the bill of indictment to the jury, contrary to N.C.G.S. 15A-1221(b). This statute proscribes the *reading* of the bill of indictment to the prospective jurors or the jury. The record does not disclose that the trial judge read the bill to the jurors at any time. He made reference to the contents of the bill during his remarks to the jurors while they were being selected and during his charge. Defendant did not object to the remarks at jury selection and thereby waived any possible defect. Leaving aside the question of the constitutionality of N.C.G.S. 15A-1221(b), which has not been raised by the parties, we find that the court did not violate the statute, and the assignment of error is overruled. *State v. McNeil*, 47 N.C. App. 30, 266 S.E. 2d 824, *disc. rev. denied*, 301 N.C. 102 (1980), *cert. denied*, 101 S.Ct. 1356 (1981).

[2] Defendant makes several arguments concerning the evidence. The witness Lillian Best, defendant's girlfriend, testified that on the day after the robbery defendant had what seemed to her an unusual or large amount of money. On cross-examination the amount was stated to be $274. The witness's testimony was a shorthand statement of fact derived from her own experience. *See State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975), *death penalty vacated*, 428 U.S. 904 (1976); *Edwards v. Junior Order*, 220 N.C. 41, 16 S.E. 2d 466 (1941). Moreover, once the amount was before the jury, the witness's characterization was not prejudicial. The testimony was relevant as a foundation for a series of questions concerning defendant's reaction when confronted with the witness's inquiry about the source of the money. Defendant did not object to these questions or answers at trial. *See* 1

Stansbury's N.C. Evidence §§ 79 and 27 (Brandis rev. 1973). We find no error in this testimony.

[3] State's witness Brown testified that he was involved in the robbery along with defendant and several others. He, defendant and Paul Carter had planned the robbery at an earlier time. Defendant was living in California and flew into Durham the day of the robbery. Defendant objected to Brown testifying that Carter, one of the robbers, told him that he was going to the airport to pick up defendant. This testimony was competent as a statement of a coconspirator made in furtherance of the plan to commit the robbery. "When the State shows a *prima facie* conspiracy, the declarations of the coconspirators in furtherance of the common plan are competent against each of them. . . . *This is so even where the defendants are not formally charged with a criminal conspiracy.*" *State v. Covington*, 290 N.C. 313, 325-26, 226 S.E. 2d 629, 639 (1976) (citations omitted; emphasis added).

We find no prejudicial error in the testimony of Brown. His testimony concerning the plans to commit a robbery was competent. *State v. Gregory*, 37 N.C. App. 693, 247 S.E. 2d 19 (1978). While the trial judge may not have accurately summarized this testimony in his jury charge, it was immaterial as there was abundant evidence that the robbery was planned in December 1979 and January 1980. Defendant failed to call the mistake to the attention of the court. *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977). Brown also testified, over objection, that he was afraid of defendant and that during his incarceration in the Durham County jail he had experienced no difficulty in getting along with the prison personnel. This testimony was competent. Brown was testifying pursuant to an agreement with the state and this testimony was logically related to that agreement. Stansbury, *supra*, § 79. Moreover, defendant has failed to show any prejudice from the testimony. *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979).

Next, defendant contends the court committed prejudicial error by failing to caution the jury with appropriate instructions concerning their behavior during the trial, in violation of N.C.G.S. 15A-1236(a). The constitutionality of this statute has not been raised. Defendant failed to object at the times he contends the court was remiss in its duty to instruct the jury, nor did he request fur-

ther instructions. Under the holding in *State v. Turner*, 48 N.C. App. 606, 269 S.E. 2d 270 (1980), we find no prejudicial error.

[4] Apparently after the noon recess on the second day of the trial, juror O'Neil Reams was absent. The trial judge seated an alternate juror in place of Reams. The following entry is in the record:

> (The trial was recessed at 12:40 p.m., and reconvened at 2:30 p.m.)
>
> COURT: Upon the explained absence of the juror, O'Neil Reams, it is ordered that the alternate, Mr. Bennett, be substituted to take the place of that juror. Mr. Bennett, change your chair, please. Now have Mr. Brown come back. Now proceed.

Defendant did not object to this procedure, did not request additional findings, and did not move for mistrial, either then or at the conclusion of the trial. N.C.G.S. 15A-1215(a) does not require that specific findings be made by the court in seating an alternate juror. The statement by the court is sufficient for an appellate court to determine that the seating of the alternate juror was not an abuse of discretion. After a lunch recess of an hour and fifty minutes,[1] juror Reams failed to return. His absence was explained. At this point, in the absence of a motion by counsel, the trial judge was required to decide whether to enter a mistrial on his own motion or seat an alternate juror. He wisely exercised his discretion and chose to seat the alternate juror. No abuse of discretion is shown. The holding of the Supreme Court in *State v. Nelson* is appropriate:

> Defendants' contention that the excusal constituted prejudicial error requiring a mistrial is without merit. The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and defendant may receive a fair trial. . . . This discretionary power to regulate the composition of the jury continues beyond enpanelment. . . . It is within the trial court's discretion to excuse the juror and substitute an alternate at any time before final sub-

1. The recess was protracted as the trial judge was hearing another matter during this time period.

> mission of the case to the jury panel. G.S. 15A-1215. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error.

298 N.C. 573, 593, 260 S.E. 2d 629, 644 (1979) (citations omitted).

During defendant's cross-examination of the witness Brown, the court interrupted defendant's counsel and directed that he move his examination along. The witness had been asked if he was high on drugs on the date the robbery occurred. Defendant has failed to include the witness's answer in the record and has therefore failed to show prejudice. *State v. Little*, 286 N.C. 185, 209 S.E. 2d 749 (1974). Additionally, defendant had already examined the witness extensively concerning his use of drugs and the testimony indicated that the witness was high on rum and marijuana at the time of the robbery. The trial court's efforts to utilize court time economically will not ordinarily be held reversible error. *State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1951). We find no merit in the assignment of error.

Defendant's contention that the court erred in failing to give defendant's requested charge on circumstantial evidence is controlled by *State v. Hicks*, 229 N.C. 345, 347, 49 S.E. 2d 639, 640 (1948), where the Court held:

> It is a well settled principle in this jurisdiction that the duty imposed upon the trial court by G.S., 1-180, to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony where the State relies principally upon the direct evidence and the direct evidence is sufficient, if believed, to warrant the conviction of the accused.

The state relied principally upon the direct testimony of the witnesses Ferrell, Rudd, and Brown to establish its case. This testimony, if believed, would support the verdict of guilty. Also, defendant's requested written instruction, in the context of this case, was erroneous. On the other hand, the district attorney had the right, as did defendant's counsel, to argue the strengths and weaknesses of the circumstantial evidence offered at trial. N.C.

Gen. Stat. § 84-14 (1981); N.C. Gen. Stat. § 15A-1230(a) (1978). We find no prejudicial error.

Defendant contends the court erred in four respects in its jury instructions. We have examined each with care and find that the court's charge, viewed contextually, contains no prejudicial error. *State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970).

No error.

Judges MARTIN (Robert M.) and BECTON concur.

DARRELL G. HEMRIC, EMPLOYEE, PLAINTIFF v. REED AND PRINCE MANUFACTURING COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC84

(Filed 20 October 1981)

Master and Servant § 59— workers' compensation—injuries from shooting by co-worker's boyfriend—accident not arising out of employment

Injuries received by plaintiff at his place of employment when the boyfriend of a co-worker shot both plaintiff and the co-worker did not arise out of his employment where the assault resulted from the personal relationship between the co-worker and her boyfriend and was not created by or reasonably related to the employment, notwithstanding plaintiff was present in the office in which the shooting occurred because he had been instructed to keep a record of the co-worker's hours.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 25 September 1980. Heard in the Court of Appeals 2 September 1981.

In this proceeding plaintiff sought compensation for injuries he received at his place of employment when he was shot by the boyfriend of a co-worker. The parties stipulated that the provisions of the Workers' Compensation Act controlled the action, that an employer-employee relationship existed between the plaintiff and defendant-employer, that defendant insurance company was the carrier, and that plaintiff's average weekly wage was $192.31. Plaintiff appealed from the denial of benefits by the North Carolina Industrial Commission.

Defendant Reed and Prince Manufacturing Company is a Massachusetts-based corporation with a regional warehouse-office facility located in High Point, North Carolina. Mr. R. J. Smith was regional manager for defendant-employer and in charge of the operations in High Point. Plaintiff was employed as an inside sales and purchasing agent by defendant-employer. The High Point office had four other employees in addition to plaintiff, one of whom was Doris M. Hicks, an office secretary.

Hicks had a boyfriend named Jimmy Lee Williams. During the two years of her employment, Hicks talked freely with her co-workers about the volatile and sometimes violent nature of her relationship with Williams. On one occasion Williams assaulted Hicks while on the business premises. When Hicks tried to end her relationship with Williams, he began to threaten her and made harassing telephone calls to her during business hours at least five or six times a day. Hicks was afraid of Williams and carried a pistol in her pocketbook for protection. Several days before the shooting, Williams placed an obscene message about Hicks on the front door of the business. This incident was reported to the High Point Police and investigated by them. Several employees feared for their personal safety from Williams after this occurred.

After repeated complaints by other workers in the office that Hicks was not adequately performing her job because of her involvement with Williams, Smith decided to fire her. Another reason for this decision to terminate Hicks' employment was Smith's growing concern that Williams "was like a time-bomb" and might do some harm. Smith asked plaintiff to keep a record of Hicks' working hours so that he could use her tardiness as justification for firing her.

On the morning of 16 May 1978, plaintiff arrived at work at 8:05 a.m. It was his custom to go to the office and then go to the post office to pick up the mail for defendant-employer. However, since he was keeping a record of Hicks' working hours, plaintiff remained at his desk until Hicks' arrival at 8:25 a.m. Upon Hicks' arrival, Williams appeared from a place where he had been hiding and fired three rifle shots at Hicks, killing her. Before fleeing, he fired four shots at plaintiff, seriously injuring him. Williams was later convicted of murder and assault with a deadly weapon with intent to kill.

In a hearing before the Deputy Commissioner of the North Carolina Industrial Commission, on 12 April 1979, plaintiff's claim for benefits under the Workers' Compensation Act was allowed. The Deputy Commissioner found that defendant-employer's retention of Hicks as an employee increased the risk that other employees would be assaulted, and that plaintiff's injuries arose out of and in the course of his employment.

Upon appeal by defendant, the Full Industrial Commission set aside the award of benefits to plaintiff. It found that the assault on plaintiff was unrelated to his employment and did not arise out of the employment, and therefore denied plaintiff's claim. One Commissioner filed a dissenting opinion.

Plaintiff appealed the decision of the Full Commission to this Court.

Schoch, Schoch and Schoch by Arch Schoch, Jr. and Aaron N. Clinard for plaintiff appellant.

Hutchins & Tyndall by Richard Tyndall and Richard D. Ramsey for defendant appellees.

CLARK, Judge.

In an appeal from a decision by the Industrial Commission, the scope of review is limited to a determination of whether the Commission's findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings. In order to be compensable under the Workers' Compensation Act, an injury must result from an accident arising out of and in the course of employment. G.S. 97-2(6); *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *rehearing denied*, 300 N.C. 562 (1980). Whether the injury arose out of and in the course of employment is a mixed question of fact and law, and where there is evidence to support the Commission's findings, this Court is bound by them. *Barham v. Food World, supra; Hollar v. Furniture Co.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980).

This appeal presents only the question of whether plaintiff's injuries arose out of his employment with defendant-employer. The parties have stipulated that plaintiff's injuries resulted from

an accident within the meaning of the Workers' Compensation Act, and his injuries clearly occurred in the course of his employment.

In *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977), the Supreme Court stated that the test of whether an injury "arises out of" the employment is:

> "whether the injury is a natural and probable consequence of the nature of the employment. A contributing proximate cause of the injury must be a risk to which the employee is exposed because of the nature of the employment. This risk must be such that it 'might have been contemplated by a reasonable person familiar with the whole situation as incidental to the service when he entered the employment. The test "excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. . . ." ' *Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E. 2d 193, 195 (1973). In other words, the '"causative danger must be peculiar to the work and not common to the neighborhood. . . ." ' *Harden v. Furniture Co., supra*, [199 N.C. 733] at 735, 155 S.E. at 730."

Id. at 404, 233 S.E. 2d at 532-533.

The court in *Gallimore* relied on *Robbins v. Nicholson*, 281 N.C. 234, 188 S.E. 2d 350 (1972), where the facts are somewhat similar to the facts in the case *sub judice*. In *Robbins* the claimants were the survivors of two deceased employees of a grocery store. The estranged husband of one of the employees entered the store and shot his wife and a co-worker. The shootings had their origin in domestic problems. The husband was jealous, accused her of "running around" with her co-worker, and had gone to the store and threatened to kill them. He also threatened to kill her employer if he continued to employ her. The Court reversed the Commission award to the survivors, holding that to be compensable the injury must be caused by a risk which is reasonably related to and created by the employment, and since the origin of the shootings was in the domestic problems of the husband and wife and not in the employment, the claimants could not recover.

The plaintiff makes the argument that *Robbins* is distinguishable on the facts in that in the case before us the violent nature of the Hicks-Williams relationship was a continuing one and that the deceased was given the responsibility of keeping a time record of Hicks' work, which required the claimant to be present in the office at the time of the shooting. But we find these factors present also in *Robbins* where there was a continuing threat of death and the duties of the co-workers required their presence at the store with the intimidated employee. Further, in *Robbins* the risk of death or bodily injury to co-workers was greater in that the threat of death by the outsider included other co-workers and was not limited, as in the case *sub judice*, to a threat against the one worker involved in the personal relationship with the outsider.

The *Gallimore* and *Robbins* cases are authority for the principle of law that an injury is not compensable when it is inflicted in an assault upon an employee by an outsider as the result of a personal relationship between them, and the attack was not created by and not reasonably related to the employment. The assault must have had such a connection with the employment that it can be logically found that the nature of the employment created the risk of the attack. *See* 8 Strong's N.C. Index 3d *Master and Servant* § 59 (1977), and 82 Am. Jur. 2d, Workmen's Compensation § 329 (1976).

Plaintiff also argued that, had it not been for Smith's instructions to plaintiff that he keep a record of Hicks' hours, he would have been at the post office and not in the office at the time of the shooting. The shooting of plaintiff, and also the shootings of the employees in *Robbins v. Nicholson, supra*, occurred on the premises not because the victim was performing the duties of employment at the time of the assault, but merely because he was present on the premises. The serious injuries which plaintiff sustained were caused by the vicious and unreasoned criminal act of Williams, not by an accident arising out of plaintiff's employment.

Where the employee is injured in the course of employment by an outsider because of hate, jealousy, or revenge based on a personal relationship, the fact that the employer has knowledge of prior threats of death or bodily harm does not result in the injury's arising out of the employment. To allow compensation under such circumstances would have the practical effect of plac-

ing on the employer the duty of yielding to such threats of violence and terminating the employment of any worker so threatened. This would saddle the employer with a grossly unfair burden and the employee, in many cases, with an unjust job termination.

We find that the evidence was sufficient to support the Industrial Commission's findings of fact and that these findings support the Commission's denial of plaintiff's claim for Workers' Compensation benefits since plaintiff's injury did not arise out of his employment.

Affirmed.

Chief Judge MORRIS and Judge WELLS concur.

HAROLD E. LOWE v. JAMES L. BRADFORD AND WIFE, JOY S. BRADFORD

No. 8122SC71

(Filed 20 October 1981)

Easements § 8.4— obstruction and interference with use of easement—summary judgment improper

Where plaintiff forecast evidence which tended to show that defendants constructed a concrete driveway over and unpaved cul-de-sac in which they shared an easement with plaintiff and that the change in access "greatly impaired the fair market value of the plaintiff's lot," and defendants forecast evidence which tended to show the market value of plaintiff's lot was unchanged, it was error to grant summary judgment for defendants as there was a genuine issue of material fact presented by the forecasts of evidence.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Davis, Judge.* Order granting defendants' motion for summary judgment entered 15 October 1980 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 1 September 1981.

Plaintiff and defendants are adjoining lot owners in Sapona Subdivision in Davidson County. The recorded map reveals the lots are served by Indian Wells Circle, a paved street. Between the street and the lots is an unpaved half circle, or cul-de-sac,

over which both parties pass for ingress and egress from Indian Wells Circle to their lots. Defendants constructed a sixteen-foot wide concrete driveway from their lot across the cul-de-sac and in front of plaintiff's lot to Indian Wells Circle.

Plaintiff contends that his and defendants' lots were acquired with easements appurtenant in the above-described street and cul-de-sac, and that defendants' driveway restricts access to his lot so that plaintiff has no reasonable and adequate access to his property. Plaintiff seeks to enjoin defendants from obstructing or interfering with his use of his easement appurtenant in the cul-de-sac, and prays for damages. Defendants admitted construction of the concrete driveway across the portion of the cul-de-sac which adjoins defendants' lot, but contended that the cul-de-sac, and apparently the portion of the driveway therein, is dedicated to public use and therefore is for the equal use and benefit of both parties.

Defendants filed a motion for summary judgment with their answer, and plaintiff filed a motion for summary judgment thereafter. The trial judge concluded that there was no genuine issue of material fact and granted defendants' motion for summary judgment against plaintiff. Plaintiff appeals. We reverse the order of the trial judge granting defendants' motion for summary judgment and remand the case for trial.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, for plaintiff-appellant.

Ted S. Royster, Jr., for defendant-appellees.

HILL, Judge.

Summary judgment is proper where "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 any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the trial judge does not decide issues of fact but merely determines whether a genuine issue of fact exists. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). The affidavits filed in support of the parties' motions for summary judgment provide

forecasts of evidence upon which we base our review of the trial judge's decision that no genuine issue of material fact exists in this case.

Defendants' affidavits forecast evidence by local realtors which tends to show that the market value of plaintiff's lot was not damaged by the construction of defendants' driveway across the cul-de-sac. Plaintiff's affidavits forecast evidence which tends to show that the construction of defendants' driveway in front of plaintiff's lot "blocked reasonable and necessary access to the plaintiff's lot," and that the alleged change in plaintiff's access "greatly impaired the fair market value of the plaintiff's lot." We must examine these affidavits in light of Rule 56(e) of the North Carolina Rules of Civil Procedure which requires allegations of "specific facts showing that there is a genuine issue for trial." Thus, the question for our decision is whether the above-quoted forecasts of evidence are sufficient under Rule 56(e) to show a genuine issue of material fact. We hold that the forecasts are sufficient to withstand summary judgment.

"Generally, an owner in common in an easement cannot make alterations which will render the easement appreciably less convenient and useful to any one of the co-tenants." 25 Am. Jur. 2d Easements and Licenses § 88, p. 494. Although plaintiff has not spelled out in minute detail the changes in access to his lot made by the construction of the driveway, we find he has alleged facts to show that such construction in front of his lot has created a change in plaintiff's access thereto. Since the facts alleged in plaintiff's affidavit are within his personal knowledge and are admissible at trial, he has forecast evidence from which a jury may find that his use of the easement is "appreciably less convenient and useful."

We believe plaintiff has forecast a genuine issue of material fact as to the change in access and its attendant effect upon the value of plaintiff's lot. We therefore reverse the order of the trial judge granting defendants' motion for summary judgment and remand the case for trial.

Reversed and remanded.

Judge WHICHARD concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

Summary judgment must be granted, upon motion, "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 any party is entitled to a judgment as a matter of law." G.S. § 1A-1, Rule 56(c). *See also Oakley v. Little*, 49 N.C. App. 646, 272 S.E. 2d 370 (1980).

G.S. § 1A-1, Rule 56(e) in pertinent part provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

See also Econo-Travel Motor Hotel Corp. v. Taylor, 301 N.C. 200, 271 S.E. 2d 54 (1980).

The pleadings, affidavits, and exhibits submitted by the parties establish the following uncontroverted facts: (1) Defendants and plaintiff are owners of adjoining lots nos. 2 and 3, respectively, in Block N of Sapona Subdivision; (2) the parties acquired their respective lots subject to a permanent easement appurtenant, dedicated by the subdivision developer, in the paved street known as Indian Wells Circle and in the common access area between the paved street and their lots known as the "cul-de-sac"; (3) Lots 2, 3, and 4 of Block N, Sapona Subdivision are the only lots adjoining the cul-de-sac; (4) defendants' lot lies partially between plaintiff's lot and Indian Wells Circle; (5) defendants have constructed a concrete driveway over the cul-de-sac from their lot to the paved surface of Indian Wells Circle; and (6) plaintiff's only access to Indian Wells Circle is by crossing the cul-de-sac.

Generally, owners in common in an easement cannot make alterations which will render the easement appreciably less convenient and useful to any of the co-owners. 25 Am. Jur. 2d Easements and Licenses § 88; 28 C.J.S. Easements § 95. Also, one of several owners in common of an easement must not obstruct

the easement so as to interfere with its free use by the other owners. 28 C.J.S. Easements § 96.

When the foregoing uncontroverted facts are considered in connection with the foregoing principles of law, the question raised by this appeal is whether there is any evidence in this record that defendants' construction of a concrete driveway over the cul-de-sac interferes with plaintiff's use of the cul-de-sac. Defendants' evidence in support of their motion for summary judgment is to the effect that plaintiff can use the driveway just as defendants can and thus the concrete driveway does not interfere with plaintiff's right of access to Indian Wells Circle. In opposition to defendants' motion, plaintiff filed affidavits which merely reiterate the allegations of his unverified complaint and establish the location of the cul-de-sac easement. In his own affidavit, plaintiff states only that the concrete driveway exists and that it interferes with his use of the cul-de-sac area. The record before us contains no evidence that shows in what manner the concrete driveway interferes with plaintiff's use of the cul-de-sac to gain access to Indian Wells Circle. Indeed, it appears from the record that plaintiff's access to Indian Wells Circle over the concrete surface constructed by defendant would be better than that over the unpaved portions of the cul-de-sac. Plaintiff's evidence in opposition to defendants' motion is devoid of any allegations or evidence of *specific* facts as to how the concrete driveway constructed by defendants interferes with plaintiff's use of the easement.

In my opinion the record discloses no genuine issue of material fact and summary judgment for defendants was appropriate.

I vote to affirm.

WILLIE GODLEY, EMPLOYEE-PLAINTIFF v. COUNTY OF PITT AND/OR TOWN OF WINTERVILLE, EMPLOYER, U. S. FIRE INSURANCE AND/OR GREAT AMERICAN INSURANCE, CARRIER, DEFENDANTS

No. 8110IC141

(Filed 20 October 1981)

1. **Estoppel § 4.6— workers' compensation—application of equitable estoppel improper—no evidence of detrimental reliance**

It was error to conclude the county and its insurance carrier was estopped from asserting the lack of an employment relationship between it and the plaintiff where plaintiff, a CETA employee, was paid and insured by the county but did not work for and at the direction of the town. The essential element of detrimental reliance by the party seeking estoppel was missing as there was no evidence the town or its insurer altered its position in reliance of the fact the county's insurer accepted premiums on behalf of the plaintiff.

2. **Master and Servant § 53— workers' compensation—findings insufficient to support employment by county**

The findings of fact did not support the Commission's conclusion that plaintiff was an employee of the county at the time of his injury even though he was hired, paid and insured by the county pursuant to conditions imposed by the federal government for receipt of CETA funds where the town alone controlled plaintiff's work schedules, duties and work environment, and it alone benefited from his services.

APPEAL by defendants Pitt County and U. S. Fire Insurance Company from the North Carolina Industrial Commission. Opinion and award filed 14 November 1980. Heard in the Court of Appeals 15 September 1981.

This case arises under the Workers' Compensation Act, G.S. 97-1 *et seq.*, from injuries suffered by the plaintiff in an admittedly compensable, work-related accident on 10 January 1979. At issue before the Commission was a dispute as to which of two alleged employers of the plaintiff was in fact his employer and therefore obligated to compensate the plaintiff for his injuries.

The defendants agreed, pending the outcome of this action, that appellant insurer, carrier for Pitt County, would compensate the plaintiff fully and that appellee insurer, carrier for the Town of Winterville, would reimburse appellant if plaintiff were found to have been the town's employee at the time of the accident.

The facts are not disputed by the parties.

Defendant Pitt County (County) hired plaintiff pursuant to a contract with the Community Employment Training (CETA) program of the federal government and assigned him to work for defendant Town of Winterville (Town). Plaintiff's work was supervised by Town employees and his duties and hours were determined by the Town. Time sheets were kept by the Town on which plaintiff's hours were recorded and these were turned over to the County. County paid the plaintiff from CETA funds and maintained his payroll records. Town kept no records on the plaintiff other than his time sheets and could not fire the plaintiff without the County's approval.

Pursuant to a condition imposed by the federal government for receipt of CETA funds, County paid workers' compensation insurance premiums covering plaintiff and other CETA employees. County was reimbursed by CETA for these expenditures. Town did not pay premiums to its insurance carrier with respect to plaintiff.

The hearing officer found that the County and its insurance carrier were estopped to deny that the County was plaintiff's employer since the County had paid insurance premiums based on inclusion of the plaintiff under its workers' compensation policy and its insurer had accepted these premiums. In apparent reliance upon this finding, the Commission held as a matter of law that the County was plaintiff's employer and was obligated to compensate plaintiff for his injuries. On appeal, the Full Commission affirmed. Defendants Pitt County and U. S. Fire Insurance Company appeal.

Young, Moore, Henderson & Alvis, by B. T. Henderson II and William T. Lipscomb, for defendant appellants.

Teague, Campbell, Conely & Dennis, by George W. Dennis, III, and Jeffery L. Jenkins, for defendant appellees.

ARNOLD, Judge.

Two assignments of error are brought forth on appeal.

I.

[1] Defendant County first contends that the Industrial Commission erred in concluding that the County and its insurance carrier

are estopped from asserting that no employment relationship existed between the plaintiff and the County. We agree. Application of the principles of equitable estoppel was improper on the facts of this case.

We recognize that it is well established law in North Carolina that principles of estoppel are applicable to workers' compensation cases. *Aldridge v. Motor Co.*, 262 N.C. 248, 251, 136 S.E. 2d 591 (1964). Furthermore, as the defendant Town correctly points out, acceptance of premium payments by a compensation insurer has been held sufficient to subject the insurer to liability on equitable grounds even where the claimant was not properly includable under the terms of the policy. *Aldridge v. Motor Co., supra; Britt v. Colony Construction Co.*, 35 N.C. App. 23, 240 S.E. 2d 479 (1978). However, in each case cited by the Town, an element essential to equitable estoppel, that of detrimental reliance by the party seeking estoppel, has been met. *See* 5 Strong's N.C. Index 3d, *Estoppel* § 4.6 (1977). These cases are, in this respect, distinguishable from the case at bar. While it is true that the County's insurer accepted premiums on behalf of the plaintiff, there is no evidence in the record to indicate that the Town or its insurer appreciably altered its position in reliance upon this fact. The only reliance asserted by the Town is its own failure to pay insurance premiums specifically on behalf of the plaintiff. We are not persuaded that this omission constitutes detrimental reliance. The Town's insurer has conceded liability in the event that plaintiff is found to have been an employee of the Town and has made no claim that the policy would have been altered or cancelled had it been known that plaintiff was a covered individual. Although failure to collect premiums for covered individuals does not relieve an insurer of liability, the insurer can, of course, recover unpaid premiums upon discovery of the error. *Williams v. Ornamental Stone Co.*, 232 N.C. 88, 59 S.E. 2d 193 (1950).

We find no evidence in the record of an act or omission detrimental to either of the parties seeking estoppel which justifies imposition of this equitable remedy. *See Bourne v. Lay and Co.*, 264 N.C. 33, 140 S.E. 2d 769 (1965).

II.

[2] Defendant's second argument is that the Commission erred in concluding that plaintiff was an employee of Pitt County. It is

clear that in workers' compensation cases, as the North Carolina Supreme Court has succinctly held, "the test is this: For whom was the plaintiff working as an employee at the time of the accident?" *Suggs v. Truck Lines*, 253 N.C. 148, 155, 116 S.E. 2d 359 (1960).

In answering this question, we find this Court's holding in *Forgay v. State University*, 1 N.C. App. 320, 161 S.E. 2d 602 (1968), to be directly on point. In Forgay, the employee claimant was hired under a federal program (Plan Assuring College Education or "PACE") which, like the CETA program here, involved payment of the employee by one government entity (N. C. State University) for work performed by the employee for another (the Town of Madison). In that case, this Court held unequivocally that payment of the employee's salary and maintenance of his payroll records by the University were not sufficient evidence, standing alone, to support a finding that an employment relationship existed. In *Forgay* it was the town, not the university, which assigned duties and hours of work to the claimant, and it was the town which received the value of his services. The same is true of the Town in the case at bar.

In the present case it is true that the County had slightly greater authority over the employee than did the university in *Forgay*. However, we find that the County's added power to assign and dismiss CETA workers, and its payment of compensation insurance premiums as required by the CETA program, are insufficient as a matter of law to distinguish this case from *Forgay*. Here the Town alone controlled the plaintiff's work schedule, duties, and work environment. The Town alone benefited from his services. These are the factors to which the Commission should have given weight, absent a showing of detrimental reliance, in determining whether the Town or County was the plaintiff's employer.

We agree with the County that the Commission's findings of fact are insufficient to support its conclusion of law that an employment relationship existed between the plaintiff and the County at the time of the plaintiff's injuries.

Reversed.

Judges VAUGHN and WEBB concur.

Cox v. Haworth and Cox v. Haworth

ALFRED W. COX v. CHESTER C. HAWORTH, JR., M.D., AND HIGH POINT MEMORIAL HOSPITAL, INC.

AVIS HELEN COX v. CHESTER C. HAWORTH, JR., M.D., AND HIGH POINT MEMORIAL HOSPITAL, INC.

No. 8118SC192

(Filed 20 October 1981)

1. **Hospitals § 3.3— respondeat superior—failure to prove physician agent of hospital**

Where a hospital denied that defendant physician was an employee of the hospital and supported the denial with affidavits tending to prove the physician was not an employee of the hospital, the hospital was entitled to summary judgment on the issue of liability based upon *respondeat superior* because plaintiffs merely rested upon the allegations in their pleadings without offering competent evidence to show the physician was an agent of the hospital.

2. **Hospitals § 3.3— corporate negligence—no duty of hospital to inform patient of risks of procedure**

Any liability imputed to a hospital under the theory of corporate negligence would have to flow from acts or omissions which were a part of the function it performed in the procedure plaintiff underwent. The doctrine does not impose a duty upon a hospital to properly inform and advise a patient of the nature of a medical procedure to be performed on him when the patient is admitted to the hospital for an operation under the care of his privately retained physician.

APPEALS by plaintiffs from *Collier, Judge.* Judgment entered 13 January 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 23 September 1981.

Plaintiff Alfred Cox appeals from summary judgment granted to defendant High Point Memorial Hospital (Hospital) in his medical malpractice case (80CVS3503). Mr. Cox was admitted to the Hospital so that Dr. Chester C. Haworth, Jr., his privately retained physician, could perform a medical procedure known as a myelogram on him. During the myelogram, Dr. Haworth was assisted by Hospital personnel, he used Hospital facilities and he administered drugs to Mr. Cox which were provided to him by the Hospital upon his request. Mr. Cox alleges that because Dr. Haworth failed to remove all of the pantopaque dye that had been injected into his spinal canal during the myelogram, he suffered severe and incapacitating pain and spinal cord arachroiditis (scar-

ring of the spinal cord).[1] Mr. Cox contends that the Hospital is liable to him for the injuries he sustained under the theories of *respondeat superior*, corporate negligence, and battery.

In 80CVS5049, plaintiff Avis Helen Cox, the wife of Alfred Cox, sued the Hospital on the same theories as did her husband, but alleged damages due to the "loss of her husband's general companionship and conjugal society. . . ."

The issues in these two cases on appeal are the same. We, therefore, treat the two cases as one.

Barefoot & White, by Spencer W. White, for plaintiff appellants.

Nichols, Caffrey, Hill, Evans & Murrelle, by G. Marlin Evans, for defendant appellee.

BECTON, Judge.

The Coxes argue that the trial court improperly granted summary judgment to the Hospital because (1) Dr. Haworth, their privately retained physician, was an agent of the Hospital; and (2) the Hospital was liable to them under both corporate negligence and battery theories since the Hospital was under a duty to, but never did, obtain Mr. Cox's informed consent before Dr. Hawroth performed the myelogram. We reject these arguments.

We note initially that on a motion for summary judgment the moving party has the burden of proving that there are no issues of material fact; all "papers" will be viewed in a light most favorable to the non-movant. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974); G.S. 1A-1, Rule 56(c).

> If a party moving for summary judgment presents, by affidavits or otherwise, materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavits or otherwise, that show there is a triable issue of material fact.

1. "[X]-rays reveal scar tissue on the lower seven or eight inches of plaintiff's spinal cord. . . ." Complaint, page 7.

Askew's, Inc. v. Cherry, 11 N.C. App. 369, 372, 181 S.E. 2d 201, 203 (1971) (citations omitted).

I

[1] We address the *respondeat superior* issue first. The Coxes alleged in their Complaints that Dr. Haworth was an employee of the Hospital engaged in the regular scope of his employment during the time he performed the myelogram. The Hospital not only denied that allegation in its Answer, but also filed affidavits showing that Dr. Haworth was not an employee of the Hospital at the time the myelogram was performed. The Coxes did not respond to the Hospital's affidavits with counter affidavits or other proof as required by our Rules of Civil Procedure. G.S. 1A-1, Rule 56(e).

Rule 56(e) provides for the filing of "[s]upporting and opposing affidavits" in summary judgment proceedings and states, in relevant part, that:

> The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

G.S. 1A-1, Rule 56(e). *See Pitts v. Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978).

The Hospital, having filed affidavits to support its motion for summary judgment, was entitled to summary judgment on the issue of liability based on *respondeat superior* because the Coxes did not offer competent evidence to show that Dr. Haworth was an agent of the Hospital. They chose instead to "rest upon the mere allegations" in their pleadings. This, they are not allowed to do.

II

[2] We also find that the Hospital was entitled to summary judgment on the issue of corporate negligence. Under the doctrine of

corporate negligence, a hospital is liable for acts which constitute a breach of a duty owed directly to a patient. *Bost v. Riley*, 44 N.C. App. 638, 645, 262 S.E. 2d 391, 395, *disc. rev. denied* 300 N.C. 194, 269 S.E. 2d 621 (1980). We are urged to extend the doctrine to impose a duty upon a hospital to properly inform and advise a patient of the nature of a medical procedure to be performed on him when the patient is admitted to the hospital for an operation under the care of his privately retained physician. We decline to do so.

Judge Wells, in *Bost v. Riley*, very aptly summarized the law of corporate negligence as applied to hospitals in this State. He stated:

> In contrast to the vicarious nature of *respondeat superior*, the doctrine of "corporate negligence" involves the violation of a duty owed *directly* by the hospital to the patient. Prior to modern times, a hospital undertook, "only to furnish room, food, facilities for operation, and attendants, and [was held] not liable for damages resulting from the negligence of a physician in the absence of evidence of agency, or other facts upon which the principle of *respondeat superior* [could have been] supplied." *Smith v. Duke University*, 219 N.C. 628, 634, 14 S.E. 2d 643, 647 (1941). In contrast, today's hospitals regulate their medical staffs to a much greater degree and play a much more active role in furnishing patients medical treatment. [Emphasis in original.]

44 N.C. App. at 645, 262 S.E. 2d at 395. *See also Rabon v. Hospital*, 269 N.C. 1, 152 S.E. 2d 485 (1967) in which our Supreme Court, while abolishing the doctrine of charitable immunity formerly available to charitable hospitals, acknowledged this "changed structure of the modern hospital." 44 N.C. App. at 645, 262 S.E. 2d at 395. With this "changed structure" comes a corresponding duty. As stated in *Bost*,

> [w]hile the doctrine of corporate negligence has never previously been either expressly adopted or rejected by the courts of our State, it has been implicitly accepted and applied in a number of decisions. The Supreme Court has intimated that a hospital may have the duty to make a reasonable inspection of equipment it uses in the treatment of patients and remedy any defects discoverable by such in-

spection. *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159 (1965). The institution must provide equipment reasonably suited for the use intended. *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976). The hospital has the duty not to obey instructions of a physician which are obviously negligent or dangerous. *Byrd v. Hospital*, 202 N.C. 337, 162 S.E. 738 (1932). We have suggested that a hospital could be found negligent for its failure to promulgate adequate safety rules relating to the handling, storage and administering of medications, *Habuda v. Hospital*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968), or for its failure to adequately investigate the credentials of a physician selected to practice at the facility, *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978).

44 N.C. App. at 647, 262 S.E. 2d at 396.

In the case before us, the Coxes allege only that the Hospital was negligent in not obtaining the informed consent of Mr. Cox before the medical procedure was performed. They do not allege negligence by the Hospital in the selection or referral of the physician they privately retained. They do not allege negligence by the Hospital in the performance of the myelogram, in the operation of machinery or equipment during the myelogram, in the staffing of the support personnel who assisted during and after the myelogram, or in the administration of drugs to Mr. Cox. Further, the Complaint contains no allegations of negligence by the Hospital personnel during the myelogram.

We do not read *Bost* or the cases cited therein to impose a duty on the Hospital to obtain the informed consent of Mr. Cox under the facts of this case. The role of the Hospital in the entire procedure was to provide facilities and support personnel for Dr. Haworth. Any liability imputed to the Hospital would have to flow from acts or omissions which were a part of the function it performed in the myelogram.

This Court has held that if circumstances warrant, a physician has a duty to warn a patient of consequences of a medical procedure. *Brigham v. Hicks*, 44 N.C. App. 152, 260 S.E. 2d 435 (1979). The physician in this case was Mr. Cox's own privately retained physician. Any duty to inform Mr. Cox of the risks of the procedures would have been on the privately retained physician,

not on the Hospital or its personnel. Consequently, we find that the Hospital had no duty to inform Mr. Cox of the risks and procedures to be used in the administration of the myelogram or to secure his informed consent when Mr. Cox hired his private physician to perform the myelogram.

We recognize that our courts have held that it is only in exceptional negligence cases that summary judgment should be granted since the prudent man rule and other applicable standards of care must be applied and since these standards should be applied by a jury. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Smithers v. Collins*, 52 N.C. App. 255, 278 S.E. 2d 286 (1981). However, summary judgment is appropriate in negligence cases in which it appears the plaintiff cannot recover even if the facts as claimed by him are accepted as true. *Whitaker v. Blackburn*, 47 N.C. App. 144, 266 S.E. 2d 763 (1980). Since we find no duty on the part of the Hospital to advise Mr. Cox of the risk involved in the myelogram and no duty to obtain his consent, the Coxes could not recover under the facts of this case, and summary judgment was properly granted.

III

Since we find no duty on the part of the Hospital to obtain Mr. Cox's consent, we summarily dismiss the Coxes' argument that the Hospital was liable under a battery theory.

For the foregoing reasons, the judgments in Mr. Cox's case (80CVS3503) and in Mrs. Cox's case (80CVS5049) are

Affirmed.

Judge MARTIN (Robert M.) and Judge MARTIN (Harry C.) concur.

JOHN ARTHUR DOUGLAS, RITA LYNN DOUGLAS & RICHARD G. DOUGLAS, BY THEIR GUARDIAN AD LITEM, NAOMI DOUGLAS v. NATIONWIDE MUTUAL INSURANCE COMPANY AND ALICE L. GRIFFIN BY HER GUARDIAN AD LITEM, ALICE DOUGLAS GRIFFIN v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 8120DC230

(Filed 20 October 1981)

Insurance § 87.2— automobile insurance—medical payments—permission to use vehicle—innocent mistake as to identity

Permission to drive an insured automobile given under an innocent mistake as to the identity of the person to whom permission is given is effective so as to require coverage under the medical payments provision of an automobile insurance policy.

APPEAL by defendant from *Huffman, Judge.* Judgment entered 16 October 1980 in District Court, Richmond County. Heard in the Court of Appeals 13 October 1981.

The appeal is from a judgment awarding plaintiffs medical expenses under a family automobile and comprehensive liability policy.

On 17 June 1979, Coy Douglas, Jr., and his wife, Minnie Stanford Douglas, were the owners of a 1975 Buick automobile covered by Family Automobile and Comprehensive Liability Insurance issued by defendant. That morning, Minnie Douglas left home for Rockingham. Before leaving, she told her husband that she had left the keys to the Buick in the ignition. She expected Douglas' brother, Lee, to borrow the car to drive his mother to church.

Between 10:00 and 11:00 a.m., Coy Douglas heard a voice outside his bedroom window. The unidentified speaker asked if he could use the Douglas car. Thinking that the speaker was his brother, Douglas granted permission. He placed no restriction on the use of his car.

That afternoon, the Buick was involved in a one-car accident. Robert Junior Griffin, the unlicensed driver, died as a result of the injuries he sustained. Griffin was the brother-in-law of Coy Douglas. He lived about 100 yards from Douglas. Plaintiffs were passengers in the automobile. Each sustained injuries resulting in

medical expenses. They attempted to recover under the medical payments coverage provision of the automobile insurance policy.

At the close of plaintiffs' evidence and again at the close of all the evidence, defendant moved for a directed verdict. The motions were denied. The court submitted to the jury the issue of whether Robert Junior Griffin at the time of the collision was driving the insured automobile with the permission of Coy Douglas, Jr. Based on the jury's affirmative finding, the court ordered defendant to pay $2,000.00 to plaintiff John Arthur Douglas, $154.50 to plaintiff Rita Lynn Douglas, and $270.00 to plaintiff Richard G. Douglas.

Leath, Bynum, Kitchin and Neal, by Fred W. Bynum, Jr., for plaintiff appellees.

Taylor and Bower, by George C. Bower, Jr., for defendant appellant.

VAUGHN, Judge.

The issue presented is whether permission given under an innocent mistake as to identity is effective so as to require coverage under the medical liability provision of this automobile insurance policy. We hold that on these facts permission is effective.

An omnibus clause, such as that in the medical liability provision of the present insurance policy, protects persons other than the named insured. Under the clause of this policy, passengers injured while occupying the insured car can recover up to $2,000.00 medical expenses if the driver of the insured car had permission from the named insured to operate the vehicle. The permission required by an omnibus clause may be either express or implied. 7 Blashfield Automobile Law § 315.10 (3rd ed. 1966). It must originate, however, in the language or conduct of the named insured. *Keeler v. Allstate Insurance Co.*, 261 S.C. 151, 198 S.E. 2d 793 (1973).

In the cause at bar, the policy was listed in the name of Minnie Stanford Douglas. "Named insured" is further defined in the policy to include the spouse if a resident of the same household. At the time of the accident, Minnie Stanford Douglas and Coy Douglas, Jr., were living as husband and wife in the same

household. Coy Douglas, Jr., therefore, also had authority to give permission to a third party to use the automobile and coverage would exist. The question is whether the language or conduct of Coy Douglas sufficiently constituted "permission" to Robert Junior Griffin.

At the outset, we note that extended coverage clauses are usually construed in the broadest sense. 7 Blashfield Automobile Law § 315.10 (3rd ed. 1966). The fact, therefore, that Robert Griffin did not have a driver's license and could not legally drive a car does not affect the permission granted. 12 Couch on Insurance 2d § 45.347 (2d ed. 1964). *See Lane v. Surety Co.*, 48 N.C. App. 634, 269 S.E. 2d 711 (1980). Defendant argues that what is decisive is that Coy Douglas was mistaken as to the identity of the person with whom he was speaking. Defendant contends that permission given under such a mistake of fact is ineffective.

Since "permission" is not defined by the policy, analogy to contract and tort principles is beneficial. Under North Carolina contract law, unilateral mistake without fraud, undue influence, or other oppression is insufficient to avoid a contract. *Gill v. Seaboard Air Line R. Co.*, 208 F. 2d 7 (4th Cir. 1953). In the present case, there is no evidence that Douglas' mistake was due to any misrepresentation by Robert Griffin. Griffin asked if he could borrow the car and Douglas said "Okay." Douglas never questioned the speaker as to his identity nor looked outside his bedroom window. The situation is similar to one's signing an instrument in ignorance of its contents although the ability and opportunity to read the instrument are present. *Davis v. Davis*, 256 N.C. 468, 124 S.E. 2d 130 (1962). In neither instance under contract law does ignorance constitute relief from liability.

Applying tort law, Douglas' permission is also effective. If plaintiff manifests consent to defendant's actions under a mistake as to the actions' nature, the consent is still effective unless the defendant was aware of plaintiff's mistake and took advantage of it. Restatement (Second) of Torts § 892B (1979). There was no reason in the present case for Robert Griffin to believe Douglas' permission was to someone other than himself. Douglas expressly told Griffin he could drive the car. He did not place any restrictions on the car's use.

Where a policy provision is susceptible of two interpretations, one which imposes liability upon the company and the other which does not, North Carolina courts have construed the provision in favor of coverage. *See, e.g., Wright v. Casualty Co. and Wright v. Insurance Co.*, 270 N.C. 577, 155 S.E. 2d 100 (1967); *Bank v. Insurance Co.*, 49 N.C. App. 365, 271 S.E. 2d 528 (1980). We, therefore, hold that the essential permission required under the medical payments coverage of this policy is permission to the driving of the insured vehicle by the person to whom that permission is given. Since ultimate control over the automobile remains with the named insured, a mistake as to the identity of the permitted person which is not caused by that person's representations will not negate the consent given.

In the case at bar, there was sufficient evidence from which a jury could find Robert Junior Griffin was the speaker outside the Douglas window and that he received permission from Douglas to operate the insured automobile. The court, therefore, properly denied defendant's motions for a directed verdict. We also find no error in the court's instructions to the jury. The judgment is affirmed.

Affirmed.

Judges HILL and WHICHARD concur.

CLARENCE WILLIAM ANDERSON, EMPLOYEE v. A. M. SMYRE MANUFACTURING COMPANY, EMPLOYER, AND LUMBERMENS MUTUAL INSURANCE COMPANY, CARRIER

No. 8110IC220

(Filed 20 October 1981)

1. Master and Servant § 96.5— workers' compensation—scope of appellate court's review

The appellate court's review in a workers' compensation proceeding is simply to determine whether the Industrial Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings.

2. Master and Servant § 68— occupational disease—evidence supporting total disability

Evidence that plaintiff, age 58, had a fifth grade education and had no training to do any work other than textile work; that prior to his employment in textile mills, plaintiff had no lung disease or breathing difficulties; that during his employment he developed respiratory problems; that plaintiff was diagnosed as having byssinosis; and that he was 50% to 70% disabled for impairment and totally disabled to perform his former textile employment was evidence supporting the Commission's findings and conclusion that plaintiff is totally disabled from an occupational disease.

APPEAL by defendants from North Carolina Industrial Commission. Opinion and award filed 17 October 1980. Heard in the Court of Appeals 25 September 1981.

In this appeal from the North Carolina Industrial Commission's (Commission) award of benefits to a 58-year-old byssinosis claimant, the sole issue is whether the evidence supports the Commission's findings and conclusions.

In an opinion and award entered 12 December 1979, Deputy Commissioner Christine Denson found and concluded that plaintiff had contracted byssinosis as a result of employment with A. M. Smyre Manufacturing Company (defendant) and that plaintiff was *totally* disabled as a result of byssinosis. From an award of benefits, defendant appealed to the Commission. The Commission adopted as its own the decision of Deputy Commissioner Denson and affirmed the award of benefits. Defendant appeals contending that the Commission erred in finding and concluding that plaintiff was totally and permanently disabled.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Richard T. Feerick, for defendant appellants.

Fredrick R. Stann for plaintiff appellee.

BECTON, Judge.

Defendant argues that compensation may be awarded only to the extent that a disability results from an occupational disease and that since there is evidence that plaintiff could work at some occupation, compensation (a) should have been apportioned, or (b) should have been based on the loss or injury to an organ (lungs)—i.e., on the percentage of predicted lung function loss.

Considering the scope of appellate review of an award made by the Commission and the facts in this case, we are, as was the Commission, persuaded that the award of benefits to the plaintiff should be affirmed.

SCOPE OF REVIEW

[1] The Commission's award is conclusive and binding on us as to all questions of fact. Our review is simply to determine whether the Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. *See Barham v. Food World,* 300 N.C. 329, 266 S.E. 2d 676 (1980); *Walston v. Burlington Industries,* 49 N.C. App. 301, 271 S.E. 2d 516 (1980).

FACTS

Plaintiff worked in card rooms of cotton mills from 1923 or 1924 until 1978. Card rooms are considered high risk areas for contracting byssinosis.[1] Plaintiff began working for defendant in November, 1977, but was forced to retire in May 1978 because of respiratory difficulties. Plaintiff had first experienced breathing difficulties about ten years before he began working for defendant, and at a time when he was working at Groove Thread, another cotton mill. As pointed out by the plaintiff in his brief, evidence was also offered at the hearing that: (1) plaintiff, age 58, has a fifth grade education; (2) prior to his employment in cotton textile mills, plaintiff had no lung disease or breathing difficulties; (3) plaintiff had a light smoking history[2]; (4) during his employment, plaintiff developed respiratory symptoms of shortness of breath, chest tightness, and a cough with sputum production; (5) Dr. Fred T. Owens, Jr., a medical expert in the field of lung disease, who serves on a panel of pulmonary specialists, examined

1. Dr. Cates testified: "I would consider a card room to be what is called a highest [sic] risk area for someone to have byssinosis." Dr. Owens testified: "A card room is a higher risk [area] than other areas but all areas are a risk for byssinosis."

2. While there appears to be a hearsay problem in Dr. Cates' testimony indicating that another doctor took a medical history (which was not part of plaintiff's medical records) suggesting that plaintiff smoked two to three packs of cigarettes daily over a 40-year period, the Commission was free to accept as a fact the medical history taken by Dr. Owens that plaintiff smoked approximately ⅓ to ½ pack of cigarettes per day over a seven-year period.

the plaintiff and disgnosed his occupational disease as byssinosis; (6) plaintiff's last injurious exposure to the hazards of cotton dust was at his employment with defendant; (7) plaintiff had not done, and had no training to do, any work other than textile work; (8) Dr. Owens opined that "six months exposure, at the end of [plaintiff's cotton mill] career, would constitute injurious exposure;" and (9) Dr. Owens considers the plaintiff to be 50% to 70% disabled using the AMA criteria for impairment and totally disabled to perform his former textile employment.[3]

LAW

[2] The controlling statute is G.S. 97-53(13) which deems an occupational disease to be:

> Any disease, . . . which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

This statute, then, does not require the conditions of employment to be the exclusive cause of the disease. Indeed, our Supreme Court in *Booker v. Medical Center*, 297 N.C. 458, 472, 256 S.E. 2d 189, 198 (1979) said: "[a] disease is 'characteristic' of a profession when there is a recognizable link between the nature of the job and an increased risk of contracting the disease in question." *See also Humphries v. Cone Mills*, 52 N.C. App. 612, 279 S.E. 2d 56 (1981). As recently stated by our Supreme Court in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), to be entitled to an award for disablement resulting from an occupational disease covered by G.S. 97-53(13), a claimant must establish:

3. Dr. Owens testified: I stated that I believe that Mr. Anderson is significantly impaired, 50% to 70% impaired, relative to a person of his peers and objective date of the pulmonary function studies indicate, with a FEV of less than 55% of predicted, he would have difficulty with his daily activities as mentioned above, climbing steps, et cetera.

In my opinion, Mr. Anderson should never be exposed again to any sort of dust, particularly cotton dust. With his degree of breathing impairment I believe that he could not perform physically his previous job even if it was dust free. Mr. Anderson would not be able to perform any significant manual labor. He may be able to perform a sedentary type occupation. . . . [H]e would be completely disabled from performing [his former employment] because he has byssinosis in my opinion.

> (1) that [his] disablement *results from an occupational disease* encompassed by G.S. 97-53(13), *i.e.*, an occupational disease due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment as distinguished from an ordinary disease of life to which the general public is equally exposed outside of the employment; and (2) the extent of the disablement *resulting from* said occupational disease, *i.e.*, whether [he] is totally or partially disabled *as a result of the disease.*

304 N.C. at 12, 282 S.E. 2d at 466-67. (Emphasis in original.) The claimant is entitled to compensation for total disability if the disablement resulting from the occupational disease is total.

In the case *sub judice* there is expert medical testimony that plaintiff's six months exposure to the hazards of cotton dust at defendant's plant was injurious and that plaintiff was permanently and totally disabled as a result of byssinosis. The Commission's findings and conclusions are supported by the evidence and are binding on us.

Moreover, in further response to defendant's contention that *plaintiff was not totally disabled*—i.e., "he could work in some employment away from the exposure to cotton dust"—the case of *Mabe v. Granite Corporation*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972) is instructive. In *Mabe* we said:

> The Commission's findings of fact are sufficient to establish that plaintiff is fully incapacitated because of silicosis to earn wages through work at hard labor, which is the only work he is qualified to do by reason of his age and education.
>
> . . .
>
> Defendant contends that elements of age and poor education are factors which are beyond the control of an employer and cannot be considered in determining an employee's disability. The answer to this is that an employer accepts an employee as he is. If a compensable injury precipitates a latent physical condition, such as heart disease, cancer, back weakness, and the like, the entire disability is compensable and no attempt is made to weigh the relative contribution of the accident and the pre-existing condition. 2 Larson,

> Workmen's Compensation Law, § 59.20, p. 88.109. By the same token, if an industrial disease renders an employee actually incapacitated to earn any wages, the employer may not ask that a portion of the disability be charged to the employee's advanced age and poor learning on the grounds that if it were not for these factors he might still retain some earning capacity.

Id. at 255-56, 189 S.E. 2d at 806-07.

In this case, we find no evidence of any disability other than plaintiff's disabling occupational lung disease. Consequently, there is no need to apportion any loss or injury to a percentage of lung function loss as suggested by defendant. The recent decision of *Morrison v. Burlington Industries* does not apply to the facts of this case.

For the foregoing reasons, the decision and award of the Commission is

Affirmed.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. MILTON MURRELL, JR.

No. 8121SC373

(Filed 20 October 1981)

Criminal Law § 149.1 — dismissal for insufficiency of evidence — State loses right to appeal

The State had no right to appeal from the trial court's dismissal of criminal charges against defendant based on (1) defendant's motion to suppress the State's evidence because of entrapment and (2) insufficiency of the evidence, since the charges were dismissed on the merits and involved a determination of guilt or innocence, G.S. 15-173, and further proceedings against defendant are barred under principles of double jeopardy. G.S. 15A-1445(a).

APPEAL by the State of North Carolina from *Mills, Judge.* Order entered 3 February 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 25 September 1981.

Defendant was tried on charges of possession of marijuana with intent to sell and sale of marijuana. Defendant produced evidence in support of his defense of entrapment. At the close of the state's evidence, defendant moved for dismissal for failure of the state to produce sufficient evidence. The motion was renewed at the close of all the evidence. From the dismissal of the charges, the state appeals.

Attorney General Edmisten, by Associate Attorney Fred R. Gamin, for the State.

Graham, Glenn, Crumpler & Habegger, by Daniel S. Johnson, for defendant.

MARTIN (Harry C.), Judge.

At the threshold we are faced with the question whether the state can appeal the dismissal of the charges. Appellee raised this question in his brief, and the state filed a reply brief.

At the close of all the evidence, the record contains the following:

> In this case wherein the defendant stands charged with the offense of Sell and Deliver Marijuana 2 counts, and Possession with Intent to Sell & Deliver 2 counts.
>
> It is now ORDERED:
>
> (xx) Other—Charges dismissed based on Defendant's oral motion to suppress the State's evidence as a matter of law based upon entrapment as a matter of law and based on Defendant's motion for directed verdict as a matter of law.
>
> s/ F. FETZER MILLS
> Judge Presiding

The trial court justified dismissal of the charges against defendant based on: (1) defendant's motion to suppress the state's evidence on a finding of entrapment, and (2) defendant's motion for a directed verdict as a matter of law.

The state's right of appeal in a criminal proceeding is entirely statutory; it had no such right at the common law. Statutes granting a right of appeal to the state must be strictly construed.

State v. Harrell, 279 N.C. 464, 183 S.E. 2d 638 (1971); *State v. Horton*, 7 N.C. App. 497, 172 S.E. 2d 887 (1970). The pertinent parts of our statute are:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the superior court to the appellate division:
>
> (1) When there has been a decision or judgment dismissing criminal charges as to one or more counts.
>
> . . . .
>
> (b) The State may appeal an order by the superior court granting a motion to suppress as provided in G.S. 15A-979.

N.C. Gen. Stat. § 15A-1445(a)(1), (b)(1978).

Under the statute, the dismissal would be appealable by the state unless further prosecution of defendant is barred by principles of double jeopardy. We hold that defendant has been placed in jeopardy by this prosecution and further prosecution is thereby barred. *State v. Vaughan and State v. Catena and State v. Smith*, 268 N.C. 105, 150 S.E. 2d 31 (1966). There the Court held:

> "(J)eopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case." . . .
>
> . . . .
>
> A motion for judgment as in case of nonsuit challenges the sufficiency of the State's evidence to warrant its submission to the jury and to support a verdict of guilty of the criminal offense charged in the warrant or indictment on which the prosecution is based. When the motion is allowed, and judgment is entered in accordance therewith, "such judgment shall have the force and effect of a verdict of 'not guilty' as to such defendant" as to the criminal offense charged in the warrant or indictment. G.S. 15-173 . . ..

268 N.C. at 107, 150 S.E. 2d at 32-33 (citations omitted).

In its reply brief the state relies upon *United States v. Scott*, 437 U.S. 82, 57 L.Ed. 2d 65 (1978). In *Scott* the charge against defendant was dismissed upon motion, made before and during trial, that his defense had been prejudiced by preindictment delay. The motion was granted at the close of all the evidence. Defendant did not move to dismiss based upon insufficiency of evidence. The dismissal was based solely upon preindictment delay, grounds fully unrelated to guilt or innocence. The Supreme Court held that the dismissal was appealable because further prosecutions were not barred by double jeopardy principles. *Scott* is not applicable to the case under consideration. Defendant Murrell moved to dismiss for insufficiency of the evidence and the court allowed the motion. Further proceedings against Murrell are barred as the case was dismissed on the merits and did involve a determination of guilt or innocence. Moreover, under N.C.G.S. 15-173 a dismissal based on lack of evidence has the effect of a verdict of not guilty. The Supreme Court, in the absence of a statute, announced the same rule in *Scott*.

Defendant cannot now be placed in jeopardy upon these same charges. The state has no right of appeal from the judgment entered.

We recognize that had the entrapment issue been resolved upon a motion by defendant to suppress pursuant to N.C.G.S. 15A-979(c), the state could appeal. Under that procedure the issue would be determined prior to jeopardy and N.C.G.S. 15A-1445 specifically provides for appeal by the state. Such is not the case before us.

In holding that under these facts the state's right of appeal is precluded, we are not required to discuss the issue of entrapment.

Appeal dismissed.

Judges MARTIN (Robert M.) and BECTON concur.

B. KERMIT CALDWELL v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY

No. 8125SC202

(Filed 20 October 1981)

Insurance § 144— homeowner's insurance—amount of liability for damages to boat

Defendant insurer's liability under a homeowner's policy for damages to plaintiff insured's boat, motor and trailer caused by a windstorm was limited to $500 where the policy provided coverage $17,000 for unscheduled personal property "subject to all conditions of this Policy" and the "Additional Conditions" section of the policy limited coverage to $500 for loss with respect to watercraft, motors and trailers.

APPEAL by plaintiff from *Friday, Judge.* Judgment entered 8 August 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 24 September 1981.

On 25 January 1978 plaintiff's boat, outboard motor, and trailer were damaged in the amount of $5,695 when a windstorm blew down a building in which they were temporarily stored. The property damage was covered by a Homeowner Extension Certificate issued by defendant to plaintiff effective 17 October 1977 to 17 October 1978. The portions of the policy at issue are as follows:

--- DESCRIPTION OF PROPERTY AND INTERESTS COVERED---

* * *

COVERAGE C—UNSCHEDULED PERSONAL PROPERTY

This policy covers unscheduled personal property usual or incidental to the occupancy of the premises as a dwelling and owned or used by an Insured, while on the described premises and, at the option of the Named Insured, owned by others while on the portion of the premises occupied exclusively by the Insured.

This coverage also includes such unscheduled personal property while elsewhere than on the described premises, anywhere in the world:

1. owned or used by an Insured; or

2. at the option of the Named Insured,

a. owned by a guest while in a residence occupied by an Insured; or

b. owned by a residence employee while actually engaged in the service of an Insured and while such property is in the physical custody of such residence employee or in a residence occupied by an Insured;

3. but the limit of this Company's liability for the unscheduled personal property away from the premises shall be an additional amount of insurance equal to 10% of the amount specified for Coverage C, but in no event less than $1,000.

* * *

— ADDITIONAL CONDITIONS —

* * *

2. Special Limits of Liability on Certain Property:

* * *

b. *Under Coverage C, this Company shall not be liable for loss in any one occurrence with respect to the following property for more than:*

* * *

(5) *$500 in the aggregate on watercraft, including their trailers (whether licensed or not), furnishings, equipment and outboard motors; . . ..*

(Emphasis added.)

The policy limits defendant's liability in "Coverage C—Unscheduled Personal Property" to $17,000, "subject to all conditions of this Policy."

Judge Friday concluded that "Paragraph 2(b)(5) under the Section of the insurance policy entitled 'Additional Conditions' is applicable to the loss to the boat, motor and trailer," and that defendant's liability is limited to $500 in the aggregate thereunder. Plaintiff appeals from this judgment.

B. Kermit Caldwell, plaintiff-appellant, pro se.

Mitchell, Teele, Blackwell & Mitchell, by Marcus W. H. Mitchell, Jr., for defendant-appellee.

HILL, Judge.

On appeal, plaintiff contends that defendant's liability is limited by Paragraph 3 under "Coverage C—Unscheduled Personal Property" to $18,700 rather than the $500 limitation in Paragraph 2(b)(5) under "Additional Conditions." Thus, the sole question before this Court is whether the "Additional Conditions" section of the policy should be construed with "Coverage C—Unscheduled Personal Property" to limit defendant's liability to $500.

"Since policies of insurance are prepared by the insurer, they are liberally construed in favor of the insured, and strictly construed against the insurer." *White v. Mote*, 270 N.C. 544, 555, 155 S.E. 2d 75, 83 (1967). However, this rule of construction "does not justify the courts in enlarging the terms of the policy beyond the meaning of the language of the policy." *Henderson v. Hartford Accident & Indemnity Co.*, 268 N.C. 129, 131, 150 S.E. 2d 17, 19 (1966).

Accepting plaintiff's construction of the policy in the case *sub judice* would require us to enlarge its terms beyond their meaning. The terms of the policy dealing with watercraft, motors, and trailers are clear and unambiguous. The policy reads, "*Under Coverage C*, this Company shall not be liable for loss in any one occurrence . . . for more than . . . $500 in the aggregate on watercraft . . .." (Emphasis added.) These terms under "Additional Conditions," though separate from the enumeration of "Property and Interests Covered" under Coverage C, are part of Coverage C and clearly limit defendant's liability for damage to plaintiff's boat, motor, and trailer to $500.

For the reasons stated above, the judgment of the trial judge is

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. HENRY EDWARD HARRELSON

No. 8115SC306

(Filed 20 October 1981)

1. **Criminal Law § 167— error in excluding evidence of witness's mental condition not prejudicial**

It was error to exclude evidence of defendant's mother's mental condition as she testified as an eyewitness but defendant testified she was not present and as the existence of a mental impairment may be shown to discredit testimony. However, the error was not prejudicial as there was ample evidence to sustain defendant's conviction absent his mother's testimony and as the jury was able to observe defendant's mother on the witness stand.

2. **Criminal Law § 113.1— jury instructions—recapitulation of evidence**

It was not necessary to recapitulate evidence of the close range of the shot killing the deceased for the jury to understand and decide upon defendant's plea of self-defense.

APPEAL by defendant from *Britt, Judge.* Judgment entered 29 October 1980 in Superior Court, ORANGE County. Heard in the Court of Appeals 22 September 1981.

The State's evidence tended to show that Levenia Harrelson was the mother of the deceased, Owen Harrelson, and defendant. She and another son, George Harrelson, were eyewitnesses to the murder for which defendant was charged. On 14 June 1980 the Harrelsons were at home. The evidence indicated that defendant had been drinking liquor heavily. However, defendant apparently was asleep until Owen walked to the refrigerator. Both Levenia and George testified that they saw defendant shoot Owen in the neck while he was standing in front of the refrigerator. George testified that after the shooting defendant got a knife and put it beside Owen's body. There was evidence that on the previous day Owen and defendant argued over some meat.

Defendant testified at length about arguments he had with his two brothers over some wine and liquor. Owen accused defendant of stealing some meat, defendant stated, and continued "cussing" him about it on the day of the shooting. Owen threatened defendant with a knife and defendant shot him "because [he] was scared of him." According to defendant's testimony, Levenia was not in the house at that time. Defendant also offered evidence of four prior incidents where Owen had assaulted someone.

Defendant was found guilty of second degree murder. From the judgment entered thereon, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Epting, Hackney & Long, by Joe Hackney, for defendant-appellant.

HILL, Judge.

[1] Defendant first argues that the trial court erred in excluding evidence of Levenia's mental condition. Defendant attempted to show through *voir dire* examination of George Harrelson that Levenia's mind had deteriorated with age, that she was forgetful, confused, and could not accurately remember things that happened or when events took place. Since she testified as an eyewitness, defendant believes the weight of Levenia's testimony should be for the jury to evaluate, especially in view of his contention that Levenia was not an eyewitness to the shooting. We agree. However, we do not find prejudicial error.

It is well settled that "[t]he existence of a mental or physical impairment which would affect the witness's powers of observation, memory or narration, may be shown in order to discredit his testimony." 1 Stansbury's N.C. Evidence § 44, pp. 122-23 (Brandis rev. 1973). This may be proven by cross-examination or by extrinsic evidence. *State v. Armstrong*, 232 N.C. 727, 62 S.E. 2d 50 (1950). Exclusion of the evidence of Levenia's mental impairment therefore was error.

Nevertheless, every error is not so prejudicial as to warrant a new trial. Defendant must show that the error complained of was prejudicial and thereby affected the result adversely to him. *State v. Matthews*, 299 N.C. 284, 261 S.E. 2d 872 (1980); *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1967). If the testimony of Levenia Harrelson in the case *sub judice* is disregarded, there remains ample evidence in the record to sustain defendant's conviction in the form of George Harrelson's eyewitness testimony. The latter substantially corroborated Levenia's testimony about the shooting. Even so, the jury observed Levenia Harrelson on the witness stand. George Harrelson testified that his mother is eighty-one years old. Levenia's earlier testimony that she was

only thirty-two years old certainly brought her mental state to the jury's attention. Therefore, for these reasons, we find that the trial court's failure to permit evidence of Levenia Harrelson's mental condition was not so prejudicial as to have adversely affected the result of defendant's trial.

In his second argument defendant alleges error by the trial court in sustaining the State's objection to a question put to defendant about whether George was on defendant's "side" or Owen's "side" of their argument on the weekend of the shooting. It is apparent that the form of the offending question required defendant to draw a conclusion as to what George Harrelson was thinking. The trial court thereafter allowed defendant to testify about things George did or said to him on the day of the shooting. Thus, from the admitted evidence the jury could properly evaluate the mental state of George Harrelson and thereby draw its own conclusions. The objection was properly sustained.

[2] By his next assignment of error, defendant argues that the trial court erred in failing to include the evidence of the close range of the shot in its jury instructions. We do not agree. The trial judge is not required to recapitulate all the evidence in his charge to the jury, but only that amount necessary to explain the application of the law to the evidence. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); G.S. 15A-1232. Evidence of the close range at which defendant shot Owen Harrelson was before the jury. It was not necessary to recapitulate such evidence for the jury to understand and decide upon his plea of self-defense. This assignment of error is overruled.

We also overrule defendant's assignments of error which allege error in the trial court's jury instructions on the law of self-defense and voluntary manslaughter. These arguments have no merit and do not warrant further discussion.

In defendant's trial, we find

No error.

Judge HEDRICK concurs in result.

Judge WHICHARD concurs.

IN THE MATTER OF WALTRAUD H. HOLT

No. 8112DC290

(Filed 20 October 1981)

Insane Persons § 1.2— findings required by involuntary commitment statute—insufficient evidence to support commitment order

G.S. 122-58.7(i) requires, as a condition to a valid commitment order, that the court find by convincing evidence that (1) respondent is mentally ill or inebriate, and (2) respondent is dangerous to herself or others. Petitioner failed to meet the second prong of the test where the findings concerning respondent's incapacity to care for herself were not supported by the evidence, and evidence concerning threatening statements to her husband, without evidence of their substance, was insufficient to support a conclusion she is dangerous to others.

APPEAL by respondent from *Cherry, Judge.* Order entered 5 January 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 22 September 1981.

This is a proceeding pursuant to General Statute chapter 122, article 5A, for involuntary commitment of respondent to a mental health facility.

Respondent's estranged husband filed a sworn petition alleging that respondent was mentally ill and dangerous to herself or others. The facts on which the petition was based were stated as follows:

> [R]espondent has a history since 1975 of psychi[atric] treatment; hospitalized at Cumberland Psychi[atric] Hospital in Dec 1978; received outpatient care from Jan to Sep 79; and had refused since that time to accept further treatment. Believes that certain unidentified forces are plotting against her, and preventing her from doing things that she wants to do; further [,] that there is a conspiracy against her. Frequently threatens to (roast) inflict physical injury upon the petitioner. Periodically complains of imaginary odors; claims her 4 children are speaking with voices differ[ent] from their own. Rapidly changing moods from passive to hostile behavior. Frequently calls the military police at Ft Bragg for imagined occurrences.

The district court, after receiving evidence from petitioner and respondent, made oral findings upon which it orally ordered

respondent committed, "for hospitalization and treatment over a period of ninety days unless . . . discharged as by law provided." A written order of commitment was subsequently signed and filed.

From the order of commitment, respondent appeals.

Attorney General Edmisten, by Assistant Attorney General Lemuel W. Hinton, for the petitioner, appellee.

Staples Hughes, Assistant Public Defender, for the respondent, appellant.

WHICHARD, Judge.

The involuntary commitment statute, G.S. 122-58.7(i), required as a condition to a valid commitment order that the district court find, by clear, cogent, and convincing evidence, two distinct facts: first, that respondent was mentally ill or inebriate, as those words are defined in G.S. 122-36; and second, that respondent was dangerous to herself or others. *In re Carter*, 25 N.C. App. 442, 213 S.E. 2d 409 (1975).

The court found, in its oral ruling and its written order, that respondent was mentally ill. The record contains competent evidence, medical and non-medical, to support this finding. It is thus conclusive on appeal, and the first of the two statutory requirements is satisfied. *In re Underwood*, 38 N.C. App. 344, 247 S.E. 2d 778 (1978).

To satisfy the second requirement there must be (1) findings to support a conclusion that respondent was dangerous to herself or others, and (2) competent evidence to support such findings. *Id.* With reference to whether respondent was dangerous to herself, the oral ruling contained a finding that she was "presently incapable of managing her own affairs, incapable of properly caring for herself as to medication or as to proper nourishment." The written order contained a finding that she was "incapable of properly caring for her medical needs, diet, grooming and general affairs." These findings, if supported by competent evidence, would support a conclusion that respondent was dangerous to herself.

Petitioner concedes that the portion of the findings relating to respondent's incapacity properly to care for herself as to

medication "does not appear from the record to be based on the evidence." The evidence likewise in no way indicates respondent's incapacity to care for her grooming needs.

As to the remaining portion of these findings, which relates to respondent's incapacity to care for herself in terms of proper nourishment and diet, the psychiatrist who examined her four days before the hearing testified:

> By incapable of managing her own affairs I mean that in the withdrawn state she would not feed herself properly and do those things for herself that would maintain proper health. I have no personal knowledge of her not feeding herself properly. I only know what she said. She said that she would not eat if she suspected the food was poisoned.

While this witness testified that respondent "ha[d] a history of . . . severe withdrawn state," he did not testify that she was *at that time* experiencing it. Because his testimony that respondent "would not feed herself properly and do those things for herself that would maintain proper health" related only to when she was "in the withdrawn state," absence of evidence that she was in that state at the time the ruling was made renders the evidence insufficient to support the findings that respondent was incapable of properly caring for herself "as to proper nourishment" and "diet." The evidence that respondent "would not eat if she suspected the food was poisoned" merely indicates normal behavior expected of any reasonable person. It thus is also insufficient to support the findings.

"Our function on appeal is . . . to determine whether there was any competent evidence to support the factual findings made." *Underwood*, 38 N.C. App. at 347-348, 247 S.E. 2d at 781. Exercise of this function here discloses no evidence to support the findings from which the court could have concluded that respondent was dangerous to herself.

With reference to whether respondent was dangerous to others, the findings were not sufficient to support such a conclusion. The court found, in its oral ruling and its written order, that "respondent ha[d] made statements to her husband of a threatening nature." There was no finding, however, and no evidence to support any finding that might have been made, as to when these

statements were made, the nature of the threats they contained, or the danger to petitioner reasonably inferable therefrom. This finding thus was insufficient to sustain a conclusion that respondent was dangerous to others. *See Carter*, 25 N.C. App. at 445, 213 S.E. 2d at 411. Moreover, we take judicial notice that if a mere finding that a wife made threatening statements to her husband suffices to support a conclusion that she is dangerous to others, few wives could withstand such a conclusion.

The evidence was not sufficient to support the findings from which the court could have concluded that respondent was dangerous to herself. The findings were not sufficient to support a conclusion that respondent was dangerous to others. The second of the two statutory requirements for involuntary commitment thus has not been met.

Accordingly, the order appealed from is

Reversed.

Judges HEDRICK and HILL concur.

GREENSBORO-HIGH POINT AIRPORT AUTHORITY v. PEARL TAYLOR IRVIN, CHARLES WATSON IRVIN, JR. AND WIFE, MARY S. IRVIN, JOHN LAFAYETTE IRVIN AND WIFE, NANCY B. IRVIN, DORIS IRVIN EGERTON AND HUSBAND, GEORGE G. EGERTON

No. 8118SC187

(Filed 20 October 1981)

Eminent Domain § 5.2— time for determining compensation—date of trial rather than date of petition

Where a petition to condemn plaintiff's land was filed in 1975 but the parties were unable to agree upon a purchase price and during the years of litigation the owners have received no payment and no interest has accrued on the value of the property assessed by the commissioners in 1976, the market value of the property must be determined as of the date of trial rather than the usual valuation date of the date of the petition.

APPEAL by defendants from *Walker, Judge.* Judgment entered 10 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 September 1981.

On 1 July 1975 the Airport Authority filed a petition to condemn 90.35 acres of defendants' land for airport purposes. The parties were unable to agree on a purchase price and commissioners were appointed to assess the market value of the property. The commissioners' report came in on 24 November 1976 but no monies were paid into court and no entry upon the land was made by the Airport Authority.

After numerous appeals over several years' time, a pretrial order was entered by Judge Mills on 2 May 1979 finding that the date of "taking" on which valuation of the property was to be based was the date on which the Airport Authority should deposit monies in court or the date of trial, whichever occurred first. On 3 November 1980, this pretrial order was modified by Judge Walker who found the date of taking to have been 1 July 1975. Using this date to determine market value, the jury returned an award of $400,000 for defendants, an increase of $90,000 over the appraisal of the commissioners.

Defendants appeal.

Cooke and Cooke, by Arthur O. Cooke and William Owen Cooke, for plaintiff appellee.

Dees, Johnson, Tart, Giles & Tedder, by J. Sam Johnson, Jr., and Hugh P. Griffin, Jr., for defendant appellants.

ARNOLD, Judge.

The question presented by this appeal is whether, for the purpose of assessing the value of defendants' land, the date of taking was the date the petition was filed or the date of trial, some five years after petition.

The Airport Authority's position is that North Carolina cases consistently have held that the value of land taken by eminent domain "should be ascertained as of the date of the taking . . ." and that "the land is taken within the meaning of this principle when the proceeding is begun." *Western Carolina Power Co. v. Hayes*, 193 N.C. 104, 107, 136 S.E. 353 (1927). Indeed it may be said that a policy favoring the date of petition as the date of taking has been developed by courts and that this policy holds a certain attraction in that it establishes a uniform valuation date. *See Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E. 2d 231 (1973); *Ayden v. Lan-*

caster, 197 N.C. 556, 150 S.E. 40 (1929). However, a close anaylsis of cases setting forth the rule that the date of taking in a Chapter 40 condemnation proceeding is the date the proceeding is commenced discloses, in our view, an underlying purpose for the rule. It is to prevent a windfall to the landowner whose property value is "enhanced by the purpose for which it is taken." *Ayden, supra* at 559. In the case at bar there is no evidence that the value of defendants' land was so enhanced or that it increased because of anything other than a general increase in property values during the five years between petition and trial. In *Kings Mountain v. Goforth, supra*, and *Charlotte v. Spratt*, 263 N.C. 656, 140 S.E. 2d 341 (1965), our Supreme Court adhered to the rule which was applied by the trial court: that the value of the condemned property is determined as of the date the condemnation action is commenced. In both *Kings Mountain* and *Charlotte v. Spratt* Chief Justice Bobbitt, writing for the Court, prefaced his statement of the rule with the adverb "ordinarily," thus implying that some facts might justify imposition of a valuation date other than the date of petition. Such a fact situation is presented by the present case.

During the years of litigation between these parties the property owners have received no payment, and no interest has accrued on the value which was assessed by the Commissioners. Our economy unquestionably has experienced rampant inflation during this period of time resulting in a reduction in the value of the dollar. To permit the Authority to satisfy its obligation to the landowners in the value of 1980 dollars when the value of the land was measured by 1975 dollars of considerably greater value is patently unfair. The market value of the property, therefore, in the case at bar, must be ascertained as of the date of trial rather than the date of petition.

We are unimpressed by plaintiff's contention that the long delay here was due to defendants' election to raise a "myriad" of defenses to the condemnation proceeding which resulted in four years of hearings and appeals.

Likewise, we refuse to accept plaintiff's argument that payment of money into court would have been futile. While it is true that such payment would not have given plaintiff the right to damage or irreversibly alter the land while the appeal was pending, it would have placed the plaintiff in possession for the purpose of establishing the valuation date.

New trial.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. JAMES GREGORY ARMISTEAD

No. 812SC401

(Filed 20 October 1981)

Parent and Child § 2.2— child abuse—evidence of other offenses—error not prejudicial

In a prosecution for child abuse, it was error to allow the introduction of testimony concerning a separate incident where defendant struck his child; however, the error was not prejudicial as there was ample uncontradicted evidence that defendant intentionally inflicted some physical injury on his child and defendant did not meet the burden of proving there is a reasonable probability a different result would have occurred had the court not admitted the testimony.

APPEAL by defendant from *Brown, Judge.* Judgment entered 29 October 1980 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 13 October 1981.

Defendant was convicted of misdemeanor child abuse. Judgment imposing a prison sentence was entered.

Defendant was indicted for felonious child abuse in violation of G.S. 14-318.3. The evidence tends to show that Janie Norman and defendant are the parents of the minor child Evay Markey Norman. On 18 July 1980, Markey was two years old and not yet toilet trained. When Markey wet his diapers, defendant told the child he was going to beat him. Defendant got a rod of unbreakable fiber of 2½ to 3 feet in length. He pulled down the child's pants, hit him on the rear, and continued to hit him after the child began crying. The child was bleeding from his buttocks. Janie Norman was unable to prevent defendant from beating the child. Several days after the incident Ms. Norman contacted the Department of Social Services which made photographs of the child's injuries and took the child to a doctor for medical attention.

At the close of the State's evidence, the defendant moved for a dismissal. The court granted a dismissal of the felony charge and instead submitted the case to the jury on the misdemeanor charge of child abuse.

The defendant presented no evidence.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Herman E. Gaskins, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant contends the court committed prejudicial error in allowing the introduction of testimony concerning a separate incident where defendant struck his child.

It is well established in North Carolina that when the defendant in a criminal trial does not testify, evidence of other offenses is inadmissible if its only relevance is to show the character of the accused or his disposition to commit the offense charge. 1 Stansbury, N.C. Evidence § 91 (Brandis rev. 1973); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Allen*, 50 N.C. App. 173, 272 S.E. 2d 785 (1980). Such evidence predisposes jurors toward guilt and diverts attention from the incident at hand. Exceptions to the rule, however, exist when the evidence is relevant to show identity, intent, knowledge, motive, habit, a continuing offense, or a common transaction. *State v. McClain, supra.*

In the present case, the court allowed Janie Norman to testify over defendant's objections that defendant had struck the same child two years earlier with an Afro comb and that the child's injuries had required medical attention. Her testimony is not relevant to show identity since defendant has never denied he struck the child on 18 July 1980. Nor is it admissible under any of the above-listed exceptions since the only issue in the cause at bar is whether defendant used excessive force on this particular occasion in disciplining his child. Commission of an offense at an earlier time does not constitute proof of commission of the one charged. *State v. McClain, supra.* Since the only relevancy of the excepted portions of Ms. Norman's testimony is to show defendant's disposition to hit his child, the evidence should not have been admitted. We do note, however, that even defendant's

counsel elicited testimony from the child's mother that she and defendant had disagreed in the past about how to discipline the child.

The burden is on the defendant to prove that there is a reasonable possibility that a different result would have occurred had the court not committed error. *State v. Turner*, 268 N.C. 225, 150 S.E. 2d 406 (1966). In the present case, defendant has not met that burden.

To convict defendant of misdemeanor child abuse, the State needed to prove only one of the following elements: (1) that the parent nonaccidentally inflicted physical injury on the child; (2) that the parent nonaccidentally allowed physical injury to be inflicted on the child; or (3) that the parent nonaccidentally created or allowed to be created a substantial risk of physical injury on the child. G.S. 14-318.2; *State v. Fredell*, 17 N.C. App. 205, 193 S.E. 2d 587 (1972), *aff'd*, 283 N.C. 242, 195 S.E. 2d 300 (1973).

Although the testimony of the separate offense should have been excluded, there is no possibility that the error affected the result. There was ample uncontradicted evidence that defendant intentionally inflicted some physical injury on his child. The force used was at least sufficient to draw blood and leave visible signs of the injury for several days. [The testimony of the case worker and doctor was not included in the record on appeal.] The situation here can be distinguished from those cases where the improperly admitted evidence was prejudicial in reducing the defendant's credibility before the jury. *See generally State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981); *State v. Pace*, 51 N.C. App. 79, 275 S.E. 2d 254 (1981). The defendant at bar never testified. His defense, therefore, depends not on his credibility but on the reasonableness of his discipline. We hold that the evidence was sufficient to convince any rational trier of the facts beyond a reasonable doubt that defendant nonaccidentally inflicted injury to the child. This jury was so satisfied, and the result would have been the same without the error we have discussed.

No error.

Judges HILL and WHICHARD concur.

CLARENCE YOUNG v. MARY CECELIA DENNING

No. 8110SC231

(Filed 20 October 1981)

Automobiles § 57.1— intersection accident—failure to stop at stop sign

In an action arising out of an automobile accident at an intersection, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in failing to stop at a stop sign and yield the right-of-way to plaintiff's automobile traveling on the dominant highway.

APPEAL by plaintiff from *Canaday, Judge.* Judgment entered 28 August 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 13 October 1981.

Plaintiff and defendant were involved in an automobile accident at approximately 5:15 p.m. on 10 March 1977. Plaintiff alleged negligence on the part of defendant in that she drove into an intersection without ascertaining whether there were oncoming vehicles to which she owed a duty to yield the right-of-way, and that defendant drove her car directly into the path of plaintiff's car causing a collision. Defendant pleaded contributory negligence on the part of plaintiff in that he operated his vehicle carelessly, he failed to yield to defendant the right-of-way, he was speeding, he failed to keep his vehicle under proper control, he failed to avoid the collision when he had the opportunity to do so, and that plaintiff failed to keep a proper lookout.

At the end of plaintiff's evidence, the trial court granted defendant's motion for directed verdict. Plaintiff appeals and assigns error to the trial court's ruling on defendant's motion.

Shyllon, Shyllon & Ratliff, by Mohamed M. Shyllon and Prince E. N. Shyllon; and Shabia & Hehre, by Frederick W. Hehre, for plaintiff-appellant.

Bailey, Dixon, Wooten, McDonald & Fountain, by Wright T. Dixon, Jr., for defendant-appellee.

HILL, Judge.

The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. The trial court must make this determination by considering the evidence in the light

most favorable to the non-movant. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). "It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted." *Rappaport v. Days Inn of America, Inc., supra* at 384, 250 S.E. 2d at 247.

Plaintiff's evidence tended to show that plaintiff and his wife were traveling east on Cabarrus Street. Plaintiff approached the intersection of Cabarrus Street and West South Street and, he testified, "when I looked up, Mrs. Denning was out on Cabarrus Street. Her whole front end was out there right into me, the whole street. She had come out and I had collided with her." Plaintiff's wife saw defendant's automobile entering the intersection from West South Street. She testified that "[t]he car came right into the intersection . . . without stopping."

J. W. Witherspoon, then a uniformed police officer, testified that the intersection was controlled by a stop sign on West South Street. Anyone entering the intersection from West South Street had to stop and see traffic clear on Cabarrus Street before proceeding. He measured tire marks at 32 feet in length from where plaintiff's automobile stopped. Witherspoon observed no marks on the street leading to defendant's automobile.

The above evidence is sufficient to show defendant's failure to stop at the stop sign and yield the right-of-way to plaintiff's automobile traveling on the "through highway," Cabarrus Street. *See* G.S. 20-158(b)(1). Even though such failure to stop may not be considered negligence *per se*, G.S. 20-158(d), these facts are sufficient for a jury to determine the issue of defendant's negligence. In addition, we find no evidence of contributory negligence as a matter of law on the part of plaintiff. *See Rappaport v. Days Inn of America, Inc., supra.*

For these reasons, we

Reverse and remand for a new trial.

Judges VAUGHN and WHICHARD concur.

FRANCES EUBANKS v. LYNWOOD EUBANKS

No. 8121DC183

(Filed 20 October 1981)

Appeal and Error § 6.2— partial summary judgment—premature appeal

Defendant's appeal from partial summary judgment entered for his wife, plaintiff, on the issue of arrearages in support payments was premature as the judgment neither affected a substantial right of defendant's nor would work injury to defendant if not corrected before appeal from the final judgment.

APPEAL by defendant from *Harrill, Judge.* Judgment entered 19 December 1980 in District Court, FORSYTH County. Heard in the Court of Appeals 22 September 1981.

Plaintiff obtained a judgment in the Superior Court of California which awarded her one-half of defendant's Navy retirement pay in division of community property and $200.00 per month as "spousal support." In this action she alleged that defendant was in arrears and prayed that (1) full faith and credit be given to the California judgment, (2) judgment be entered against defendant for the arrearages, and (3) defendant be ordered to continue to pay her $200.00 per month as spousal support and one-half of his Navy retirement pay.

The trial court granted plaintiff's motion for partial summary judgment and entered judgment for plaintiff for the arrearages then due plus interest. From this judgment, defendant appeals.

Craige, Brawley, Liipfert & Ross, by Terrie A. Davis, for plaintiff appellee.

Green and Leonard, P.A., by Robert K. Leonard and David L. Spence, for defendant appellant.

WHICHARD, Judge.

Because further action is required by the trial court to determine plaintiff's action in its entirety, the judgment is interlocutory in character. "Ordinarily, an appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from final judgment." *Stanback v. Stanback,* 287 N.C. 448, 453, 215 S.E.

2d 30, 34 (1975). We perceive no substantial right to be affected and no injury to defendant to be worked by delaying appeal until final judgment. Justice Exum's statement in *Industries, Inc. v. Insurance Co.*, is equally applicable here: "If this partial summary judgment is in error defendant can preserve [his] right to complain of the error on appeal from the final judgment by a duly entered exception." 296 N.C. 486, 491, 251 S.E. 2d 443, 447 (1979). We thus dismiss the appeal.

We note that in a memorandum of additional authorities defendant has argued the applicability here of *McCarty v. McCarty*, --- U.S. --- , 69 L.Ed. 2d 589, 101 S.Ct. 2728 (1981). In *McCarty*, the United States Supreme Court held, pursuant to the supremacy clause of the United States Constitution, article VI, clause 2, that federal law precludes a state court from dividing military nondisability retirement pay pursuant to state community property laws. In view of our dismissal of this appeal, the issue of applicability to this case of *McCarty* should now be presented to the trial court prior to any appellate review.

Appeal dismissed.

Judges HEDRICK and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 OCTOBER 1981

DUKE POWER v. WINEBARGER No. 8123SC149	Wilkes (76SP142)	No Error
IN RE LaSALLE No. 8112DC249	Cumberland (79J487)	Affirmed
IN RE LAUTNER No. 8128DC122	Buncombe (80SP155)	Affirmed
IN RE WALKER No. 8112DC376	Cumberland (73J193)	Reversed
PITTMAN v. PITTMAN No. 8115DC139	Orange (76CVD369)	Affirmed in Part, Reversed & Remanded in Part
STATE v. CAGLE No. 8128SC358	Buncombe (80CRS0992)	No Error
STATE v. CARTER No. 8114SC166	Durham (80CRS12661)	No Error
STATE v. CARVER & COOPER No. 8130SC402	Haywood (80CRS3371) (80CRS3372)	Judgment is Arrested—Cooper No Error—Carver
STATE v. LOCKAMY No. 815SC242	New Hanover (80CRS13288) (80CRS13290)	No Error
STATE v. LOFTON No 818SC283	Wayne (80CRS6404)	No Error
STATE v. MOORE No. 8120SC232	Richmond (80CRS5538)	No Error
STATE v. SMITH No. 813SC367	Craven (80CR11577)	No Error

STATE OF NORTH CAROLINA v. ROBERT EDWARD YOUNG

No. 8110SC196

(Filed 3 November 1981)

1. **Larceny § 4— indictment for common law robbery—conviction of larceny from the person**

Larceny from the person is a lesser included offense of common law robbery, and an indictment for common law robbery will support a conviction for larceny from the person.

2. **Indictment and Warrant § 10.1— use of alias in warrant—idem sonans**

Where defendant's real name was unknown at the time of his arrest and a witness mistakenly believed the defendant's nickname to be "Shank" when it was "Chink," an arrest warrant issued for "Shank" sufficiently identified defendant since the names "Chink" and "Shank" sound sufficiently similar to invoke the doctrine of *idem sonans.* Furthermore, defendant waived any objection to the misnomer appearing in the warrant by pleading not guilty and going to trial on the merits of the case.

3. **Criminal Law § 75.7— asking of defendant's name—no custodial interrogation**

An officer's asking of the defendant's name did not constitute custodial interrogation, and testimony that defendant falsely identified himself to police officers following his arrest was admissible even though defendant had not been given the Miranda warnings.

4. **Criminal Law § 33; Robbery § 3— street price of marijuana—relevancy in robbery case**

In a common law robbery prosecution in which the State's evidence tended to show that defendant unlawfully took $50 from the person of the prosecuting witness, and defendant contended that the prosecuting witness had arranged to buy a half-pound of marijuana from defendant for the price of $60 and instituted a false robbery claim against defendant when defendant failed to deliver the drugs, the State's rebuttal of the street price of a half-pound of marijuana was relevant to aid the jury in deciding which party's version of the facts was true.

5. **Larceny § 4— larceny from the person—sufficiency of indictment**

An indictment for common law robbery was sufficient to support defendant's conviction of larceny from the person even though it did not contain express allegations that the property was taken with intent to steal and against the victim's will or without his consent.

Judge BECTON dissenting.

APPEAL by defendant from *Clark, Judge.* Judgment entered 26 November 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 2 September 1981.

Defendant was indicted for common law robbery. At trial after the presentation of the evidence, the court allowed the defendant's motion to dismiss the charge of common law robbery based on the insufficiency of the evidence. The jury found the defendant guilty of larceny from the person and sentenced him to seven to ten years imprisonment.

The State's evidence tended to show that a man snatched fifty dollars from James Blue's hand as he walked down a Raleigh street. Blue was unable to apprehend the thief. Danny Sanders witnessed the incident and recognized the defendant as a man who lived on his block, whom he knew only by the nickname "Shank". Pursuant to the statements of Danny Sanders and James Blue, a warrant was issued for the arrest of "Shank" and the defendant was arrested. The defendant's nickname was not "Shank" but was "Chink." Other evidence necessary for the resolution of the appeal is contained in the opinion of the court.

Attorney General Edmisten, by Associate Attorney Michael Rivers Morgan, for the State.

Assistant Appellate Defender Marc D. Towler, for the defendant-appellant Robert Edward Young.

MARTIN (Robert M.), Judge.

[1] The defendant first argues that his conviction for larceny from the person is invalid because that offense is not a lesser included offense of common law robbery governed by N.C. Gen. Stat. § 15-170. We disagree.

While larceny from the person does carry the same penalty as common law robbery, the North Carolina courts have treated larceny from the person as a lesser included offense. See *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979), *disc. rev. denied* 299 N.C. 123, 261 S.E. 2d 925 (1980). In *State v. Kirk*, 17 N.C. App. 68, 193 S.E. 2d 377 (1972), the prosecuting witness was working as a gas station attendant one night, and while pumping gas for a customer, the customer exited his car, went behind the prosecuting witness, removed a billfold containing money from the prosecuting witness' hip pocket, and ran down the street. The victim called for the wrongdoer to stop, but to no avail. The Court expressly stated that larceny from the person is a lesser in-

cluded offense of common law robbery. *Id.* at 70, 193 S.E. 2d 379. Thus defendant's assignment of error is without merit and is overruled.

The defendant next contends that the trial judge erroneously admitted into evidence testimony that defendant identified himself to police by giving two false names following his arrest. The defendant argues that (1) his utterance was the product of an unlawful arrest made pursuant to an arrest warrant which did not adequately identify the defendant and (2) testimony concerning this utterance was erroneously admitted because of the absence of a showing that defendant had been informed of his Miranda rights prior to making the statement.

[2] Considering the first contention, it is true that a warrant must clearly and positively identify the person charged with the commission of an offense. *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). Nonetheless a description of an accused in a warrant by whatever alias names he may have been known to use, if done in good faith, is proper. *State v. Culp*, 5 N.C. App. 625, 169 S.E. 2d 10 (1969). In this case none of the State's witnesses knew the defendant's real name at the time of arrest. Danny Sanders, however, did identify the defendant as the thief but mistakenly believed the defendant's nickname to be "Shank." Accordingly the arrest warrant was issued for "Shank" while the defendant's nickname was "Chink."

The names "Chink" and "Shank" sound sufficiently similar to invoke the doctrine of *idem sonans*. The doctrine of *idem sonans* has been applied in the North Carolina cases of *State v. Sawyer*, 233 N.C. 76, 62 S.E. 2d 515 (1950), where there was a variance between the defendant's name "Sawyer" and the name of "Swayer" which appeared in the warrant, and *State v. Vincent*, 222 N.C. 543, 23 S.E. 2d 832 (1943), where the defendant's actual name was "Vincent," yet the name "Vinson" appeared in the indictment. In both of these cases, the Supreme Court noted that the respective defendants could not be heard to claim that they were not adequately identified in the arrest warrants at issue. Furthermore, the defendant waived any objection to the misnomer appearing in the warrant by pleading not guilty and going to trial on the merits of the case. *State v. Sawyer, supra; State v. Ellis*, 200 N.C. 77, 156 S.E. 157 (1930).

[3] In addition the defendant argues that his statement was improperly admitted in light of *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). *Miranda* warnings are only required when a defendant is being subjected to custodial interrogation. *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971). The mere asking of the defendant's name did not constitute interrogation. Thus no *Miranda* warnings were required.

In *State v. Phillips*, 37 N.C. App. 202, 245 S.E. 2d 587 (1978), a police officer's inquiry as to whether an arrested defendant knew "what was going on" did not constitute custodial interrogation. Similarly, other jurisdictions have ruled that the preliminary questions asked during the booking procedure such as name, address, place of employment, age and other routine background inquiries did not constitute custodial interrogation. *People v. Hernandez*, 263 Cal. App. 2d 242, 69 Cal. Rptr. 448 (1968), *People v. McIntosh*, 53 Ill. App. 3d 958, 369 N.E. 2d 217 (1977), *Clarke v. State*, 3 Md. App. 447, 240 A. 2d 291 (1968).

We do not think that testimony concerning defendant's false identification was improperly admitted. Even if there had been error in the admission of the statement, it would not have been prejudicial since there is no reasonable possibility that it would have contributed to Young's conviction. We believe that the admission of the statement if erroneous would have been harmless beyond a reasonable doubt. *State v. Fletcher* and *State v. St. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971). Defendant's assignments of error are without merit and are overruled.

[4] The defendant also alleges that the admission of evidence relating to the street price of marijuana was error in that the evidence was irrelevant and prejudicial. This contention is totally without merit.

The State's evidence tended to show that the defendant unlawfully took fifty dollars from the person of James Blue. The defense, on the other hand, tried to prove that Blue had arranged to buy a half-pound of marijuana from the defendant for the price of sixty dollars and that when the defendant failed to deliver the drugs, Blue instituted a false robbery claim. Thus the defendant placed the drug issue before the jury and the State's rebuttal evidence concerning the price of a half-pound of marijuana was

appropriate. That evidence served to aid the jury in deciding the ultimate question in this case—which party's version of the facts was true. Consequently, this assignment of error is without merit and is overruled.

[5] The defendant-appellant's final contention is that the indictment which charged him with the offense of common law robbery was insufficient to support his conviction of the offense of larceny from the person because the indictment did not contain the express allegations that the property was taken with intent to steal, and was taken against the victim's will or without his consent. The indictment read as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 22nd day of September, 1980, in Wake County Robert Edward Young did unlawfully, wilfully, and feloniously make an assault on James Blue and did put him in bodily fear and danger of his life, and then and there did unlawfully, wilfully, feloniously, forcibly, and violently take, steal, and carry away $50 in United States currency of the value of $50 dollars, from the person and possession of the said James Blue."

It is not required that an indictment charging the felonious taking of goods from the person of another by the use of force aver that the taking was with the intent to convert the personal property to the defendant's own use, for the question of specific intent would properly be submitted to the jury under the charge. *State v. Williams*, 265 N.C. 446, 144 S.E. 2d 267 (1965); *State v. Frietch*, 8 N.C. App. 331, 174 S.E. 2d 149 (1970). Furthermore, the judge expressly charged the jury that the taking must be without the victim's consent. Consequently, this assignment of error is overruled.

For the foregoing reasons, we find in defendant's trial

No error.

Judge MARTIN (Harry C.) concurs.

Judge BECTON dissents.

Judge BECTON, dissenting.

I have neither an aversion to, nor am I unmindful of, the holdings of our courts that larceny from the person is a lesser included offense of common law robbery, since the latter is an aggravated species of the former.[1] However, believing that due process rights are implicated and further believing that it is inherently unfair to submit to the jury the charge of larceny from the person as a lesser included offense of common law robbery since the allowable punishment for the two crimes is the same, I dissent. The due process question, which the defendant raised, was not addressed by the majority, and, apparently, has not been addressed by our courts. Stating my position differently and setting forth the basis for my dissent in the face of seemingly controlling authority, I quote our Supreme Court in *State v. Hale*, 231 N.C. 412, 414, 57 S.E. 2d 322, 323-24 (1950):

> [I] have not overlooked the cases in which seemingly similar instructions have been upheld, but in none of the cases so far examined was the question here debated presented or decided.

The doctrine of lesser included offenses was initially designed to assist the prosecutor; society deemed it unfair that a defendant could be acquitted simply because the prosecutor failed to establish *all* of the elements of the crime charged.[2] Now, however, the defendant shares the benefit of the doctrine. For example, if there is a genuine conflict in the evidence, a defendant is *entitled* to a charge on the lesser included offense. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Robinson*, 188 N.C. 784, 125 S.E. 617 (1924).

The following general principles govern the submission of any lesser included offense to the jury. "To be necessarily included in the greater offense, the lesser must be such that it is im-

1. *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399, *appeal dismissed* 402 U.S. 1006, 29 L.Ed. 2d 428, 91 S.Ct. 2199 (1971); *State v. Wenrich*, 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Bell*, 228 N.C. 659, 46 S.E. 2d 834 (1948); *State v. Cody*, 60 N.C. 197 (1864); *State v. Kirk*, 17 N.C. App. 68, 193 S.E. 2d 377 (1972).

2. *See Kelly v. United States*, 370 F. 2d 227, 229 (D.C. Cir. 1966) *quoting People v. Mussenden*, 308 N.Y. 558, 562, 127 N.E. 2d 551, 553 (1955), wherein it is stated: "The doctrine evolved at common law to 'prevent the prosecution from failing where some element of the crime charged was not made out.' "

possible to commit the greater without first having committed the lesser." *Giles v. United States*, 144 F. 2d 860, 861 (9th Cir. 1944), *quoting House v. State*, 186 Ind. 593, 117 N.E. 647 (1917). Or, as stated in *State v. Riera*, 276 N.C. at 368, 172 S.E. 2d at 540:

> [W]hen a defendant is indicted for a criminal offense he may be convicted of the charged offense or of a lesser included offense when the greater offense charged in the bill contains all the essential elements of the lesser offense, all of which could be proved by proof of the allegations of fact contained in the indictment.

A defendant is entitled to a charge on the lesser included offense when there is evidence to support the lesser included offense. *State v. Riera; State v. Robinson.* "[I]f the court charges on a lesser included offense when all the evidence tends to support a greater offense, the error is favorable to the defendant and he is without standing to challenge the verdict." *State v. Vestal*, 283 N.C. 249, 252, 195 S.E. 2d 297, 299, *cert. denied* 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973). ("In all of [the] cases [dealing with the latter principle], however, the evidence [has been] such as to compel [our courts] to conclude that had the jury not been given the unsupported lesser offense as an alternative, it most certainly would have returned a verdict of guilty of a higher offense." *State v. Ray*, 299 N.C. 151, 163, 261 S.E. 2d 789, 797 (1980).) "Conversely, where there does exist a reasonable possibility that defendant would have been acquitted had not the lesser offense been erroneously submitted, the error is prejudicial and defendant is entitled to appellate relief." 299 N.C. at 164, 261 S.E. 2d at 797.

I believe the two requirements that follow must exist concurrently in order for larceny from the person to be a lesser included offense of common law robbery: (1) larceny from the person must share common elements with, but contain fewer of the same constituent elements as, common law robbery; and (2) larceny from the person must have a lesser penalty attached to it than does common law robbery. With the first prerequisite there can be no quarrel. Indeed, common law robbery includes all of the elements of larceny from the person, but has "assault" as an additional element. The majority, in my opinion, has not sufficiently addressed the second requirement suggested above.

First, as noted above, larceny from the person and common law robbery have the same punishment. Common law robbery, until the recent enactment of the Fair Sentencing Act,[3] was not given a specific punishment by statute. Punishment was under G.S. 14-2, the general statutory provision prescribing punishment for felonies. Larceny from the person is, and has been punished under the same statutory provision since it, too, is given no specific punishment under our statutes. *See* G.S. 14-72(b)(1) and 14-2. A legislative history of the two statutes shows that from 1895 to the present, the two crimes have carried the same punishment.[4] To the contrary, and by way of example, the punishment prescribed for murder and its lesser offenses differ in descending gradations, as do the punishments for rape and its lesser offenses and burglary and its lesser offenses.

Second, that jurors sometimes render compromised verdicts when they are given alternative charges to choose from is not unheard of. Nor is it blasphemy to suggest that jurors sometimes think they are doing the defendant a favor by convicting him of a lesser offense. As suggested by defendant in his brief, when a jury is instructed on a lesser included offense which has a lesser penalty than the offense charged, the defendant receives something in return for his exposure to conviction for some offense other than the one charged—that is, the possibility of being exposed to a lesser potential punishment. On the other hand, when a jury is instructed on an offense of "less degree" which has the same penalty as the offense charged, the defendant receives nothing in return for his exposure to conviction of an offense which requires the proof of fewer elements than the offense charged.

Support for the defendant's argument is found in this Court's opinion in *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979), *disc. rev. denied* 299 N.C. 123, 261 S.E. 2d 925 (1980). In

3. G.S. 14-1.1 *et seq.*

4. *See* G.S. 14-2 (Cum. Supp. 1979) and antecedent sections—(R.C., c.34, s.27; Code, s.1096; Rev., s.3292; C.S., s. 4172; 1967, c.1251, s.2; 1973, c. 1201, s.6; 1977, c.711, s.15); *and* G.S. 14-72(b)(1) (Cum. Supp. 1979) and antecedent sections (1895, c.285; Rev., s.3506; 1913, c. 118, s.1; C.S., s. 4251; 1941, c.178, s.1; 1949, c.145, s.2; 1959, c. 1285; 1961, c.39, s.1; 1965, c.621, s.5; 1969, c.522, s.2; 1973, c.238, ss. 1,2; 1975, c.163, s.2; c.696, s.4; 1977, c.978, ss.2,3; 1979, c.408, s.1).

McLawhorn, the defendant appealed a conviction of driving under the influence in violation of G.S. 20-138(a) arguing that he was harmed by the failure of the trial court to give an instruction on a 0.10 driving violation under G.S. 20-138(b). (It is to be remembered that the defendant in the case *sub judice* argued that he was harmed because the court gave an instruction on a lesser included offense.) The *McLawhorn* Court, in the face of statutory language of G.S. 20-138(b) that a 0.10 driving offense "shall be treated as a lesser included offense of the offense of driving under the influence," disagreed with the defendant therein and said that a lesser included offense instruction should *not* have been given. The Court stated:

> Although the instruction could have been given, the omission of the instruction was to defendant's benefit. While driving with 0.10 percent by weight alcohol in the blood is by statute to "be treated as" a lesser included offense of driving under the influence, it, in reality, is not a lesser offense. The effect of G.S. 20-138(b) is to allow the court to impose the punishment it could impose for a conviction under subsection (a) of the same statute without the State having to prove that the defendant was under the influence of intoxicating liquor. For both offenses, the State must prove (1) defendant was driving a vehicle and (2) defendant was driving upon a public highway or public vehicular area within the State. As a third element of G.S. 20-138(a), the State must prove beyond a reasonable doubt defendant was under the influence of intoxicating liquor. For a conviction under subsection (b) the State need only prove that the amount of alcohol in defendant's blood was 0.10 percent or more by weight. The punishment range for both offenses under G.S. 20-138 is identical. *See* G.S. 20-179(a). By not instructing on the latter motor vehicle violation, the trial judge benefited the defendant and handicapped the State. The State had the verdict options of only driving under the influence or not guilty. The State was thus put to a greater burden than it would have under G.S. 20-138(b).

43 N.C. App. at 701, 260 S.E. 2d at 142. The defendant was handicapped in this case. He was tried under circumstances whereby he faced the same possible punishment regardless of whether the

State proved *the additional element* of "assault" required for common law robbery.

Further support for the defendant's argument is found, by analogy, in Rule 31(c) of the Federal Rules of Criminal Procedure. Rule 31(c) provides that "[t]he defendant may be found guilty of an offense necessarily included in the offense charged or an offense necessarily included therein if the attempt is an offense."[5] The language of Rule 31(c) refers to offenses "necessarily included in the offense charged" while our statute refers to crimes of a "less degree." The words "less degree" as used in our statute, G.S. 15-170, even more so than the words "necessarily included" as used in Federal Rule 31(c) suggest that the included offense must have a lesser penalty than the offense charged. Even if this were not so, any subtle distinctions which may be drawn from the use of the two terms have been obliterated by the federal courts' use and interpretation of "necessarily included." Federal courts have read Rule 31(c) to mean lesser included offenses. *See Olais-Castro v. United States*, 416 F. 2d 1155, 1157 (9th Cir. 1969) *citing* Orfield, Criminal Procedure under the Federal Rules, § 31.12, pages 139-140; Annot., 11 A.L.R. Fed. 173 (1972).

The two Circuit Courts of Appeals which have addressed the issue presented to us have construed Rule 31(c) such that in order for the offense to be a lesser offense it must carry a lighter penalty than the greater offense. In *James v. United States*, 238 F. 2d 681 (9th Cir. 1956), the court held that the conviction of a defendant charged under the Alaska dwelling burglary statute could not be upheld on the theory that burglary of a nondwelling was a lesser offense of burglary of a dwelling. The dwelling burglary statute specified a minimum of one year imprisonment while the nondwelling burglary statute carried a two-year minimum punishment. The court stated that "[w]e are not disposed to hold that the included offense rule is meant to apply where the claimed 'lesser' or included offense prescribes a greater minimum punishment than the so-called 'greater' or including offense." *Id.* at 683.

5. G.S. 15-170 provides that "[u]pon trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

In *United States v. Cady*, 495 F. 2d 742 (8th Cir. 1974), the defendant, charged with aiding and abetting a bank robbery aggravated by putting the life of another in jeopardy, requested a charge on the lesser offense of larceny of a bank. The Eighth Circuit found that the trial court properly refused the request since the evidence clearly proved the greater crime. In its discussion of the lesser included offense instruction the court stated:

> A lesser included offense instruction is mandated when requested, provided the lesser offense is necessarily included in the offense charged. *See* Federal Rules of Criminal Procedure 31(c). The lesser included offense must be both *lesser* and *included*. These requirements can only be met where the included offense involves fewer of the same constituent elements as the charged greater offense and where the claimed lesser offense has a lighter penalty attached to it than does the charged offense. [Emphasis in original.]

Id. at 747.

The reasoning of *McLawhorn* and of the federal cases supports the defendant's position. I believe the procedure used in this case, whereby the defendant was exposed to conviction for an offense requiring proof of fewer elements without the corresponding benefit of being exposed to a lesser potential penalty if convicted of that offense, is inherently unfair and violates the defendant's due process rights under the Fourteenth Amendment to the Constitution of the United States and under Article I § 19 of the Constitution of North Carolina. I, therefore, vote to reverse the conviction.

LUCILLE B. POYTHRESS, EMPLOYEE v. J. P. STEVENS AND COMPANY, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 8110IC222

(Filed 3 November 1981)

1. Master and Servant § 85— two-year time limit for filing claims—condition precedent to Industrial Commission's jurisdiction

In the absence of facts suggesting that a defendant-employer engaged in false representations or in the concealment of material facts reasonably

calculated to mislead a plaintiff, enabling a plaintiff to invoke the doctrine of equitable estoppel to attack jurisdiction, the two-year time limit for filing claims under N.C.G.S. 97-58(c) is a condition precedent, rather than a statute of limitations, with which a claimant in a workers' compensation proceeding must comply in order to confer jurisdiction on the Industrial Commission to hear the claim.

2. **Witnesses § 9— redirect—new evidence improper**

The purpose of redirect is to clarify the subject matter of the direct examination and new matter elicited on cross-examination. New evidence relating to an issue not yet raised by either party is not a proper subject for redirect.

3. **Master and Servant §§ 68, 91— workers' compensation—occupational disease—time for filing claim**

Plaintiff's time for filing her claim for an occupational disease began to run when she was "first informed by competent medical authority of the nature and work-related cause of the disease." Therefore, where a licensed medical doctor diagnosed plaintiff's symptoms and conditions as byssinosis in 1963 and plaintiff was fully apprised of the nature and work-related cause of her disease when she finally left her job in 1965, the time for her to file her claim began in 1965.

4. **Master and Servant § 68— workers' compensation—byssinosis—which statute applies—date of disability**

The time of disablement for purposes of deciding which version of the Workers' Compensation Act to apply runs from the date the claimant was incapable of working.

5. **Master and Servant § 90— failure of employer to notify commission of injury—no tolling of statute of limitation**

The prescribed penalty against an employer for the neglectful omission to report to the Industrial Commission an employee's absence under G.S. 97-92(a) is not the tolling of a "statute of limitation" or a bar, either through estoppel or waiver, to the defendants' reliance upon N.C.G.S. 97-58(c).

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 11 September 1980. Heard in the Court of Appeals 13 October 1981.

Plaintiff appeals from a decision of the Commission granting defendants' motion to dismiss her claim as not having been timely filed. Supporting the Commission's decision are the following facts as established by the record:

Plaintiff was born in 1922 and at the age of seventeen began working in the spinning room of a cotton mill. Between 1939 and 1965 she worked intermittently for J. P. Stevens whenever her

husband was not assigned to shore duty with the United States Navy. She testified that during the periods of her employment there was poor ventilation in the work areas. She described the amount of cotton dust to which she was exposed as extensive. "[W]e would look like it had snowed on us."

In 1963 plaintiff began experiencing difficulty with her breathing, particularly soon after her arrival at the mill on Mondays. Her symptoms included tightness and congestion in her chest, persistent coughing, and wheezing.

On 13 November 1963 plaintiff was discharged from the Portsmouth naval hospital in Virginia where she had undergone fifteen days of observation and tests for her breathing problems. On that date Dr. W. W. Simmons, LT MC USN, prepared a report in which he wrote:

> After consultation with the radiologist and after obtaining further history from the patient which revealed that she worked in a textile mill in the cutting room which was full of cotton lint, it was felt that this entire process could be explained by inhalation of cotton lint fibers leading to a disease of the lung characterized by foreign body reaction in an afebrile but coughing patient.

Dr. Simmons diagnosed plaintiff's condition as byssinosis. As a result of this diagnosis and upon the recommendation of Dr. Simmons, the plaintiff stopped working at the mill in April of 1965.

At the hearing conducted before Deputy Commissioner Delbridge, plaintiff testified as follows: "The doctor at Portsmouth Naval Hospital was the first doctor I went to for breathing trouble. He is the one that found it. He is the one that told me . . . I quit work because the doctor told me to." Plaintiff's medical records also reveal that on 24 April 1965 Dr. Portela noted the following: "Has had Dx of Byssinosis at US Naval Hosp-She claims she can't work. . . . Advised to get chest XRay to check progress of illness . . .."

Plaintiff filed her claim with the Industrial Commission on 26 September 1977. On 3 January 1978 plaintiff was examined by Dr. Sieker, professor of medicine at Duke University Medical Center. Dr. Sieker testified that plaintiff was suffering from permanent lung disease. He could not testify whether in 1965 her lung

disease could or might have been present at the time she stopped working. His report reads: "The patient is disabled for all but the most sedentary work. She has hypoxemia at rest and with exercise. The disability is primarily related to chronic obstructive pulmonary disease and the cotton dust exposure is certainly a factor through the course of years in causing the chronic pulmonary disease."

On 7 January 1980 defendants filed a motion to dismiss, alleging that plaintiff had failed to comply with N.C.G.S. 97-58(c) which states that "[t]he right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be."

Based on the foregoing, the Commission found as a fact that: "Plaintiff's disability began on April 29, 1965. She filed her claim with the Industrial Commission on or about September 26, 1977." The Commission concluded as a matter of law that plaintiff "filed her claim with the Industrial Commission more than 2 years (formerly 1 year) after her disability."

Hassell & Hudson, by Robin E. Hudson, for plaintiff appellant.

Maupin, Taylor & Ellis, by Richard M. Lewis and David V. Brooks, for defendant appellees.

MARTIN (Harry C.), Judge.

In reviewing an award of the Industrial Commission, this Court is limited to two questions: (1) whether the Commission's findings are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its legal conclusions. *Inscoe v. DeRose Industries*, 292 N.C. 210, 232 S.E. 2d 449 (1979); *Walston v. Burlington Industries*, 49 N.C. App. 301, 271 S.E. 2d 516 (1980). However, as plaintiff contends that defendants waived the defense of N.C.G.S. 97-58(c) by failing to raise it until after all evidentiary hearings had been concluded, we first deal with this important procedural question.

[1] Assuming that the two-year limit for filing claims under N.C.G.S. 97-58(c) is in the nature of a statute of limitations to be pleaded and proved by defendants, plaintiff's contention finds

doubtful support in the law. Because the case involves an administrative proceeding instituted by an application for workers' compensation benefits rather than formal pleadings, the rights of the parties are to be determined by the facts. *See In re Gibbs*, 205 N.C. 312, 171 S.E. 55 (1933). The facts in this case point to only one conclusion—the plaintiff did not comply with the applicable time limit for filing claims in order to determine her right to compensation for occupational disease. Moreover, it has been stated that:

> The Administrative Procedure Act provides very clearly what constitutes a final agency decision. By its very nature a decision that is not final is subject to change. This is as it should be. Administrative agencies should be encouraged to continue cases under active deliberation until rendition of a final decision to assure that that decision is the product of adequate, sound deliberation. *See* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis*, 53 N.C.L. Rev. 833, 892 (1975). . . . [A]n agency retains jurisdiction to continue its deliberations after an initial vote and until such time as a final agency decision is rendered . . ..

In re Savings & Loan Assoc., 53 N.C. App. 326, 330, 280 S.E. 2d 748, 750 (1981).

Defendants would have us construe N.C.G.S. 97-58(c) not in the nature of a statute of limitations, but as a condition precedent. Under this construction, plaintiff's failure to comply with the condition would create a jurisdictional bar to her claim. Her waiver argument fails as lack of jurisdiction over the subject matter may be taken advantage of at any stage of the proceedings, even after judgment. *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E. 2d 354 (1964); *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958).

We find no North Carolina case in which this question has been presented for resolution. Our Courts have held that N.C.G.S. 97-24, which deals with injury by accident as opposed to occupational disease, constitutes a condition precedent to the right to compensation. Subsection (a) of that statute reads:

> "The right to compensation under this Article shall be forever barred unless a claim be filed with the Industrial Commission within two years after the accident."

Subsection (c) of N.C.G.S. 97-58 reads:

> "The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be."

We find that the two subsections are substantially similar in language and intent[1] and a like construction should be applied to both.

In *McCrater*, a case that was decided under N.C.G.S. 97-24(a), the Court discussed the distinction between statutes of limitation and conditions precedent as follows:

> "A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right."

248 N.C. at 709, 104 S.E. 2d at 860.

It has also been stated that:

> The North Carolina Industrial Commission has a special or limited jurisdiction created by statute, and confined to its terms. Viewed as a court, it is one of limited jurisdiction, and it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.

1. In *Taylor v. Stevens & Co.*, 300 N.C. 94, 98, 265 S.E. 2d 144, 146 (1980), Justice Carlton equates N.C.G.S. 97-24(a) and N.C.G.S. 97-58(c) as being part of the same general claim concept within this state.

Hart v. Motors, 244 N.C. 84, 88, 92 S.E. 2d 673, 676 (1956). *See also Clodfelter v. Furniture Co.*, 38 N.C. App. 45, 247 S.E. 2d 263 (1978); *Barham v. Hosiery Co.*, 15 N.C. App. 519, 190 S.E. 2d 306 (1972).

Applying this law to the present case, we hold that the two-year time limit for filing claims under N.C.G.S. 97-58(c) is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim. In the absence of facts suggesting that defendant-employer engaged in false representations or in the concealment of material facts reasonably calculated to mislead plaintiff, we do not decide whether a claimant might invoke the doctrine of equitable estoppel to attack jurisdiction. *See Clodfelter, supra; Barham, supra.*

[2] As the burden was on the plaintiff to establish that her claim was timely filed, we turn now to her contention that she was precluded from doing so during the hearing because objections to her questions were sustained on grounds of relevancy. The testimony on redirect examination reads as follows:

Q: Did any of them tell you to file a claim for byssinosis.

A: No.

MR. TITUS: Objection, Your Honor. None of this is from the courtroom. This is all new. This is redirect.

THE COURT: I agree.

MRS. HUDSON: Your Honor, this bear[s] on the matter, but up on cross—when she knew or when the claim was timely filed, which is absolutely essential in this case.

MR. TITUS: Relative to her condition; not anything to do with filing the claim.

MRS. HUDSON: It's absolutely essential.

THE COURT: I think she's right. You are not contesting timely filed.

MR. TITUS: Yes, we would, Your Honor.

THE COURT: When did she file the claim?

MR. TITUS: November 28, 1977.

MRS. HUDSON: I have September.

THE WITNESS: I thought it was in September. I wasn't sure.

THE COURT: Go ahead.

Q: (Mrs. Hudson) I'll ask you did you know anyone that ever filed a claim at work for byssinosis?

A: No.

MR. TITUS: Objection to the relevancy.

THE COURT: I'll sustain it on that basis.

Q: (Mrs. Hudson) Do you know when anyone at the mill ever filed any form notifying the Industrial Commission that you had an occupational disease?

A: No, not that I know of.

MR. TITUS: Objection and move to strike. That's all new matters.

THE COURT: She said she didn't know anybody. Go ahead.

I do not recall telling anyone at the mill my reason for quitting besides Mr. Barnes and Mr. Person. None of them told me anything I should do. I did not receive any compensation benefits from the mill.

The purpose of redirect is to clarify the subject matter of the direct examination and new matter elicited on cross-examination. 1 Stansbury's N.C. Evidence § 36 (Brandis rev. 1973). Plaintiff had testified on direct examination that a period of approximately twelve and one-half years had elapsed from when she last worked in defendant-employer's mill to when she filed her claim for compensation. On cross-examination, defendants did little more than elicit that same information. Plaintiff's effort to justify her failure to file within the statutory period was not a proper subject for redirect. This was new evidence relating to an issue not yet raised by either party. Moreover, we find no prejudice with respect to the deputy commissioner's rulings in light of the overwhelming evidence that plaintiff was informed of the occupational nature of her illness as early as 1963.

[3] Plaintiff further objects to the fact that the Commission's opinion and award was limited to only those findings and conclu-

sions which the deputy commissioner deemed sufficient to support his denial of plaintiff's claim on grounds of N.C.G.S. 97-58(c). We note initially that the Commission's findings of fact were supported by the evidence and that the findings justify the legal conclusions. By filing her claim in 1977, plaintiff has at once the benefit of twelve years of medical understanding and legal clarification of her disease. She is also bound by the recent case law respecting her rights under the Workers' Compensation Act. In *Taylor v. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 144, 149 (1980), Justice Carlton wrote that "with reference to occupational diseases the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease." Such was the law in 1963. *Duncan v. Carpenter*, 233 N.C. 422, 64 S.E. 2d 410 (1951).[2] Without attempting to impose a rigid definition of what constitutes "competent medical authority," we hold that under the facts of this case a licensed medical doctor who, in 1963, was astute enough to diagnose byssinosis based on the patient's symptoms and confirmed by X rays and work history is, as a matter of law, a competent medical authority. Dr. Simmons's diagnosis was in large measure derived from plaintiff's work history, and he both orally and in his report informed plaintiff that her disease was the direct result of her contact with cotton dust. Thus plaintiff was fully apprised of the nature and work-related cause of her disease when she finally left her job in 1965. The time for her to file her claim began in April 1965.

[4] The time of disablement for purposes of deciding which version of the Workers' Compensation Act to apply runs from the date the claimant was incapable of working. *Taylor, supra.* Therefore, the 1963 version of the Act applies to plaintiff's case. In *Taylor*, the Court further held that "the 1963 version of the Workers' Compensation Act provides benefits for those suffering from byssinosis or brown lung disease, and occupational obstructive lung disease of the type this plaintiff suffers." 300 N.C. at 105, 265 S.E. 2d at 150.

2. *Taylor* overruled the holding in *Duncan* only to the extent that the finding of competent medical authority include the fact that disablement occurred within one year from the last exposure in claims involving occupational diseases other than asbestosis, silicosis and lead poisoning.

We are sympathetic with plaintiff's argument that had she filed her claim in 1965 when the medical and legal implications of the disease were in a formative stage, it is unlikely that she would have recovered. Nor are we unmindful of the fact that those who then worked in the cotton mills were at times subjected to intolerable conditions and were afforded little, if any, education concerning their rights to compensation for occupational disease, particularly byssinosis. However, the Workers' Compensation Act has never been construed to guarantee recovery. It merely affords the right to a claim for recovery. *Hatchett v. Hitchcock Corp.*, 240 N.C. 591, 83 S.E. 2d 539 (1954). Nor are we now willing to hold, in retrospect, that it was necessary to inform plaintiff not only of the nature and work-related cause of her disease, but that she had a claim for compensation under the Act as it was written in 1963. Under the 1963 version of the Act, plaintiff had one year to file her claim. This she failed to do. For this reason, we must affirm the dismissal of her claim as being time-barred.

[5] Finally, plaintiff contends that because defendants took no action with respect to plaintiff's claim until 1977, they are estopped to rely on N.C.G.S. 97-58. We disagree. Plaintiff told her supervisors that she was leaving her job because she had byssinosis. N.C.G.S. 97-92(a) requires that the employer give notice to the Industrial Commission where an injury to an employee causes the employee's absence from work for more than one day. However, 97-92(e) provides that: "Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars ($5.00) and not more than twenty-five dollars ($25.00) for each refusal or neglect." It is clear that the prescribed penalty against an employer for the neglectful omission of a report is not the tolling of a "statute of limitation" or a bar, either through estoppel or waiver, to the defendants' reliance upon N.C.G.S. 97-58(c). In his concurring opinion in *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 455, 46 S.E. 2d 109, 114 (1948), Justice Barnhill stated: "The employer is required to report the accident, G.S. 97-92, and the report becomes a part of the private records of the Commission, not open to the public, and the Commission, *for statistical purposes*, must compile the information contained in the report." (Emphasis added.)

For the reasons set forth above, we affirm the decision of the Industrial Commission.

Affirmed.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. JAMES WILLIE ASHLEY

No. 8126SC391

(Filed 3 November 1981)

1. **Criminal Law § 46— evidence of defendant's flight properly admitted**

In a case in which defendant was indicted for first degree rape, evidence of defendant's flight from the scene of the crime was properly admitted and the trial judge was correct in instructing on evidence of flight. Evidence of flight is only one circumstance bearing on defendant's guilt and is open to explanation in rebuttal by defendant.

2. **Criminal Law § 88.4— impeachment of defendant—charges pending against him—cross-examination proper**

By taking the stand and testifying on his own behalf, defendant was subject to impeachment by questions relating to specific acts of criminal and degrading conduct including questions related to charges pending against him in another state.

3. **Criminal Law § 112.4— instruction on circumstantial evidence not required**

As the testimony of the victim alone, if believed, was sufficient to warrant defendant's conviction of second degree rape, it was not error for the court to fail to charge upon the law of circumstantial evidence in response to defendant's oral request. Balancing the direct testimony of the victim against the defendant's flight and the result of the medical examination performed on the victim after the alleged rape does not lead to the conclusion the State relied extensively on circumstantial evidence.

4. **Rape § 6— instruction on lack of consent proper**

Where the victim's testimony clearly established that she was sexually assaulted against her will, the instruction to the jury that "consent induced by fear is not consent as a matter of law" was proper.

5. **Rape § 6.1— failure to instruct on attempt to commit second degree rape proper**

In light of the victim's unequivocal testimony supporting penetration and upon note that the absence of sperm and the absence of other physical symptoms would not be evidence of an attempted rape, in a prosecution for second

degree rape there was no evidence to support an instruction on the lesser offense of attempt to commit second degree rape.

6. Rape § 7— sentence for second degree rape within statutory limits

The record did not support defendant's contention that the trial judge imposed the maximum sentence for second degree rape based upon his mistaken assumption that the defendant could have been charged with and convicted of first degree rape, and as defendant was properly convicted of second degree rape under N.C.G.S. 14-27.3(a)(1), the sentence imposed, being within the statutory limit, was a matter for the sound discretion of the court. N.C.G.S. 14-27.3(b).

7. Rape § 7— rape of twelve-year-old within provision of first degree rape statute

N.C.G.S. 14-27.2 is substantially different from its predecessor, N.C.G.S. 14-21 (Supp. 1975), in that the legislature intended to include within the purview of N.C.G.S. 14-27.2 a child who is in her thirteenth year at the time of the rape.

APPEAL by defendant from *Smith, Judge.* Judgment entered 9 September 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 October 1981.

The defendant, James Willie Ashley, was indicted for first degree rape, tried and convicted for second degree rape, and sentenced to imprisonment for a maximum and minimum term of forty years. He appeals from his conviction and the imposition of this sentence.

The evidence at trial tended to show that the defendant had been living with Doris Stinson on and off for seven or eight years and had been acting as father to her two sons and a twelve-year-old daughter, Lisa. On 5 April 1980, the day of the alleged rape, Doris Stinson left for work and the defendant took the boys to a skating rink, leaving Lisa at home alone. When defendant returned to the house, he called Lisa into her mother's bedroom. According to Lisa's testimony, defendant then asked her to take down her pants. When she refused, he forcibly removed them, threw her onto the bed, and had sexual intercourse with her. He threatened to kill her if she related the incident to anyone.

Later Lisa and the defendant returned to the skating rink to pick up her brothers. When she was alone with her brothers, she told them what had happened. After her mother returned from work later that evening, Lisa related to her the details of the alleged sexual assault. The police were called and Lisa was taken

to Charlotte Memorial Hospital for examination. The examination revealed that Lisa had had sexual intercourse prior to the time she came to the hospital.

Defendant fled the scene. Doris Stinson received phone calls from him, originating in Fort Lauderdale, Florida, and in New Orleans, where he was eventually apprehended.

Defendant denied that he had raped Lisa or had in any way sexually assaulted her. He offered character witnesses and testified on his own behalf.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Appellate Defender Adam Stein for defendant.

MARTIN (Harry C.), Judge.

[1] Defendant submits his first assignment of error as follows: "Did the trial court's denial of the defendant's motion to suppress evidence of flight and the giving of the pattern jury instruction on flight evidence constitute reversible error because the prejudicial impact of the flight evidence in this case outweighed its probative value on the question of the defendant's guilt?"

Underlying defendant's objection to the admission of this evidence is his contention that the inference from flight to consciousness of guilt is a weak one; that is, his flight indicated a fear of being incarcerated rather than an acknowledgment of guilt. According to defendant's testimony, he denied raping Lisa Stinson and asked the police if there was a test that could be performed on Lisa to determine whether she had been raped. An officer responded that there were tests which could be performed at the hospital. Defendant agreed to go to the hospital until the officer informed him that he would be required to ride in a police car. At this point the defendant fled because he had "learned a long time ago that if you get in a police car he's going to lock you up," and because he had house and car payments to make and he could not make a bond or afford a lawyer.

"In North Carolina it has long been held that '[s]ubsequent acts, including flight . . . are competent on the question of guilt. [Citations omitted.] The basis of this rule is that a guilty con-

science influences conduct.'" *State v. Jones*, 292 N.C. 513, 525, 234 S.E. 2d 555, 562 (1977). Evidence of flight is only one circumstance bearing on defendant's guilt and is open to explanation and rebuttal by the defendant. 2 Stansbury's N.C. Evidence § 178 (Brandis rev. 1973). In this case defendant was free to, and did in fact, testify as to his motives for fleeing. We find that evidence of defendant's flight was properly admitted. Moreover, the trial judge was correct in instructing on evidence of flight. "So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper." *State v. Irick*, 291 N.C. 480, 494, 231 S.E. 2d 833, 842 (1977). *See also State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973); *State v. DeBerry*, 38 N.C. App. 538, 248 S.E. 2d 356 (1978).

[2] Defendant next contends that the trial court committed reversible error in denying his motion to prohibit the state from cross-examining him about his alleged involvement in a robbery and sexual battery for which charges were pending against him in Florida. Defendant took the stand and testified on his own behalf. In doing so, he surrendered his privilege against self-incrimination. He was subject to impeachment by questions relating to specific acts of criminal and degrading conduct. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973).

> Cross-examination for purposes of impeachment is not, however, limited to questions concerning prior convictions, but also extends to questions relating to specific acts of criminal and degrading conduct for which there has been no conviction. . . . The scope of such cross-examination is normally subject to the discretion of the trial judge, and the questions must be asked in good faith.

State v. Ross, 295 N.C. 488, 490-91, 246 S.E. 2d 780, 783 (1978) (citations omitted). In *Ross*, the Court noted that the purpose in permitting such wide scope for impeachment is to aid the jury in assessing and weighing the credibility of a defendant's often self-serving testimony.

The Supreme Court of North Carolina has declined to reverse this rule. *Ross, supra* (and cases cited therein). Nor does

the rule violate defendant's fifth or fourteenth amendment rights so long as the jury is instructed to limit its consideration of the evidence to the function of impeachment. *Ross, supra.* Defendant was permitted to and did invoke his fifth amendment privilege in an effort to thwart the state's efforts to question him concerning the charges pending against him in Florida. To invoke the fifth amendment does not, however, serve to bar cross-examination for impeachment purposes. The "likelihood of undue prejudice accruing from the attempted impeachment . . . does not outweigh the court's substantial interest in arriving at the truth." *Ross, supra,* at 493, 246 S.E. 2d at 785. *Accord, State v. Allen,* 34 N.C. App. 260, 237 S.E. 2d 869, *disc. rev. denied,* 293 N.C. 741 (1977). We find that these questions were proper and there is no basis in the record for finding a lack of good faith on the part of the district attorney.

[3] In defendant's third assignment of error, he contends that the trial court committed reversible error in denying his request that the jury be charged on the law of circumstantial evidence. Defendant concedes that where the state relies principally upon direct evidence which is sufficient, if believed, to warrant conviction, the failure of the court to charge upon the law of circumstantial evidence in response to defendant's oral request is not error. *State v. Hicks,* 229 N.C. 345, 49 S.E. 2d 639 (1948). However, defendant maintains that the state relied extensively on circumstantial evidence in its case against the defendant and therefore the requested instruction was required. *State v. Newton,* 25 N.C. App. 277, 212 S.E. 2d 700 (1975). *See also State v. Beach,* 283 N.C. 261, 196 S.E. 2d 214 (1973); *State v. Lowther,* 265 N.C. 315, 144 S.E. 2d 64 (1965).

We balance the direct testimony of Lisa Stinson against what defendant advances as circumstancial evidence: defendant's flight and the results of the medical examination performed on Lisa after the alleged rape. We cannot agree with defendant that the state relied extensively on circumstantial evidence. Lisa Stinson's testimony alone, if believed, was sufficient to warrant defendant's conviction. *Hicks, supra.* We find no merit in defendant's third assignment of error.

[4] Defendant next takes exception to the trial court's instruction to the jury that "consent induced by fear is not consent as a

matter of law." It is defendant's contention that this portion of the instruction is erroneous inasmuch as "[t]here was no evidence . . . that Lisa Stinson consented to have intercourse with the defendant or that she did not resist or ceased resistance through fear of great harm." Defendant does admit that the state's evidence showed that he used his superior strength to physically force Lisa to have intercourse with him. Whether she was induced by fear or overcome by defendant's physical forcefulness, Lisa's testimony clearly establishes that she was sexually assaulted against her will. She did not consent to having intercourse with the defendant. The state was entitled to an instruction on this issue to ensure that the jury gave proper consideration to Lisa's relative lack of resistance. We find no prejudicial error in the instruction.

[5] As his fifth assignment of error defendant contends that the trial judge was required, under the facts of this case, to instruct on the lesser included offense of attempt to commit second degree rape. Defendant relies on evidence presented by the state which suggests that there was no vaginal penetration:

> 1. Lisa Stinson testified that after the alleged rape she saw her brothers and mother and stated that James (the defendant) had *tried* to mess with her again.
>
> 2. Dr. Alice Bishoprick testified that she found sperm present when she examined Lisa at the hospital. However, Dr. Lewis Portis from the Charlotte police laboratory testified that he did not find any evidence of sperm when he examined the swabs from the rape kit taken of Lisa Stinson.
>
> 3. Dr. Bishoprick testified that when she examined Lisa several hours after the alleged rape, she did not find any bruises, abrasions, tears, swelling, or edema in the genital area.

We note first that the absence of sperm would not be evidence of an attempted rape since ejaculation is not an element of the offense of rape. N.C. Gen. Stat. § 14-27.2 (Supp. 1979). Moreover, the absence of other physical symptoms such as swelling or abrasions does not support a finding of attempted rape, as vaginal intercourse requires only the slightest penetration. *State v. Flippin*, 280 N.C. 682, 186 S.E. 2d 917 (1972). Lisa's statement

that "James tried to mess with me again," taken in the context of her other unequivocal testimony that the defendant "threw me on the bed, dropped his shorts, and put his penis into my vagina," amounts to little more than an inept description of what occurred. "[W]hen all the evidence tends to show that the accused committed the crime with which he is charged and there is no evidence of guilt of a lesser-included offense, the court correctly refuses to charge on the unsupported lesser offense." *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). *Accord, State v. Summitt*, 301 N.C. 591, 273 S.E. 2d 425 (1981); *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976). From the record we find no evidence to support an instruction of attempt to commit second degree rape.

[6, 7] Finally, defendant contends that he is entitled to a remand for resentencing because the trial judge imposed the maximum sentence for second degree rape based on his mistaken assumption that the defendant could have been charged with and convicted of first degree rape. The record does not support this contention. Before imposing sentence the trial judge stated: "I'm going to impose the sentence I think is appropriate for the crime for which he [the defendant] has been convicted." The character and extent of the punishment to be imposed, if within the limits of the sentence permitted by law, is a matter for the sound discretion of the court and may be reviewed by the appellate court only in case of manifest and gross abuse. *State v. Hullender*, 8 N.C. App. 41, 173 S.E. 2d 581 (1970). The defendant was properly convicted of second degree rape under N.C.G.S. 14-27.3(a)(1) and the sentence imposed is within the statutory limit of forty years provided for in this statute. N.C. Gen. Stat. § 14-27.3(b) (Supp. 1979).

However, because defendant has raised an issue involving the statutory construction of N.C.G.S. 14-27.2, effective 1 January 1980, we will deal with this assignment in further detail. Defendant has alleged that under the correct interpretation of this statute, he could not have been convicted of first degree rape because Lisa Stinson's twelfth birthday had already passed on the day of the alleged rape. We cannot agree with defendant.

N.C.G.S. 14-27.2 reads in pertinent part: "(a) A person is guilty of rape in the first degree if the person engages in vaginal in-

tercourse: . . . (2) With a victim *who is a child of the age of 12 years or less* and the defendant is four or more years older than the victim." (Emphasis added.)

According to the plain language of the statute, until Lisa reached her thirteenth birthday she was a child of the age of twelve.

We note that the wording in N.C.G.S. 14-27.2 is substantially different from its predecessor, N.C.G.S. 14-21 (Supp. 1975), which stated in pertinent part: "(a) First-Degree Rape—(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child *under the age of 12 years*, the punishment shall be death . . .." (Emphasis added.) We can only assume that by changing the language of the statute from "under the age of 12 years" to "12 years or less" the legislature intended to include within the purview of the new statute a child who is in her thirteenth year at the time of the rape.

We find that defendant had a fair trial, free of prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

RICKY NELSON SMITH v. MILLIE LEGGETT STOCKS

No. 816DC247

(Filed 3 November 1981)

1. Automobiles §§ 57.1, 79— intersection accident—negligence and contributory negligence

Defendant's evidence in support of her counterclaim was sufficient for submission to the jury on the issue of plaintiff's negligence and did not disclose contributory negligence by defendant as a matter of law where it tended to show that defendant was traveling on the servient highway and plaintiff was traveling on the dominant highway; defendant came to a full stop in reaching an intersection of the two highways; defendant looked to her left and to her right and determined that it was safe to proceed across the intersection; plaintiff's truck was either not in sight or not close enough to constitute a hazard; and after defendant crossed the median of the dominant highway and entered

the fourth lane of traffic, plaintiff's truck struck her car, since plaintiff had a duty to yield the right-of-way to defendant's vehicle which was already in the intersection, and defendant was not required to anticipate that a driver along the dominant highway would fail to observe the rules of the road applicable to him.

2. **Automobiles § 46— opinion testimony as to speed—insufficient observation**

A defendant who did not see plaintiff's vehicle until it was about three feet from her car did not have a reasonable opportunity to judge the speed of the vehicle, and the trial court erred in permitting defendant to testify that the speed of plaintiff's vehicle was "fast."

3. **Negligence § 27.1— admission to agent of liability insurer**

Testimony by an agent of defendant's liability insurer that defendant admitted to her that the automobile accident in question "was her fault as far as she knew" was not inadmissible on the ground that defendant's cross-examination of the witness would necessarily disclose the existence of liability insurance, since a thorough cross-examination of the witness could be conducted without disclosing the details of insurance coverage, and defendant may not argue prejudice if the disclosure of insurance is made by her own counsel.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 13 October 1980 in District Court, BERTIE County. Heard in the Court of Appeals 15 October 1981.

This is a civil action for property damage arising out of an intersection collision which occurred 5 December 1979 in Windsor, North Carolina. The defendant counterclaimed for property damage. At trial, the jury found against the plaintiff on the issue of defendant's negligence. Plaintiff does not appeal this decision. With respect to the counterclaim, the jury found for the defendant on the issue of plaintiff's negligence and against the plaintiff on the issue of defendant's contributory negligence. From a verdict awarding defendant $900, plaintiff appeals.

At trial, the evidence disclosed the following pertinent facts: The collision occurred at the intersection of U.S. 13 and U.S. 308. U.S. 13 is a dominant highway consisting of four lanes running north and south. U.S. 308 is a servient highway running east and west. Motorists travelling on U.S. 308 are required by signs to come to a complete stop before proceeding across the intersection at U.S. 13.

Plaintiff, Ricky Nelson Smith, testified that prior to the collision he had stopped his 1972 Ford truck at the Zip Mart located approximately 100 feet from the intersection of U.S. 13 and U.S.

308. He pulled out from the Zip Mart into the right lane of U.S. 13, travelling north. He accelerated to a speed of approximately 25 to 30 m.p.h. Plaintiff did not see defendant's car at the intersection as he pulled out from the Zip Mart. He testified that he "glimpsed" defendant's vehicle to his left when he was ten to fifteen feet from it. At that time he braked to a speed of between 10 and 15 m.p.h. and did all he could to avoid a collision. Plaintiff testified that in his opinion defendant was travelling between 35 and 40 m.p.h. as she crossed the intersection. The collision occurred at approximately 5:15 p.m.; it was dusk and plaintiff had his headlights on. Plaintiff testified that he heard defendant blow her horn, but he did not see her decrease her speed.

Defendant, Millie Leggett Stocks, testified that at the time of the collision she was driving a 1972 Pontiac. She was travelling in an easterly direction on U.S. 308. She came to a complete stop at the intersection of U.S. 13. She saw two cars coming, one to her left and one to her right. She estimated that neither car was closer than one-fourth of a mile from the intersection. The record is unclear as to whether she allowed these cars to pass before she entered the intersection. Defendant further testified that she was travelling at a speed of 25 m.p.h. all the way across the intersection and that her parking lights were on. She did not see the plaintiff's truck until it was about three feet to the right of her car. On cross-examination, she said she "glimpsed him" about three feet before he hit her. She blew her horn. Defendant was permitted to testify that in her opinion the speed of plaintiff's vehicle was "fast."

At the moment of impact defendant's car was located in the fourth lane of traffic travelling easterly across the right northbound lane of U.S. 13. Plaintiff's truck damaged the right rear end panel of defendant's car.

The trial court excluded the testimony of Ella Belch, an agent for Nationwide Insurance Company, who testified out of the presence of the jury that in speaking with defendant concerning the accident, defendant had admitted fault.

By stipulation, the court read into the record testimony offered by state highway patrolman James A. Hart, the investigating officer. He testified that the posted speeds for U.S. 13 and U.S. 308 were 45 m.p.h. and 35 m.p.h. respectively. In his

opinion the estimated speed of plaintiff's vehicle at impact was 30 m.p.h. and defendant's vehicle was travelling at a speed of 10 m.p.h.

Taylor & McLean, by Donnie R. Taylor, for plaintiff appellant.

Gillam, Gillam and Smith, by Lloyd C. Smith, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

I.

[1] Plaintiff first assigns as error the trial court's denial of his motions for a directed verdict and for judgment n.o.v. and in the alternative for a new trial on defendant's counterclaim. He alleges that defendant's evidence showed no actionable negligence on his part and, as a matter of law, showed defendant's contributory negligence. We will deal with each allegation separately.

On the issue of plaintiff's negligence, the court instructed that, if shown by the greater weight of the evidence, plaintiff could be found negligent (1) in the operation of his truck on a public highway and in operating his truck at a dangerous and unlawful rate of speed which was greater than was reasonably prudent under the conditions, and (2) in failing to keep his truck under control.

In determining the sufficiency of the evidence to withstand this plaintiff's motions for directed verdict and judgment n.o.v., all the evidence which supports the defendant's counterclaim must be taken as true and considered in the light most favorable to her, giving her the benefit of every reasonable inference which may legitimately be drawn therefrom, and resolving contradictions, conflicts and inconsistencies in her favor. *See Love v. Pressley,* 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied,* 294 N.C. 441 (1978). Based on the testimony given at trial, we find that defendant offered sufficient evidence to support her counterclaim of actionable negligence against plaintiff.

The laws of this state, both statutory and from our cases, impose upon motorists driving on either dominant or servient highways certain duties when approaching, entering, or travers-

ing intersections. Each driver is required to exercise ordinary care under the particular circumstances in which he finds himself. Failure to do so can constitute negligence when injury results. *Murrell v. Jennings*, 15 N.C. App. 658, 190 S.E. 2d 686 (1972).

Defendant's evidence tended to show that she complied with N.C.G.S. 20-158(a) in that she came to a full stop upon reaching the intersection of U.S. 13 and U.S. 308; that she looked to her left and to her right; that she determined that it was safe to proceed across the intersection; that plaintiff's truck was either not in sight or not close enough to constitute a hazard; and that after she crossed the median of U.S. 13 and entered the fourth lane of traffic, plaintiff struck her car. Under these circumstances, plaintiff had a duty to yield the right of way to defendant's vehicle, already in the intersection. *Todd v. Shipman*, 12 N.C. App. 650, 184 S.E. 2d 403 (1971)[1]; *Farmer v. Reynolds*, 4 N.C. App. 554, 167 S.E. 2d 480, *cert. denied*, 275 N.C. 499 (1969).

Finally, with respect to plaintiff's duty under the circumstances of this case, we quote from *Blalock v. Hart*, 239 N.C. 475, 479-80, 80 S.E. 2d 373, 377 (1954):

> However, the driver on a favored highway protected by a statutory stop sign (G.S. 20-158) does not have the absolute right of way in the sense he is not bound to exercise care toward traffic approaching on an intersecting unfavored highway. It is his duty, notwithstanding his favored position, to observe ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon him in approaching and traversing such an intersection (1) to drive at a speed no greater than is reasonable and prudent under the conditions then existing, (2) to keep his motor vehicle under control, (3) to keep a reasonably careful lookout, and (4) to take such action as an ordinarily prudent person would take in avoiding collision with persons or vehicles upon the highway when, in the exercise of due care, danger of such collision is discovered or should have been discovered.

1. The statutory authority in *Todd* was N.C.G.S. 20-155(b), which was rewritten in 1973. However, the law of the case remains fully applicable under these circumstances.

Thus, although plaintiff was travelling upon the dominant highway at the time of the collision, the evidence was sufficient to raise a legitimate inference of negligence. Plaintiff's motions were properly denied.

Similarly proper was the court's denial of plaintiff's motions for directed verdict and judgment n.o.v. based upon the contention that defendant was contributorily negligent as a matter of law. Defendant's evidence, when taken in the light most favorable to her, was sufficient to require a jury resolution of this issue. A driver along a servient highway cannot be expected to anticipate that the driver along a dominant highway will fail to observe the rules of the road applicable to him. *Blake v. Carroll*, 18 N.C. App. 573, 197 S.E. 2d 574 (1973).

II.

[2] Plaintiff next assigns as error the admission of defendant's opinion evidence as to his speed prior to the collision. Defendant testified that she did not see plaintiff's truck until it was about three feet from her car. Based on that momentary glimpse, she was permitted to testify that the speed of plaintiff's vehicle was "fast." Plaintiff made a timely objection, which was overruled, and the court denied plaintiff's request to strike the answer. This was error.

As a general rule, the opportunity of a witness to judge the speed of a vehicle under the circumstances of the case goes to the weight of the testimony rather than its admissibility. *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327 (1955). However, where the witness does not have a reasonable opportunity to judge the speed, it is error to permit such testimony. *State v. Colson*, 262 N.C. 506, 138 S.E. 2d 121 (1964); *Fleming v. Twiggs*, 244 N.C. 666, 94 S.E. 2d 821 (1956); *Becker, supra*. The observation must be for such a distance and over such a period of time as to enable the witness to do more than merely hazard a guess as to speed. *Key v. Woodlief*, 258 N.C. 291, 128 S.E. 2d 567 (1962); *Fleming, supra*. In *Fleming*, the witness saw the car for a distance of seven to nine feet, or the "distance" of the courtroom, before the impact. Mrs. Stocks saw or "glimpsed" plaintiff's truck for a distance of only three feet before the impact. We find that the defendant did not have a reasonable opportunity to judge the speed of plaintiff's vehicle under the facts of this case.

Moreover, the admission of her testimony was prejudicial. There was no evidence that plaintiff's vehicle was being driven at an excessive rate of speed, or that he was exceeding the speed limit. The evidence was contradictory with respect to plaintiff's speed just prior to the collision. Plaintiff testified that he braked and slowed his truck to between 10 and 15 m.p.h. Patrolman Hart testified that plaintiff's estimated speed at the time of impact was 35 m.p.h., while that of the defendant was 10 m.p.h. However, defendant, by her own testimony, admitted that she was travelling at a speed of 25 m.p.h. all the way through the intersection.

III.

[3] Plaintiff's third assignment of error concerns the exclusion of certain testimony characterized as admissions made by the defendant to the plaintiff, as well as to patrolman Hart and Ella Belch, defendant's insurance agent. The exclusion was error, but because the record does not include what the answer to the question asked of the plaintiff or patrolman Hart would have been, there is no basis for determining whether the exclusion was prejudicial. Therefore, we find no prejudicial error. *Cockrell v. Transport Co.*, 295 N.C. 444, 245 S.E. 2d 497 (1978).

Defendant argues that the testimony of Ella Belch was properly excluded because the statement was made during a conversation concerning insurance coverage. Ms. Belch testified that defendant said "she guessed it wasn't, but it was her fault as far as she knew." Defendant contends that she would be permitted during cross-examination to have the entire conversation introduced and its context explained, and that reference would necessarily have to be made to liability insurance coverage. 2 Stansbury's N.C. Evidence § 181 (Brandis rev. 1973). Reference to liability insurance can be grounds for a new trial under certain circumstances. This is true "[w]here testimony is given, or reference is made, indicating *directly and as an independent fact* that defendant has liability insurance." *Fincher v. Rhyne*, 266 N.C. 64, 69, 145 S.E. 2d 316, 319 (1965) (emphasis added). "But there are circumstances in which it is sufficient for the court, in its discretion, because of the incidental nature of the reference, to merely instruct the jury to disregard it." *Id.*, 145 S.E. 2d at 319-20; 1 Stansbury, *supra*, § 88. And, if counsel claiming prej-

udice is responsible for the jury's knowledge, then there should be neither mistrial nor reversal on appeal. Stansbury, *supra.*

Defendant, by her argument, is attempting to use a shield as a sword. In the case before us, it is the defendant who seeks, or threatens, to disclose the existence of insurance. Defendant may not then argue prejudice. Witness Belch's testimony was offered as an admission of the defendant, a subject unrelated to insurance. A thorough cross-examination of the witness could be conducted without disclosing the details of the insurance coverage, if handled in good faith. We therefore hold that the testimony is admissible.

For the reasons set forth in parts II and III of this opinion, we hold that plaintiff is entitled to a new trial on defendant's counterclaim.

New trial.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. N. L. REECE

No. 8130SC331

(Filed 3 November 1981)

Assault and Battery § 15.1— assault with a deadly weapon with intent to kill—instruction on intent improper

Defendant was entitled to a new trial where the trial court submitted assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury as possible jury verdicts, and in explaining to the jury the "intent to kill" element of the greater offense, the trial court instructed that "every man, in law, is presumed to intent (sic) any consequences which naturally flow from an unlawful act." It was improper for the jury to consider the presumption that one intends the natural consequences of his unlawful act in a crime which involves specific intent. The error was not harmless as it was not cured by the remaining instructions on intent, and the evidence did not establish defendant's intent to kill as a matter of law.

ON a writ of certiorari to review judgment of *Friday, Judge.* Judgment entered 3 April 1980 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 23 September 1981.

Defendant was indicted for assault with a deadly weapon with intent to kill inflicting serious injuries. He pleaded not guilty and was tried before a jury.

The defendant and the victim Harlay Reece are brothers. The State's evidence at trial tended to show that they got into an argument at their mother's house on the afternoon of 30 December 1979 when Harlay told the defendant that he should not bother their mother by coming to see her after he had been drinking. The two stepped outside the house, and the defendant left saying either "I'll see you" or "I'll get you." Harlay went inside, but he came back outside in about fifteen or twenty minutes and was shot from behind as he turned the corner of the house. A third brother came out on the porch after the shot and saw the defendant running up a bank across from the house with a gun in his hand. The bank is about 150 feet from the house and 50 or 60 feet high. Harlay suffered multiple wounds to his back and right leg caused by "ought or double ought buckshot from a shotgun blast." The defendant, testifying in his own defense, stated that he went home after Harlay asked him to leave and that he stayed home and did not shoot his brother.

The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and was sentenced to imprisonment. Defendant's appeal was not timely perfected; however, this Court allowed defendant a writ of certiorari.

Attorney General Edmisten, by Associate Attorney Lisa Shepherd, for the State.

Appellate Defender Adam Stein and Assistant Appellate Defender James H. Gold for defendant appellant.

BECTON, Judge.

The trial court submitted assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury as possible guilty verdicts. In explaining to the jury the "intent to kill" element of the greater offense, the trial court stated the following:

> Thirdly, it is also charged that the Defendant assaulted the prosecuting witness with the specific intent to kill him.

So, it's necessary for the Court to give you the legal definition of intent to kill, Ladies and Gentlemen.

Intent is an act or emotion of the mind; seldom, if ever, capable of direct or positive proof. But it is arrived at by such just and reasonable deductions from the acts and facts proven as the guarded judgment of a reasonably cautious and prudent man would ordinarily draw therefrom. It is usually shown by facts and circumstances known to the party charged with the intent, and may be evidenced by the acts or declarations of the party which betray it. *Now, every man, in law, is presumed to intent* (sic) *any consequences which naturally flow from an unlawful act.* So, the Court charges you that an intent to kill is the intent which exists in the mind of the person at the time he commits the assault, intentionally and without justification or excuse, to kill his victim. This element, as the others, must be proven by the State beyond a reasonable doubt.

Now, in deciding what the Defendant's intent was on the occasion in question, Ladies and Gentlemen, the Court instructs you that you may consider the way in which the defendant acted on the occasion in question; the weapon he used, if any; the injuries he inflicted; his statements and all other facts surrounding the alleged shooting on the day in question.

By his first assignment of error, the defendant challenges that portion of the instructions that we have emphasized above. He argues that the instruction in question is erroneous under our case law, citing *State v. Parks*, 290 N.C. 748, 228 S.E. 2d 248 (1976), and under federal constitutional law, citing *Sandstrom v. Montana*, 442 U.S. 510, 61 L.Ed. 2d 39, 99 S.Ct. 2450 (1979). We agree.

State v. Parks was also a prosecution for assault in which the defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. While defining intent to kill, the court in *Parks* stated, "By intent to kill, it means that no special intent is required beyond the intent to commit an unlawful act which may be inferred from the nature of the assault and the attending circumstances." Our Supreme Court found error in this instruction. It reasoned as follows:

> The quoted portion of the charge in the present case is clearly erroneous. The instruction that a person is presumed to intend the natural consequences of his act is proper only in those cases wherein a specific intent is not an element of the crime. *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Elliott*, 232 N.C. 377, 61 S.E. 2d 93 (1950). However, where a specific intent to do an act is an element of a crime, the State has the burden of proving the specific intent beyond a reasonable doubt. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). Ordinarily, a specific intent to do an act is shown by the proof of facts and circumstances from which such an intent may be inferred. *State v. Thacker, supra; State v. Cauley*, 244 N.C. 701, 94 S.E. 2d 915 (1956).
>
> In the case at bar, a specific intent to kill was a necessary element in the proof of two of the assaults charged upon by the trial judge. Further, it was the distinguishing characteristic between two of the assaults and the lesser offense of assault with a deadly weapon. The quoted portion of the charge permitted the jury to find the requisite intent to kill solely from the proof of defendant's commission of an unlawful act. This is prejudicial error and entitles defendant to a new trial.

290 N.C. at 754, 228 S.E. 2d at 251-52.

The State attempts to distinguish *Parks* from the present case by pointing out that the trial court herein did instruct the jury that it must find specific intent and, indeed, instructed the jury on the various factors which it might consider in passing upon the defendant's intent. This distinction is not convincing since one of the factors which the trial court left for the jury to consider in determining the defendant's intent was the presumption that one intends the natural consequences of his unlawful acts and this presumption is improperly applied to crimes involving specific intent. Fatal injuries may result as a natural consequence of an act which, although unlawful, was committed without intent to kill. It was therefore improper for the jury to consider this presumption in the course of deciding whether the defendant acted with intent to kill.

Sandstrom v. Montana involved a conviction for "deliberate homicide" in which the defendant admitted the killing but denied

that he had acted "purposely or knowingly," as required by the Montana statute. The trial court instructed the jury that "the law presumes that a person intends the ordinary consequences of his voluntary acts." The Supreme Court of Montana affirmed the conviction, taking the view that the above instruction did not deny due process to the defendant since it did no more than shift the burden of production to the defendant, *i.e.*, that the instruction only required the defendant to produce *some* evidence that he did not intend the ordinary consequences of his voluntary acts in order to rebut the presumption. The United States Supreme Court rejected this interpretation of the instruction and found reversible error. It held that the instruction could not be interpreted as merely shifting the burden of production or as creating only a permissible inference of intent since the jury was not instructed on the effect of the presumption. The Court wrote:

> Given the common definition of "presume" as "to suppose to be true without proof," Webster's New Collegiate Dictionary 911 (1974), and given the lack of qualifying instructions as to the legal effect of the presumption, we cannot discount the possibility that the jury may have interpreted the instruction in either of two more stringent ways.

442 U.S. at 517, 61 L.Ed. 2d at 46, 99 S.Ct. at 2456. The Court concluded that the jury may have interpreted the instruction either (1) as creating a conclusive presumption or (2) as shifting the burden of persuasion to the defendant. In either case, the instruction would have denied due process to the defendant since it would have relieved the State of its burden of proof as to the defendant's state of mind.

We find *Sandstrom* applicable to the present case. There is authority in our State for giving the presumption in question the effect of only a rebuttable presumption or a permissible inference. *See* 2 Stansbury's N.C. Evidence, § 234 (Brandis rev. 1973) and cases cited therein. However, the jury in this case was not given any qualifying instructions as to the legal effect of the presumption, and we must look not only to the definition of the presumption provided by case law but also to "how a reasonable juror might interpret the words." *State v. White*, 300 N.C. 494, 506, 268 S.E. 2d 481, 489, *pet. for reh. denied*, 301 N.C. 107, 273 S.E. 2d 443 (1980). As in *Sandstrom*, we cannot discount the possibility that

the jury interpreted the presumption as being conclusive or as shifting the burden of persuasion. The State attempts to distinguish *Sandstrom* by arguing that "the jurors in the present case were instructed that they must be convinced beyond a reasonable doubt that the assault was committed with intent to kill and that they must decide what the defendant's intent was." This is conceded; however, similar instructions were also given in the *Sandstrom* case. The United States Supreme Court dealt with these instructions as follows:

> It is true that the jury was instructed generally that the accused was presumed innocent until proved guilty, and that the State had the burden of proving beyond a reasonable doubt that the defendant caused the death of the deceased purposely or knowingly. . . . But this is not rhetorically inconsistent with a conclusive or burden-shifting presumption. The jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied.

442 U.S. at 518-19, n. 7, 61 L.Ed. 2d at 47, n. 7, 99 S.Ct. at 2546, n. 7. The same reasoning applies herein.

The State also argues that this single sentence could not have prejudiced the defendant when the instructions on intent to kill are considered as a whole. A similar doubt was expressed by two Justices in the *Sandstrom* case, but they deferred to the judgment of the majority of the Court, which felt that the error had been prejudicial. 442 U.S. at 527-28, 61 L.Ed. 2d at 53, 99 S.Ct. at 2461. In *Parks* our Supreme Court quoted *State v. Allison*, 256 N.C. 240, 243, 123 S.E. 2d 465, 467 (1962), to the following effect:

> "We have consistently held that conflicting instructions upon a material aspect of the case must be held for prejudicial error, since the jury may have acted upon the incorrect part of the charge, or to phrase it differently, since it cannot be known which instruction was followed by the jury." [Citations omitted.]

290 N.C. at 753-54, 228 S.E. 2d at 251. We cannot find that the erroneous instruction was cured by the remaining instructions on

intent. The error identified herein would be harmless if we could rule that the evidence established the defendant's intent to kill as a matter of law; however, the evidence as to the distance from which the shot was fired and as to the weapon and ammunition used does not allow for such a ruling. *Compare State v. Glenn*, 51 N.C. App. 694, 277 S.E. 2d 477 (1981); *State v. Jones*, 18 N.C. App. 531, 197 S.E. 2d 268, *cert. denied*, 283 N.C. 756, 198 S.E. 2d 726 (1973); *State v. Jennings*, 16 N.C. App. 205, 192 S.E. 2d 46, *cert. denied and appeal dismissed*, 282 N.C. 428, 192 S.E. 2d 838 (1972) (each a conviction for assault with a deadly weapon with intent to kill inflicting serious injury in which we found no error in the failure to instruct on a lesser included offense since the evidence as to the assault conclusively established intent to kill). We conclude that the defendant is entitled to a

New trial.

Judges MARTIN (Robert M.) and MARTIN (Harry C.) concur.

NANCY CAROL LOVE FORMERLY NANCY LOVE MILLS v. FRANK WILLIAM MOORE AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 8126SC79

(Filed 3 November 1981)

1. **Rules of Civil Procedure § 60— motion to vacate judgment in movant's favor**

Plaintiff could properly move under G.S. 1A-1, Rule 60(b) to set aside a judgment in her favor.

2. **Insurance §§ 81, 106.1; Rules of Civil Procedure § 60.2— default judgment against assigned risk insured—absence of notice to insurer—vacation of judgment**

Where the Court of Appeals held that plaintiff's judgment against an assigned risk insured motorist was a default judgment although no entry of default had been made and that the judgment was unenforceable against defendant insurer because defendant was not notified of the action as required by G.S. 20-279.21(f)(1), defendant insurer had actual notice of the pendency of a claim arising from the accident in question since it had conducted negotiations with plaintiff's attorney, and plaintiff had no knowledge that defendant's insured was an assigned risk although defendant had an opportunity to apprise her of that fact, the trial court did not err in vacating the judgment against the insured upon motion by plaintiff and in authorizing notice to defendant insurer more than seven years after the original complaint was filed.

3. Process § 10.4— service of process by publication—use of incorrect middle name for defendant

Notice by publication to defendant's insured was not insufficient because it incorrectly listed insured's middle name as "William" rather than "Willard," although the insured was not personally served and did not appear, where the notice included details of the accident in question.

4. Constitutional Law § 24.8; Process § 10— service of process by publication—no violation of due process

Service of process on defendant's insured by publication in an automobile accident case was not a violation of due process, although plaintiff could have inquired of defendant insurer as to the whereabouts of its insured and could have given defendant formal notice of the action against its insured, where plaintiff unsuccessfully attempted personal service on defendant's insured before resorting to notice by publication, defendant had actual notice of the pendency of a claim arising from the accident in question since it had conducted negotiations with plaintiff's attorney, and plaintiff made good faith efforts to comply with the law as she understood it at the time.

Judge VAUGHN dissenting.

APPEAL by defendant from *Burroughs, Judge.* Order entered 9 January 1981 in Superior Court, MECKLENBERG County. Heard in the Court of Appeals 1 September 1981.

Plaintiff instituted this action to recover for injuries suffered in an automobile accident with defendant's insured. The facts are largely undisputed.

On 30 October 1970, plaintiff was injured when her automobile collided with that of defendant's insured, Frank Willard Moore. The accident report erroneously listed Moore's name as Frank William Moore.

After the accident plaintiff's attorney entered into negotiations with Nationwide Mutual Insurance Company, defendant here, in an effort to settle her claim. However, negotiations were ended without resolution of the claim in October, 1972. Plaintiff had not been notified that Moore was insured under North Carolina's assigned risk plan.

On 29 October 1973, plaintiff filed this action naming Frank William Moore as defendant. After attempting without success to effect personal service on Moore, plaintiff resorted to notice by publication. Neither plaintiff nor Moore served notice on Nationwide.

No answer was filed and judgment was entered for plaintiff on 30 April 1975. On 31 May 1977, the plaintiff sought enforcement of the judgment against Nationwide. On appeal this Court held, however, that the judgment against Moore was unenforceable against Nationwide because plaintiff had failed to fulfill the notice requirements of G.S. 20-279.21(f)(1) which prohibits use against an insurer of a default judgment against an assigned risk insured unless the insurer was notified of the action.

This Court held, on a question of first impression, that the 1975 judgment was a default judgment although no entry of default had been made. *Love v. Nationwide Mutual Insurance Company*, 45 N.C. App. 444, 263 S.E. 2d 337, *cert. denied* 300 N.C. 198, 269 S.E. 2d 617 (1980).

On 10 June 1980, plaintiff successfully moved to vacate the unenforceable judgment. Nationwide was then given notice as required by the statute and subsequently filed a motion to reconsider and strike the order to vacate and a motion to dismiss for lack of jurisdiction. From denial of those motions, defendant appeals.

John D. Warren for plaintiff appellee.

Kennedy, Covington, Lobdell and Hickman, by William C. Livingston, for defendant appellant.

ARNOLD, Judge.

[1, 2] Defendant first argues that plaintiff is not entitled to set aside her own judgment. While this was arguably the law according to former G.S. 1-220 which provided for relief to "a party from a judgment . . . taken against him," Rule 60(b) has no language suggesting that the movant for relief from a judgment must be the losing party. It appears, therefore, that in general "any party may seek relief under the rule." W. Shuford, N.C. Civil Practice and Procedure § 60-4 (1975). However, defendant contends that the motion of the plaintiff was improperly granted on the facts of this case because the unenforceability of the judgment, which formed the basis for plaintiff's motion, resulted from plaintiff's own failure to comply with statutory notice requirements. In support of this argument, defendant makes three assignments of error.

Defendant's first contention is that the court erred in finding that the plaintiff followed the law when she obtained a judgment against Moore without giving notice to Nationwide.

While it is true that this Court held in *Love v. Nationwide, supra*, that the judgment which had been entered was in fact a default judgment in spite of the fact that no entry of default was made, it does not follow that plaintiff acted in violation of the law. There is no indication that plaintiff acted in bad faith since she did not know that the judgment would be held to be a default judgment, this case having been one of first impression. Neither was the plaintiff informed by Nationwide that its insured was an assigned risk. Thus, plaintiff acted in compliance with the facts and law as she reasonably understood them in giving notice only to Moore.

Defendant next argues that the court erred in finding that all necessary evidence is still available to Nationwide to defend the action. This finding, defendant contends, is contradicted by the undisputed fact that defendant Moore is now deceased, having died in 1978. In view of the fact that Nationwide had actual notice of the accident shortly after it occurred, and participated in negotiations with plaintiff's attorney regarding her claim, we find this argument unpersuasive. Nationwide had ample opportunity to depose its insured or to take whatever other action it deemed appropriate to preserve evidence favorable to Moore's defense. While it is true that not all of the evidence available in 1973 is now available to defendant, the court did not err in finding that all evidence necessary to trial is still available.

Defendant's third contention is that the court erred in vacating the judgment against Moore and authorizing notice to Nationwide more than seven years after the original complaint. In supporting this contention, defendant characterizes plaintiff's failure to give notice to the insurer as a "voluntary and conscious choice" designed "to circumvent the law of North Carolina."

While it is clear, in retrospect, that plaintiff should have given notice to Nationwide, her failure to do so hardly raises a presumption of insidious design. Plaintiff had no knowledge of the fact that defendant's insured was an assigned risk although defendant had opportunities to apprise her of the fact. Neither could she know that her understanding of the law with regard to the

entry of default judgments would prove erroneous in light of a subsequent holding of this Court. Finally, plaintiff knew that Nationwide had actual notice of the pendency of a claim arising from the accident in question since negotiations had been conducted between the parties. Moreover, if the statute is construed as placing the burden on the claimant to ascertain whether an insured is an assigned risk in order that the claimant may comply with the notice requirements thereby imposed, failure to do so is, in all likelihood, a matter of attorney neglect. As this Court has clearly stated, "[t]he neglect of the attorney will not be imputed to the litigant unless he is guilty of *inexcusable* neglect." (Emphasis added.) *Kirby v. Asheville Contracting Co., Inc.*, 11 N.C. App. 128, 132, 180 S.E. 2d 407, 410 (1971). We do not find the failure to inquire as to whether defendant's insured was an assigned risk to have been inexcusable neglect under these circumstances.

In its second question presented, defendant challenges the court's assertion of jurisdiction over defendant's insured.

[3] Defendant first contends that notice to Moore was insufficient because his middle name was incorrect in the published notice. We agree with defendant that such an error takes on greater significance in a case such as this where the defendant failed to appear, and was not personally served with process, than in cases where process is personally served and/or the defendant appears. However, defendant does not claim that it was unaware of the identity of its insured or of its own potential liability for the injury to plaintiff. Moreover, defendant made no attempt to correct plaintiff's misunderstanding as to the name of its insured during negotiations on plaintiff's claim or at any other time.

While it is possible that Moore would have been misled by the error in the published notice, this risk was reduced by the inclusion in the notice of details of the accident. We find, therefore, that notice did not fail, on the facts of this case, as a result of plaintiff's mistake as to the middle name of defendant's insured.

[4] Defendant's final argument is that service of process by publication was a violation of due process under the circumstances of this case. We find this to be the most persuasive of defendant's arguments.

In determining the constitutional sufficiency of notice afforded defendant's insured, the question is whether the notice given

was "of a nature reasonably calculated to give [him] actual notice and the opportunity to defend." *Royal Business Funds Corp. v. South Eastern Development Corp.*, 32 N.C. App. 362, 369, 232 S.E. 2d 215, 219, *cert. denied* 292 N.C. 728, 235 S.E. 2d 784 (1977).

Notice by publication is generally justified only when more adequate means of service have been exhausted. Publication clearly is not a dependable means of putting a defendant on notice. Here, plaintiff attempted personal service on defendant's insured without success before resorting to notice by publication. A reasonable argument might be made that plaintiff's efforts were not sufficiently diligent to fulfill the demands of due process. Plaintiff could have inquired of Nationwide as to the whereabouts of its insured and/or could have given Nationwide formal notice of the action against its insured so that it could exercise its right to come in and defend. Plaintiff's failure to do this weighs against her. However, in view of defendant's actual notice of the claim, and plaintiff's good faith efforts to comply with the law as she reasonably understood it at the time, we affirm the trial court's ruling that plaintiff be permitted to pursue her claim in court.

Affirmed.

Judge WEBB concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I must respectfully dissent for a number of reasons. In the first place, plaintiff is not a party aggrieved by the judgment against Moore from which she seeks to be relieved. She was obviously satisfied with that verdict and judgment. Her present predicament stems from her failure timely to take the steps necessary to get a judgment against a different entity—Nationwide. Moreover, even if plaintiff could be said to be entitled to any relief from that judgment, it would have to be based on either "Mistake, inadvertence, surprise, or excusable neglect." Rule 60(b)(1). A motion on one of those grounds has long since been barred because it must be made within one year of the judgment. Significantly, plaintiff's motion does not set out the rule

number or numbers under which she was proceeding, as required by Rule 6 of the General Rules of Practice for the Superior and District Courts. Finally, I cannot agree that Rule 60(b)(6), even if applicable, could afford plaintiff relief because, in my opinion, she has shown no reason "justifying relief" within the meaning of that section (even if it could be said the motion was made within a reasonable time). The accident occurred on 30 October 1970, and plaintiff was aware that Moore was insured by Nationwide. On 29 October 1973, just before the action would have been barred by the statute of limitations, she filed her complaint against Frank *William* Moore. No notice was given to Nationwide, known by plaintiff to be Moore's insurer. Alias and pluries summons were returned unserved, and Frank *William* Moore was served by publication in Mecklenburg County. On 30 April 1975, nearly two years after the suit was filed and nearly five years after the accident, plaintiff obtained a default judgment—still without giving Nationwide notice of the suit. Finally on 31 May 1977, nearly seven years after the accident, plaintiff tried to assert a claim against Nationwide. Moore, the insured, died in July 1978 in Rowan County. The order from which Nationwide appeals was entered 11 June 1980, nearly ten years after the accident occurred. To require Nationwide to defend this stale claim against its former insured whose voice is forever silenced, under the ruse of a Rule 60(b)(6) motion, is not a proper use of that "grand reservoir of equitable power to do justice in a particular case" referred to in 7 Moore's Federal Practice, ¶ 60.27(2), at 375 (2d ed. 1979).

For the reasons stated, I respectfully suggest that the order from which defendant appeals should be reversed.

Gillespie v. Draughn and Gillespie v. Draughn

HAROLD LLOYD GILLESPIE, JR. v. PAMELA SHULL DRAUGHN AND BOBBY J. SHULL

HAROLD LLOYD GILLESPIE, SR. v. PAMELA SHULL DRAUGHN AND BOBBY J. SHULL

No. 8117SC152

(Filed 3 November 1981)

1. **Witnesses § 6.1— cross-examination concerning deposition of unrelated case proper—impeachment by prior inconsistent statements**

In a personal injury action it was not error to allow defense counsel to cross-examine plaintiff concerning his deposition taken in another pending, unrelated case. Plaintiff's statements concerning his lack of prior medical problems contradicted plaintiff's testimony as to the extent of his injuries sustained as a result of the collision with defendant; therefore, his prior inconsistent statements were used for purposes of impeachment and were admissible. G.S. 1A-1, Rule 32(a)(3).

2. **Trial § 15.3— failure to request a limiting instruction**

Where the record discloses no request by plaintiff for a limiting instruction concerning admission of evidence for impeachment purposes only and not as substantive evidence, the trial court did not err in its failure to restrict the purpose of the cross-examination for impeachment only.

3. **Trial § 11— jury argument—reading of portions of pleadings**

The trial court did not commit prejudicial error by allowing defense counsel to read portions of the final pleadings, which had not been introduced into evidence, in his argument to the jury. G.S. 84-14.

4. **Damages § 17.8— failure of proof for loss of use of vehicle—no instruction proper**

Where plaintiff failed to offer adequate proof of damages for loss of use of a vehicle, the trial court did not err in denying plaintiff's request for instructions for such damages. G.S. 1A-1, Rule 9(g).

APPEAL by plaintiffs from *Kivett, Judge.* Judgment entered 8 October 1980 in Superior Court, SURRY County. Heard in the Court of Appeals 16 September 1981.

This is an action in which plaintiff Harold Gillespie, Jr., sought recovery for personal injuries and plaintiff Harold Gillespie, Sr., sought recovery for property damage as a result of an automobile accident. The two actions were consolidated, and at trial before a jury plaintiffs presented the following evidence: On

15 January 1976, plaintiff Gillespie, Jr., was driving a Ford van owned by his father. A pickup truck owned by defendant Shull and driven by his daughter, defendant Draughn, pulled onto the highway in front of plaintiff Gillespie, Jr. Although the plaintiff slammed on his brakes, the two vehicles collided. Plaintiff had no visible injuries, but he was taken to the hospital by his mother.

About two weeks after the accident, plaintiff Gillespie, Jr., was treated by Dr. Richard Jackson for pain in his right knee, right hip and abdominal wall. It was Dr. Jackson's opinion that plaintiff's backache, abdominal pain, and headaches were severe enough to disable him totally from doing his normal work as an automobile mechanic and body shop repairman until 1 May 1976. In addition, plaintiff's ability to work was limited for at least another month. Dr. Jackson did not expect plaintiff to have any permanent injury. Plaintiff's total medical bills were approximately $750.00.

At the time of the accident, plaintiff Gillespie, Jr., operated a shop where he did body and mechanical work on cars. From 15 January 1976 through 1 May 1976, he was unable to work. He normally billed customers from $15-$18 per hour to work on their cars. The van that plaintiff was driving at the time of the accident was used to transport automobile parts. The fair market value of the van prior to the accident was $4,500.00 and, after the accident, $1,500.00. The van was not repaired until 15 August 1976, because the delivery of the necessary parts was delayed by a strike at Ford Motor Company. Plaintiff borrowed relatives' and friends' vehicles while he was waiting for the van to be repaired.

The defendants presented no evidence. Defendants moved for a directed verdict both at the close of plaintiffs' evidence and at the close of all the evidence. Both motions were denied.

The jury found that plaintiff Gillespie, Jr., was injured and that his father's vehicle was damaged by the defendant Draughn's negligence. It awarded plaintiff Gillespie, Jr., $1,125.00 for personal injuries and plaintiff's father, Gillespie, Sr., $1,700.00 for damages to his motor vehicle. The defendants were given a credit against the judgment in the amount of $1,495.36, which had already been paid to plaintiff's father for repair of the car. Plaintiffs appealed from the judgment in their favor.

Franklin Smith for plaintiff appellants.

Hutchins & Tyndall by Richard Tyndall for defendant appellees.

CLARK, Judge.

[1] Plaintiffs' first assignment of error asserts that the trial court erred in allowing defense counsel to cross-examine plaintiff Gillespie, Jr., concerning his deposition taken in another pending, unrelated case. Plaintiff Gillespie, Jr. was involved in a second automobile accident, while driving the same Ford van as in the case *sub judice*, about two years after the accident in 1976. Plaintiff was represented by the same counsel in both matters, and counsel was present when the deposition was taken. Although plaintiff argued that the deposition had been sealed, to be opened by the presiding judge, there is no evidence in the record to support this contention. Therefore, we agree with the trial court that the sworn deposition was a matter of public record, having been filed with the Clerk of Court in a pending lawsuit. Rule 32(a)(3) of the Rules of Civil Procedure provides that at trial any part or all of a deposition, if admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or had notice of the taking. *NYTCO Leasing v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979).

Defense counsel cross-examined plaintiff Gillespie, Jr., by using statements made in the deposition that prior to the second accident, he had had no problems with his head, chest, right knee, or back. Defense counsel also questioned plaintiff concerning his statements that the same van was worth $4,500.00 prior to the second accident. For impeachment purposes, a witness may be cross-examined concerning statements made on other occasions which are inconsistent with testimony at the present trial. 1 Stansbury's N.C. Evidence § 46 (Brandis rev. 1973). The materiality and extent of cross-examination are matters largely within the discretion of the trial judge. For purposes of impeachment, prior inconsistent statements are always admissible. *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. McKeithan*, 293 N.C. 722, 239 S.E. 2d 254 (1977). Here, it is obvious that the deposition was used to impeach the plaintiff. His statements concerning his

lack of prior medical problems contradicted plaintiff's testimony in court as to the extent of his injuries sustained as a result of the collision with defendant Draughn. Similarly, the plaintiff's estimation in the deposition of the fair market value of the van tended to impeach his testimony, since he valued the same van at $4,500.00 before both accidents. Therefore, we find no abuse of discretion in the ruling of the trial judge to allow this form of impeachment by using plaintiff's prior inconsistent statements.

[2] Plaintiffs argue that the trial court erred by failing to instruct the jury that this evidence was to be considered for impeachment purposes only and not as substantive evidence. Evidence which is inadmissible for one purpose may be admissible for other proper purposes. If evidence is admitted generally, the party against whom it is offered is entitled, upon request, to have the jury instructed to consider it only for the purposes for which it is competent. *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); 1 Stansbury's N.C. Evidence § 46 (Brandis rev. 1973). Although there was a motion to strike all the testimony concerning the 1978 deposition, the record discloses no request by plaintiffs for a limiting instruction. Therefore, since plaintiffs' counsel did not request such an instruction, the trial court did not err in its failure to restrict the purpose of the cross-examination for impeachment only. We find this assignment of error without merit.

[3] Plaintiffs next argue, based upon their second assignment of error, that the trial court erred in allowing defense counsel to read to the jury the pleadings in the case which were not introduced into evidence at the trial. In his closing argument, defense counsel read from the plaintiffs' complaint to the jury. Prior to the adoption of the Rules of Civil Procedure, the practice of reading pleadings to the jury at the beginning of the trial in civil cases was widely followed. Although the Rules were designed to discourage reading pleadings to the jury, it is still within the judge's discretion to allow such practice. It also is not necessary that the pleadings be introduced into evidence before being read to the jury, since they are an integral part of the case itself. The trial judge has large discretion in controlling and directing the argument of counsel as long as it is confined within proper bounds and is addressed to the material facts of the case. G.S. 84-14; *Kennedy v. Tarlton*, 12 N.C. App. 397, 183 S.E. 2d 276 (1971). We hold that the court did not commit prejudicial error by

allowing defense counsel to read portions of the final pleadings in his argument to the jury.

[4] In their final assignment of error, plaintiffs argue that the trial court erred in his charge to the jury in that he failed to charge the jury on loss of use of the Ford van, as requested by counsel for plaintiffs. In *Roberts v. Freight Carriers*, 273 N.C. 600, 160 S.E. 2d 712 (1968), the Supreme Court set forth the rule for damages for the loss of use of a vehicle:

> "When a plaintiff's vehicle is damaged by the negligence of a defendant, the plaintiff is entitled to recover the difference between the fair market value of the vehicle before and after the damage. Evidence of the cost of repairs or estimates thereof are competent to aid the jury in determining that difference. [Citations omitted.] When a vehicle is negligently damaged, if it can be economically repaired, the plaintiff will also be entitled to recover such special damages as he has properly pleaded and proven for the loss of its use during the time he was necessarily deprived of it. [Citations omitted.]"

Id. at 606, 160 S.E. 2d at 717.

In order to recover for loss of use, it must be possible to repair the damaged vehicle at a reasonable cost and within a reasonable time. The measure of damages to be recovered is the cost of renting a similar vehicle during a reasonable time for repairs. If the vehicle cannot be repaired or if it cannot be repaired within a reasonable time, plaintiff is obligated to purchase a replacement vehicle and will be entitled to reimbursement for costs of a rental vehicle during the interval necessary to acquire the replacement vehicle. *Roberts v. Freight Carriers, supra; Ling v. Bell*, 23 N.C. App. 10, 207 S.E. 2d 789 (1974).

As stated in *Roberts v. Freight Carriers, supra*, and as set forth in G.S. 1A-1, Rule 9(g), special damages must be specifically pleaded and proved, and the facts giving rise to the special damages must be sufficient to inform the defendant of the scope of plaintiff's demand. *See also, Rodd v. Drug Co.*, 30 N.C. App. 564, 228 S.E. 2d 35 (1976). In his complaint, plaintiff Gillespie, Sr., alleged that his vehicle was out of service in his business for four months after the accident and that the "fair and reasonable rental

value or replacement value of the 1974 Ford Van was approximately $20.00 per day," for total damages for loss of use in the amount of $2,400.00. Having made these allegations, to recover damages for loss of use the burden was on the plaintiff Gillespie, Sr., to prove that he was the owner of the van used in the business, that the van could have been economically repaired in a reasonably prompt time, and that the reasonable cost of having a substitute vehicle during that time was approximately $20.00 per day.

The evidence offered by plaintiffs falls far short of the required proof. Gillespie, Sr., did not testify. Gillespie, Jr., testified that his father was the owner of the van, although title remained in the name of the previous owner; that a replacement vehicle was not rented while the van was being repaired because from time to time a replacement vehicle was borrowed from relatives and friends; that there was a delay of eight months in repairing the vehicle but no effort was made to replace the vehicle; and that within 12 days after damage the estimated cost of repair in the sum of $1,495.36 was paid to Gillespie, Sr.

The plaintiffs having failed to offer adequate proof of damages for loss of use of the vehicle, the trial court did not err in denying plaintiffs' request for instruction for such damages.

No error.

Chief Judge MORRIS and Judge WELLS concur.

CENTRAL CAROLINA FARMERS, INC., AND FCX, INC., PLAINTIFFS AND THIRD PARTY PLAINTIFFS v. W. CONE HILLIARD AND WIFE, SHIRLEY HILLIARD, DEFENDANTS v. PIONEER HI-BRED INTERNATIONAL, INC., THIRD PARTY DEFENDANTS

No. 8115DC145

(Filed 3 November 1981)

Agriculture § 10— liability of vendor for mislabeled seed—insufficient evidence to show mislabeling

The immediate vendor of mislabeled seed is liable under the theory of breach of contract for damages suffered by the purchaser of the seed.

However, the evidence in this case was insufficient to support a finding by the court that defendants obtained a reduced yield from seed corn purchased from plaintiff because the seed corn was a smaller variety than that represented on the label, causing it to pass through the planter too rapidly and to be planted too close together.

APPEAL by plaintiffs and third party defendant from *Peele, Judge.* Judgment dated 29 October 1980 entered in District Court, CHATHAM County. Heard in the Court of Appeals 16 September 1981.

Plaintiff Central Carolina Farmers, Inc. (now FCX, Inc.) sued defendants in the amount of $4,371.30 as money owed on a note executed by defendants in payment for seed corn, fertilizer and other farming supplies. In their answer defendants admitted the execution of the note but counterclaimed for damage to their corn crop in the amount of $5,000. They alleged that the failure of their crop was caused by the plaintiff's mislabeling of the seed corn purchased which resulted in the wrong type of plates being used for planting. Plaintiff filed reply to the counterclaim and joined third party defendant, Pioneer Hi-Bred International, Inc., in this action upon the allegation that the subject bags of seed corn were sold by third party defendant to plaintiff for distribution to the general public in retail sales.

This matter was submitted to the court upon stipulations and depositions taken by the parties. On 29 October 1980 an order was entered granting judgment on the note to plaintiffs. The order also awarded to defendants the sum of $2,820 on its counterclaim against plaintiffs as damages suffered due to the negligent mislabeling or breach of warranty of the seed corn. Plaintiffs in turn were accorded contribution in this amount from third party defendant. Plaintiffs and third party defendant appeal.

Robert B. Glenn, Jr. for plaintiff-appellants.

Edwards & Atwater, by Phil S. Edwards and W. Ben Atwater, Jr., for defendant-appellees.

McCoy, Weaver, Wiggins, Cleveland and Raper, by Richard M. Wiggins, for third party defendant-appellant.

MARTIN (Robert M.), Judge.

Appellants appeal from the court's allowance of defendants' counterclaim. The following facts found by the trial judge are not in dispute: On 27 June 1978 defendants executed a note and security agreement in the amount of $4,134.17 to plaintiff for the 30 May 1978 purchase of ten bags of seed corn and other farming supplies. No payments were made on the note which became in default. The seed corn was produced, prepackaged, prelabeled and delivered by third party defendant Pioneer Hi-Bred International, Inc. to plaintiff Central Carolina Farmers, Inc. for sale. Each bag of seed corn had attached to it, either by sewing or by staples, a tag which specified that the corn was F-15, brand 3194 or F15-E, brand 336A and that the bag contained between 84,000 to 93,000 kernels. The label notations of F15 or F15-E referred to the size of the seed corn and its shape as a round or flat kernel. The reverse side of the tags contained suggested recommendations for the proper planter plates to be used in planting the seed corn in order that one seed would drop at the desired distance from the previously dropped seed. The label stated that these recommendations were suggestions only and the purchaser should check his planter. Relying on the information contained on the tags, defendants purchased two planter plates which he delivered to William Beavers who was to plant the corn. Beavers installed the two plates on his planter along with two plates of his own. Defendant Cone Hilliard instructed Beavers to plant the corn eight to ten inches apart and he witnessed a test run by Beavers on hard ground at which time the corn was dropping from the planter approximately eight to ten inches apart. Spacing of the seed corn depends upon the seed plates, the setting of the planter's sprocket and the speed of the tractor pulling the planter. After viewing the test run, Hilliard left the field which was then planted by Beavers using the purchased seed corn for 39½ acres. The corn rows were planted 30 inches apart. The corn germinated adequately but upon inspection was planted six inches apart in each row rather than the desired eight to ten inches apart. When the corn was harvested by the defendants, it was discovered that the yield was forty-five bushels per acre at a time when the average yield in the county was seventy-five bushels.

The court's last finding of fact, that the subject bags of seed corn were mistagged by third party defendant, was excepted to by appellants.

Although the parties stipulated and the trial judge found that the plaintiffs had no duty to the defendants or the third party defendant to examine or inspect the contents of the prepackaged and prelabeled bags of seed corn, this in itself would not absolve the plaintiffs from liability for the sale of mislabeled bags of corn. Under the North Carolina Seed Law, G.S. 106-277 to G.S. 106-277.29, the immediate vendor of any lot of seed which is sold is made responsible for the presence of labels which state, among other things, the name of kind and variety of seed. G.S. 106-277.7 and G.S. 106-277.8. In a factual situation similar to the case at hand, where prepackaged and prelabeled seed had been purchased from a reputable dealer by the immediate vendor, the Court in *Gore v. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971), held that the sale of mislabeled seed was not negligence under the circumstances but was a violation of the North Carolina Seed Law. The court then further held that in addition to the penalties imposed by this law, the immediate vendor could be held liable for breach of contract with recovery of full damages by the plaintiff.*

Having resolved that plaintiffs, if found to be immediate vendors of mislabeled seed corn, could be held liable for damages suffered by the purchasers of the seed, we now must determine the question of the sufficiency of the evidence to support the court's finding that the seed corn was in fact mislabeled. The disputed finding is as follows:

> 16. That the subject bags of seed corn were mistagged by the Third Party defendant in that the seed was a smaller size than represented resulting in the planting of the corn too close together and too dense in the subject acreage causing a reduced yield of 45 bushels per acre instead of the county average of 75 bushels per acre thus resulting in damage to the defendants in the above of Two Thousand Eight Hundred Twenty and 00/100 ($2,820.00) Dollars, said amount being stipulated by the parties.

* We note that Chapter 99B, Products Liability, effective 1 October 1979 and establishing standards of liability for the sale of products acquired and sold in a sealed container, does not apply to defendants' counterclaim filed 9 July 1979.

The finding by the court, sitting as judge and jury, is conclusive on appeal if supported by any substantial evidence. However, any inference made must stand upon clear and direct evidence and not upon some other inference. *Carolina Milk Producers Association Co-Operative, Inc. v. Melville Dairy, Inc.*, 255 N.C. 1, 120 S.E. 2d 548 (1961). None of the subject seed corn or any analysis of the corn was ever introduced into evidence. Therefore other facts must be present to support the court's inference that the seed corn was planted too close together, resulting in a reduced yield, because the seed sold to defendants was less than the size it was represented to be on the label, i.e., a different smaller variety of corn.

A careful analysis of the evidence fails to support this finding. Defendants' argument is that, excluding other miscellaneous factors such as weather, fertilization, or soil conditions, their poor yield of corn was a consequence of the seed being planted too close together. They contend that, as a direct result of the purchased seed corn being a smaller kernel than the variety specified, it passed too rapidly through the planter plates recommended on the reverse of the label, so that the corn was planted in six inch intervals rather than eight to ten inch intervals. The evidence presented in the record does not support their hypothesis. Testimony concerning the spacing of seed corn substantiated that the distance between the dropping of corn is determined in some degree by the planter plate, the setting of the planter and the speed at which the planter is driven. If corn that is too small for the planter plate is mistakenly placed in the planter, the result will be seeds dropping out two at a time very close together in erratic spacings, not in regular one-seed spacings of a different length. Defendants' contention that, because the planter plates purchased were oversized for the "mislabeled" seed corn, their desired planting intervals became uniformly shorter by two to four inches is not supported by the evidence. We find insufficient evidence to support the court's finding that the defendants' reduced yield was due to the sale by plaintiffs of a smaller corn mislabeled by third party defendant.

Since the court's conclusion, that defendants were entitled to recover damages suffered due to the mislabeling of the seed corn, is not based upon facts supported by competent evidence, that portion of the judgment is in error.

In light of our decision, we do not reach appellants' argument regarding their limitation of warranty.

That part of the judgment awarding to plaintiff recovery on its note is

Affirmed.

That part of the judgment awarding to defendants recovery on their counterclaim against plaintiffs is

Reversed.

That part of the judgment awarding to plaintiffs recovery against third party defendant is

Reversed.

Judge MARTIN (Harry C.) concurs.

Judge BECTON concurs in the results.

THOMAS BROTHERS OIL AND GAS, INC. v. SOUTHERN RAILWAY COMPANY AND B. G. CHAMBERS

No. 8118SC211

(Filed 3 November 1981)

1. **Railroads § 5.7— negligence by train engineer—sufficiency of evidence**

In an action to recover damages resulting from a grade crossing collision between plaintiff's tractor-trailer and defendant's train, plaintiff's evidence was sufficient for the jury to find that defendant's engineer was negligent in failing to observe plaintiff's tractor-trailer on the railroad tracks at a time sufficient for the engineer to apply successfully the train's emergency brakes and in exceeding the speed limit for the train imposed by defendant's own safety regulations.

2. **Railroads § 5.8— crossing accident—contributory negligence by vehicle driver**

In an action to recover damages resulting from a grade crossing collision between plaintiff's tractor-trailer and defendant's train, the evidence did not disclose that plaintiff's driver was contributorily negligent as a matter of law where it tended to show that plaintiff's driver had stopped the tractor-trailer

on a servient highway between defendant's tracks and a dominant highway while waiting for traffic on the dominant highway to clear; before crossing defendant's tracks, plaintiff's driver looked up and down the tracks in both directions but could see no train coming; plaintiff's driver stopped as close as possible to the dominant highway, but since the distance between the railroad tracks and the highway was less than the length of the tractor-trailer, a portion of the trailer remained on the tracks; the tractor's air conditioner was running full speed and the cab windows were rolled up; and plaintiff's driver was concentrating on the traffic on the dominant highway when his trailer was struck by defendant's train.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 13 October 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 September 1981.

This is an action involving a collision between plaintiff's tractor-trailer and defendant railway's train. Plaintiff's driver had stopped the tractor-trailer on a servient highway—Gallimore Dairy Road—between defendant railway's tracks and a dominant highway—Highway 421—waiting for traffic to clear. The distance between the railroad tracks and highway was less than the length of the tractor-trailer, and a portion of the trailer remained on the tracks. Plaintiff alleged that defendant railway's engineer negligently failed to keep a proper lookout, that he approached the crossing at an excessive and unsafe speed, and that he should have known that plaintiff's driver would be unable to remove his tractor-trailer from the train's path in time to avoid a collision. Defendants sought damages to the train by way of counterclaim and pleaded contributory negligence, alleging that plaintiff's driver failed to keep a proper lookout for the train and failed to heed the locomotive's warnings of approach. Plaintiff denied contributory negligence and pleaded the doctrine of last clear chance.

The trial judge granted defendants' motion for directed verdict at the end of all the evidence on three grounds: that plaintiff's evidence failed to show negligence on the part of defendants, that plaintiff's evidence established contributory negligence as a matter of law, and that plaintiff's evidence provided no basis from which the applicability of the doctrine of last clear chance could be drawn.

Plaintiff appeals from the judgment entered on the directed verdict for defendants.

Perry C. Henson and George B. Daniel, by Perry C. Henson, Jr., for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr. and Robert A. Singer, for defendant-appellees.

HILL, Judge.

We find it unnecessary to address all the issues raised by the parties in this action. We therefore direct our attention to the single issue of whether the trial judge erred in granting defendants' motion for a directed verdict on the grounds stated.

The question raised by a directed verdict motion is whether the evidence is sufficient to go to the jury. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979); *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In reviewing such a motion granted at the close of all the evidence, we "[n]ot only consider evidence offered by the plaintiff but that offered by the defendant which is favorable to the plaintiff or not in conflict therewith, or when it may be used to clarify or explain the plaintiff's evidence." *Tew v. Runnels*, 249 N.C. 1, 6, 105 S.E. 2d 108, 111 (1958). *Accord, Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967); *Jenkins v. Starrett Corp.*, 13 N.C. App. 437, 186 S.E. 2d 198 (1972). A directed verdict motion by defendant may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

Applying the above standards to the evidence, we conclude that the trial court erred in granting defendants' motion for directed verdict. We first address the court's ruling that plaintiff failed to show negligence on the part of defendants.

Plaintiff's evidence tended to show that its truck driver, Charlie Albert Smith, Jr., approached the intersection of Gallimore Dairy Road and Highway 421 at approximately 3:00 p.m. on 14 July 1977. He "pulled up to the railroad crossing and observed both ways up and down the tracks." The railroad tracks toward Greensboro were straight for about one-half mile and level. Smith could not cross the tracks because of traffic on Highway 421, which ran parallel to the tracks. Smith testified

that "[t]he train wasn't in view before I started to go across the tracks and I didn't know it was there until just before I was hit. I did not see the approaching train at all."

Defendants' evidence tended to show that B. G. Chambers, the engineer, believed that the train "came around the curve doing 18 to 20 MPH." Chambers testified that "Train Order 739" had been issued on the day of the collision to reduce the train's speed to 25 m.p.h. However, "[t]he accident occurred within the yard limits of the Guilford College yard." The speed limit therein was 20 m.p.h. Chambers stated that he had set the dynamic brake, a traction motor which slows the train down or maintains a constant speed, to maintain a constant speed of 20 m.p.h. It was his opinion that "the train was running between 20 and 21 MPH prior to the time the collision occurred."

Chambers further testified that the train was 700 or 800 feet away from the crossing when he saw the tractor-trailer move slowly across the tracks. When the train was "possibly 300 or 400 feet from him [plaintiff's tractor-trailer]", he stated, the tractor-trailer stopped. Chambers applied the train's emergency brake anywhere from about 200 to 400 feet from the Gallimore Dairy Road crossing. The front engine eventually stopped about 165 feet west of the crossing after the collision.

Kelly Foster Spainhour, the head end brakeman on defendant railway's train, testified that the train did not exceed 18 m.p.h. as it approached the Gallimore Dairy Road intersection. Regarding the approach of the train to the intersection, Spainhour further testified as follows:

> I saw the tractor and trailer move as I came around the curve. When we came across the Fina crossing the tractor trailer started moving and we were about half way between the Fina crossing and the Gallimore Dairy crossing when the tractor got to 421 and stopped dead. Mr. Chambers put the train in emergency and hollered at me to get off, that he didn't believe the tractor was going to get off the track. I might have said, "I don't believe he is going to move."

The Fina crossing is approximately 1000 feet east of the Gallimore Dairy Road crossing. Spainhour also testified that Chambers was blowing the train's whistle and ringing the bell at the crossings.

Two eyewitnesses, one called by plaintiff and one by defendants, testified that they saw plaintiff's tractor-trailer on the railroad tracks as the train approached the crossing. Plaintiff's witness, Raymond Hoover, testified that the train was approximately 800 feet from the tractor-trailer on the tracks when he saw it; defendants' witness, Eric Weaver, first saw the train about 1100 feet from the tractor-trailer. (These distances are computed from landmarks identified by the witnesses on a wreck site survey offered into evidence by plaintiff.)

[1] This evidence, when viewed in the light most favorable to plaintiff, is sufficient to infer negligent conduct by defendant railway's engineer in failing to observe the plaintiff's tractor-trailer on the railroad tracks at a time sufficient for the engineer to apply successfully the train's emergency brakes. Further, there is evidence that the train was traveling in excess of the speed limit imposed by defendant railway's own safety regulations. *See generally Slade v. Board of Education*, 10 N.C. App. 287, 178 S.E. 2d 316, *cert. denied*, 278 N.C. 104, 179 S.E. 2d 453 (1971). The trial judge erred in refusing to submit the issue of defendants' negligence to the jury.

[2] We now address the trial judge's ruling that plaintiff was contributorily negligent as a matter of law. It is well settled that where opposing inferences are permissible from plaintiff's evidence, a directed verdict on the ground of contributory negligence as a matter of law should be denied. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969); *Atwood v. Holland*, 267 N.C. 722, 148 S.E. 2d 851 (1966). *See* 9 Strong's N.C. Index 3d Negligence § 35, p. 431, and cases cited therein. The opposing inferences then must be resolved by a jury. *Rappaport v. Days Inn of America, Inc., supra; Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976).

In addition to the above evidence, plaintiff's driver, Charlie Albert Smith, Jr., testified that when he approached the railroad tracks, he saw the traffic on Highway 421 clear to his left. However, two or three cars were coming from the right "pretty close by and so, after [Smith] looked again up and down the tracks to see if they were clear, [he] pulled across the track." There was evidence that shrubbery in the ditch line made it more difficult to see down Highway 421 in a westerly direction than down the

railroad tracks. Smith further testified that he stopped as close as possible to Highway 421. Nevertheless, since the distance between the edges of Highway 421 and the track was less than the length of plaintiff's tractor-trailer, "the rear of [his] equipment fouled the tracks." At this time, Smith had the tractor's overhead air conditioner on "full speed" to cool off the cab. The cab windows were rolled up.

Smith continued to testify as follows:

> While I was stopped there at 421 I was watching both lanes of the road and trying my best to get out. Somehow the traffic came jumping up on me from both directions and I had nowhere to go. I hadn't seen anything on the track. Possibly, if I had, I might have pulled out on 421. I was concentrating on the 421 traffic and getting out. I was stopped there for two or maybe three minutes. I remained stopped there because I couldn't get out onto 421. I couldn't make my turn safely to get out. . . .
>
> At the time of the accident I was about to make my move to pull out onto Highway 421. Then I heard a noise and I cut my eye around to the right. I was struck at that moment.

We conclude that a jury may find from this evidence that plaintiff's driver acted in a reasonable manner under the circumstances. Thus, with such inferences existing in opposition to inferences of contributory negligence, a directed verdict for defendants was improper. *Bowen v. Gardner, supra; Atwood v. Holland, supra.*

Since reasonable men may differ in their conclusions based upon the evidence, a jury must answer the issues we have discussed. *See Rappaport v. Days Inn of America, Inc., supra.*

For these reasons, we

Reverse and remand for a new trial.

Judges HEDRICK and WHICHARD concur.

In re Crainshaw

IN THE MATTER OF PATRICIA A. CRAINSHAW

No. 8119DC416

(Filed 3 November 1981)

Insane Person § 1.2— involuntary commitment—dangerous to self—dangerous to others—insufficiency of evidence

The evidence was insufficient to support a valid commitment order under G.S. § 122-58.7(i) as the evidence supporting the trial court's conclusion was that respondent had forgotten to turn off the stove on many occasions, resulting in burning of numerous pots and pans and a formica top; that she was forgetful; that she frequently talked to the wall; and that she appeared to be out of touch with her real surroundings. These facts do not support conclusion or ultimate finding of dangerousness to self as defined by G.S. § 122-58.2(1)a.

Judge WEBB dissenting.

APPEAL by respondent from *Tate, Judge*. Order entered 5 March 1981 in District Court, BURKE County. Heard in the Court of Appeals 14 October 1981.

On 24 February 1978 Mitchell Crainshaw initiated proceedings for the involuntary commitment of his wife, Patricia Crainshaw, pursuant to Ch. 122, Article 5A, of the North Carolina General Statutes. He alleged respondent was a mentally ill person who was dangerous to herself or others. On the basis of this petition, a deputy clerk of court ordered that respondent be taken into custody in order that she might be examined by a qualified physician.

Respondent was then examined by Dr. James A. Buckingham in Concord, North Carolina. Dr. Buckingham determined that respondent was mentally ill and dangerous to herself or others.

Respondent was next transferred to Broughton Hospital, where she was examined by Dr. Michael Knoelke, who also found respondent to be mentally ill and potentially dangerous to herself or others.

The matter was heard at Broughton Hospital, Burke County, on 5 March 1981, respondent being present and represented by counsel. At the hearing Dr. Knoelke testified that he had diagnosed the respondent as having a manic depressive illness, manic phase. He testified that the husband and daughter of the respond-

ent had testified that the respondent had often forgotten to turn off the stove resulting in the burning of numerous pots and pans and a formica top. Also they testified that the respondent is extremely forgetful, frequently talks to the wall and appears out of touch with her real surroundings.

Respondent testified in her own behalf and denied the allegations. In her opinion she was able to care for herself. She had done her own housework and cooking prior to her admission to the hospital. She testified that she was quite capable of meeting her needs for her basic necessities, at the present time and prior to her admission to the hospital.

At the conclusion of the hearing, the court made the following findings of fact:

> Respondent is diagnosed as having Manic Depressive Illness, Manic Phase. The testimony of her husband and daughter shows that she has forgotten to turn off the stove on many occasions, with the result that numerous pots and pans have been burned, and even the formica top. She is extremely forgetful, frequently talks to wall, and appears to be out of touch with her real surroundings. The court concludes that this unawareness amounts to severely impaired insight and judgment, raising a strong inference that she is unable to care for herself.

From the foregoing findings, the court concluded as a matter of law that respondent was mentally ill and dangerous to herself and ordered that the respondent be committed to Broughton Hospital for a period not to exceed 30 days and that the respondent be committed to the Out-Patient Clinic of Cabarrus County for 60 days. From this ruling, the respondent appealed.

Attorney General Edmisten by Associate Attorney Max A. Garner for the State.

Special Counsel for the Mentally Ill Howard C. McGlohon for the respondent.

MARTIN (Robert M.), Judge.

N.C. Gen. Stat. § 122-58.7(i) requires as a condition to a valid commitment order that the district court find two distinct facts

by clear, cogent, and convincing evidence: first that the respondent is mentally ill or inebriate and second, that the respondent is dangerous to herself or others.

It is for the trier of fact to determine whether evidence offered in a particular case is clear, cogent, and convincing. Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings made. *In re Monroe*, 49 N.C. App. 23, 270 S.E. 2d 537 (1980); *In re Underwood*, 38 N.C. App. 344, 247 S.E. 2d 778 (1978).

The respondent contends that there is no competent evidence to support a finding or conclusion of dangerousness to self, either in the facts recorded in the court's order or in the record. The phrase "dangerous to himself" when used in Article 5A is defined in N.C. Gen. Stat. § 122-58.2(1) as follows:

> a. "Dangerous to himself" shall mean that within the recent past:
>
> I. That he would be unable without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of serious physical debilitation to him within the near future unless adequate treatment is afforded pursuant to this Article. A showing of behavior that is grossly irrational or of actions which the person is unable to control or of behavior that is grossly inappropriate to the situation or other evidence of severely impaired insight and judgment shall create a prima facie inference that the person is unable to care for himself. . . .

The statutory language established a two prong test for dangerousness to self. The first prong addresses self-care ability regarding one's daily affairs. The second prong, which also must be satisfied for involuntary commitment to result, mandates a specific finding of a probability of serious physical debilitation resulting from the more general finding of lack of self-caring abili-

ty. We have held that pursuant to G.S. 122-58.7(i) the facts supporting danger must be recorded by the trial court. *In re Caver*, 40 N.C. App. 264, 252 S.E. 2d 284 (1979); *In re Jacobs*, 38 N.C. App. 573, 248 S.E. 2d 448 (1978).

We must agree with respondent that neither the facts recorded by the trial court nor the record supports a conclusion or ultimate finding of dangerousness to self. Alternatively, even if indicative of some danger, the facts do not support the finding that "[t]here is a reasonable probability of serious physical debilitation to the Respondent within the near future. . . ."

The judgment in this case discloses that the trial judge relied solely upon the testimony of the respondent's husband and daughter in its finding that the respondent was dangerous to herself. The court found that the respondent had forgotten to turn off the stove on many occasions, resulting in the burning of numerous pots and pans and a formica top; that she was forgetful; that she frequently talked to the wall; and that she appeared to be out of touch with her real surroundings. These facts may be evidence of mental illness, or under the broad language of § 122-58.2(1)a.1.I., danger characterized by inability to "exercise self-control, judgment, and discretion in the conduct of his daily responsibilities. . . ." However, these facts do not meet the second prong of the test, a reasonable probability of serious physical debilitation to her in the near future. The State presented no evidence showing the present or future effect of this behavior on the respondent. Forgetfulness and talking to the wall alone do not amount to danger as contemplated in the controlling statute.

We do not consider the respondent's remaining assignment of error.

For the reasons stated, the decision of the district court is

Reversed.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. Dr. Knoelke testified that he had diagnosed the respondent as having a manic depressive illness, manic phase. Webster's Third New International Dictionary (1971) defines a manic depressive as exhibiting features similar to manic depressive psychosis which it defines as "a major mental disorder manifested either by mania or by psychotic depression or by alternating mania and depression." I can only conclude from this that the respondent was suffering from a serious mental disease.

The majority holds that neither the facts recorded nor the record supports a conclusion of dangerousness to self. I believe the facts recorded which are supported by the evidence as to the respondent's major mental disorder, her behavior in not turning off the stove which resulted in burning the utensils and formica top, her talking to the walls, her being extremely forgetful, and her appearance of being out of touch with her real surroundings support a conclusion that the respondent was not able "to exercise self-control, judgment and discretion in the conduct of [her] daily responsibilities and social relations." I also believe the facts recorded support a conclusion that the respondent's behavior was "grossly inappropriate to the situation." This creates a *prima facie* inference that the respondent was not able to care for herself which satisfies the requirement that there was a probability of serious physical debilitation to the respondent if she had not been treated.

I would hold that there was sufficient evidence from which the district court could find facts supporting a conclusion that the respondent was mentally ill and dangerous to herself and the district court should not be reversed for so finding.

I vote to affirm.

ELLA GRIFFIN HARRIS v. WILLIS CLAYTON GUYTON AND WIFE, DOROTHY BAUCOM GUYTON

No. 8126SC269

(Filed 3 November 1981)

1. **Automobiles § 90.9— instructions—duty to reduce speed properly omitted**

In a personal injury action, the trial court was correct in omitting an instruction on defendant's duty to reduce her speed as necessary to avoid an obstruction in the street as there was insufficient evidence presented to warrant that instruction.

2. **Automobiles § 90.9— failure to instruct on violation of safety statute—no error**

In a personal injury action where the feme defendant lost control of her car after swerving to avoid a shopping cart, the trial court did not err in omitting an instruction on a violation of N.C.G.S. 20-146 nor did it err in not limiting its instruction on the doctrine of sudden emergency. Once defendant was confronted with a sudden emergency, the doctrine overrode the mandatory standards of N.C.G.S. 20-146(a)(2) and the violation of the statute was not what proximately caused plaintiff's injuries.

APPEAL by plaintiff from *Owens, Judge.* Judgment entered 10 September 1980 and order entered 21 October 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 20 October 1981.

This appeal arises out of a personal injury action resulting from an automobile accident. At trial the jury found in favor of the defendants on the issue of negligence. Plaintiff's motion for a new trial was denied.

The evidence tended to show that on 21 September 1975, at approximately 2:00 a.m., the defendant Dorothy Guyton was driving an automobile registered in the name of her husband, defendant Willis Guyton. She was proceeding in an easterly direction along Plaza Road in Charlotte, North Carolina. Plaintiff, Ella Harris, was a passenger in the front seat of the car. Mr. Guyton and Mr. Harris were seated in the back. Mrs. Guyton was travelling in the left-hand lane as she approached the intersection of Plaza Road and Camrose Drive. At that time she saw a shopping cart in the middle of her lane. In attempting to avoid this obstruction, Mrs. Guyton lost control of the car. According to plaintiff's testimony, Mrs. Guyton swerved to the right, then back to the left. The car went up an embankment, hit an advertising sign, and

came to rest on the parking lot of a shopping center. As a result of the accident, the plaintiff suffered injuries to her neck and back. Defendant did not offer any evidence.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Philip R. Hedrick and Mel J. Garofalo, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff's assignments of error relate primarily to the trial court's omission of certain instructions to the jury. The only issues submitted to the jury on the question of defendants' negligence were whether Mrs. Guyton failed to keep a reasonable lookout and whether she failed to keep her vehicle under proper control. The trial judge also instructed on the doctrine of sudden emergency.

It is plaintiff's contention that the trial judge was required, under the facts of this case, to instruct on defendants' negligence in the following respects:

(1) Failure to reduce speed as necessary to avoid an obstruction in the street;

(2) Violation of N.C.G.S. 20-146(a), (c) and (d) in failing to drive upon the right-hand side of a street; driving to the left of the centerline; failing to drive as nearly as practicable entirely within a single lane, and moving from her lane before first ascertaining that the move could be made in safety. Violation of this statute constitutes negligence per se. *See, e.g., Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968).

[1] We find that the trial court was correct in omitting an instruction on defendant's duty to reduce her speed as necessary to avoid an obstruction in the street. At trial, no evidence of speed was introduced. Nor was there evidence that the defendant failed to reduce her speed when confronted with the shopping cart. Before a trial judge may instruct a jury on a particular issue, there must be sufficient evidence presented to warrant that instruction. *Childress v. Motor Lines,* 235 N.C. 522, 70 S.E. 2d 558 (1952).

[2] Likewise, we find no error in the trial court's omission of an instruction on a violation of N.C.G.S. 20-146. A safety statute such as the one in question is pertinent only when there is evidence tending to show the violation proximately caused the injuries. *Powell v. Clark*, 255 N.C. 707, 122 S.E. 2d 706 (1961); *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 35 S.E. 2d 337 (1945).

In *Powell*, our Supreme Court held as prejudicial error the trial court's instruction to the jury on N.C.G.S. 20-146, under facts substantially similar to the present case. The Court held that N.C.G.S. 20-146 was inapplicable in an action by a guest passenger for injuries received when the driver lost control of the vehicle and as a result, drove off the road. "Its purpose is the protection of occupants of other vehicles then using the public highway and pedestrians and property thereon." 255 N.C. at 710, 122 S.E. 2d at 708. Once the defendant lost control of her car, "by reason of her own negligence or otherwise, the fact that the car went off the left rather than the right side of the road was not a proximate cause of plaintiff's injuries." *Id.* at 711, 122 S.E. 2d at 708.

Plaintiff also contends that the trial court erred

> in failing to instruct the jury that, in order for a sudden emergency to excuse compliance with a motorist's statutory duty to drive solely on the righthand side of the street, the motorist seeking to avoid compliance with the statutory duty must prove by the greater weight of the evidence that he or she has met the requirements for avoidance set out in the statute, that is, that there was no reasonable alternative method of avoiding the partial obstruction in the street than crossing the center line of the street and that he or she exercised such care as a reasonably prudent person would have exercised under the circumstances, considering the statutory standards.

The statutory standards to which plaintiff refers appear in N.C.G.S. 20-146 as follows:

> (a) Upon all [highways] of sufficient width a vehicle shall be driven upon the right half of the highway except as follows:
>
> . . . .
>
> (2) When an obstruction exists making it necessary to drive to the left of the center of the highway; provided, any person so doing shall yield the right-of-way to

> all vehicles travelling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;

N.C. Gen. Stat. § 20-146(a)(2) (1978).

The North Carolina courts have followed the general rule with respect to the application of the doctrine of sudden emergency. "One faced with a sudden emergency, not reasonably to be anticipated, is not held to a standard of care greater than that which a reasonable person would exercise under like circumstances." *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E. 2d 524, 527 (1973). Moreover, "[t]hat the action or course taken in an effort to avoid the threatened peril is contrary to the law of the road or to the directions of a traffic regulation has been held not to preclude the giving of an instruction on the sudden emergency rule." Annot., 80 A.L.R. 2d 5, 73 (1961); *Dinkins v. Booe*, 252 N.C. 731, 114 S.E. 2d 672 (1960).

The trial court was correct in not limiting the instruction on the doctrine of sudden emergency. The doctrine overrides the mandatory standards of N.C.G.S. 20-146(a)(2).

We have reviewed plaintiff's assignments of error regarding the trial court's summary of the evidence and his failure to grant plaintiff's motion for a new trial. Based on the foregoing, we find these assignments of error without merit.

No error.

Judges VAUGHN and CLARK concur.

STATE OF NORTH CAROLINA v. LEDELL MEMPHIS HUDSON

No. 8113SC507

(Filed 3 November 1981)

1. Homicide § 21.7— second degree murder—sufficiency of evidence

The State's evidence was sufficient for the jury on the issue of defendant's guilt of second degree murder where it tended to show that defendant obtained a rifle, told a neighbor he was going to kill someone, went to

the victim's home, called out the victim's name, walked back toward the victim's bedroom, and intentionally shot the victim in the back of the head while he was sleeping.

2. **Homicide § 30.3— second degree murder case—failure to instruct on involuntary manslaughter**

The trial court in a second degree murder case did not err in failing to instruct the jury on involuntary manslaughter where all the evidence showed that defendant intentionally discharged his rifle and thereby killed the victim.

3. **Criminal Law § 114.3— instruction on duties of district attorney and defense counsel—no expression of opinion**

The trial court did not express an opinion on the evidence in violation of G.S. 15A-1222 in instructing the jury that the district attorney has the responsibility of prosecuting cases and defense counsel have the responsibility of defending the defendant in the specific cases.

4. **Criminal Law § 111.1— responsibility of each juror to participate—instruction not erroneous**

The trial court's instruction that "There is a responsibility on each juror to participate in the verdict reached by the jury" could not have misled the jury into believing that a juror must conform his decision to that of the majority.

5. **Criminal Law § 113.9— misstatements of facts—necessity for objection at trial**

The trial court's misstatements of certain facts were not prejudicial where defendant failed to call them to the attention of the court in time to correct them and it does not appear that the jury could have been misled thereby.

APPEAL by defendant from *Lane, Judge.* Judgment entered 20 January 1981 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 22 October 1981.

Defendant was indicted for murder in violation of G.S. 14-17.

The State's evidence tends to show the following. On the night of 6 June 1980, Barney Lee Blanks and his wife, Jettie Mae, attended a party at the home of defendant, Mrs. Blanks' brother. At some point in the evening, Mrs. Blanks told her husband not to let defendant drive their truck because he was drunk. When the Blanks left the party between 10:30 and 11:00 p.m., defendant cursed at Mrs. Blanks and kicked her car. Mr. and Mrs. Blanks drove from defendant's house to their home. Mr. Blanks went to sleep shortly thereafter.

Between 11:30 and 12:00 p.m., defendant stopped by the home of Zannie Hall, his brother-in-law. Defendant was intoxicated, had a rifle, and asked Mr. Hall for some bullets. When Mr. Hall

replied that he did not have any, defendant said he was going to kill someone and left. Mr. Hall's house is located approximately 150 feet from the Blanks' home.

Around midnight, defendant came to the Blanks' home and asked the Blanks' daughter where her mother was. She replied "back in her room," and defendant headed in that direction. The daughter noticed he had a gun.

Jettie Mae Blanks was in the bathroom. She recognized defendant's voice and heard him come down the hall. He called out her husband's name twice. Then Mrs. Blanks heard a gunshot. When she entered the bedroom, she saw her husband on the bed with blood coming from his neck. She did not see the defendant who had left, carrying the gun. Barney Lee Blanks died from a bullet which passed from the back of his head through his brain.

Police received a call about the killing and arrested defendant around 1:00 a.m. on 7 June 1980. He was asleep at his father's house with an unloaded .22 calibre rifle in his right hand. The casing found in the Blanks' bedroom came from that rifle.

Defendant presented evidence that he was not involved in an altercation with the Blanks at his party. He was intoxicated and left the party with a friend. Defendant remembered climbing through a bedroom window at his father's house and removing his father's .22 calibre rifle. He did not, however, remember why he used the window or why he got the rifle. Defendant did not own any ammunition for a .22 calibre weapon. He did not remember going to Zannie Hall's home. Although he remembered going to the victim's house, he did not remember what happened. Defendant stated he loved Barney Blanks and did not shoot him.

At the close of the evidence, the court charged the jury on the elements of second degree murder and voluntary manslaughter. The jury convicted defendant of second degree murder.

Attorney General Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

T. Craig Wright and Sankey W. Robinson, for defendant appellant.

VAUGHN, Judge.

Defendant first contends it was error for the trial court to deny his motions for nonsuit and dismissal of the charge of second degree murder. We do not agree.

On a motion for nonsuit, the court must determine whether there is substantial evidence of each material element of the offense charged. Evidence is to be considered in the light most favorable to the State. *State v. Avery*, 48 N.C. App. 675, 269 S.E. 2d 708 (1980). We conclude that in the present cause there was sufficient evidence for the court to charge the jury on second degree murder.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. Jenkins*, 300 N.C. 578, 268 S.E. 2d 458 (1980). Malice is implied in law from the intentional firing of a deadly weapon which results in death. *State v. Currie*, 7 N.C. App. 439, 173 S.E. 2d 49 (1970).

[1] In the present cause, there is evidence of an unlawful and malicious killing. Drawing all reasonable inferences in favor of the State, there is evidence that defendant obtained a rifle, stated to Zannie Hall that he was going to kill someone, went to Barney Lee Blanks' home, called out Mr. Blanks' name, walked back toward the bedroom, and intentionally shot Mr. Blanks in the back of the head while he was sleeping. Defendant argues that there can be no presumption of malice if he did not know the gun was loaded. *State v. Currie, supra.* Defendant, however, never testified that he fired the gun believing it to be unloaded.

[2] The remainder of defendant's assignments of error are addressed to the court's charge to the jury. Defendant first argues the court erred in refusing to instruct the jury on involuntary manslaughter. Where there is some evidence of defendant's guilt of a lesser degree of the crime charged in the indictment, the court must submit the defendant's guilt of the lesser included offense to the jury. *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Williams*, 51 N.C. App. 397, 276 S.E. 2d 715 (1981). Involuntary manslaughter is the unlawful killing of a person, without malice, without premeditation and deliberation, and without the intent to kill or inflict serious bodily injury. *State v.*

Wrenn, 279 N.C. 676, 185 S.E. 2d 129 (1971). It is a lesser included offense of murder, requiring recklessness rather than intent.

In this cause, however, the evidence does not support a lesser verdict of involuntary manslaughter. There is no evidence of a scuffle during which the rifle accidentally discharged. Neither is there evidence that defendant was joking around when the rifle fired. *State v. Currie, supra.* Defendant admits climbing through his father's window to obtain a rifle. He admits entering the Blanks' bedroom with it. He testified that the rifle cannot be fired unless one first cocks the rifle, puts a shell in it, closes the bolt, and pulls back on the pin. When all the evidence shows that defendant *intentionally* discharged his rifle, killing Barney Lee Blanks, defendant was not entitled to a jury instruction on involuntary manslaughter.

[3] Defendant next objects to the judge's statements that "Under our system of law, there are specific duties outlined. The District Attorney has the responsibility of prosecuting cases. Defense counsel have the responsibility of defending the defendant in the specific cases." Defendant contends that the statements are an improper expression of opinion. G.S. 15A-1222.

A court's instructions should aid the jury in its understanding of the legal system and the responsibility before it. The above comments indicate the roles attorneys play in a criminal prosecution. They are not improper expressions of opinion as to the merits of either party's case. Defendant's exception is overruled.

[4] Defendant also objects to the statement "There is a responsibility on each juror to participate in the verdict reached by the jury." Defendant's argument that a juror could infer he must conform his decision to that of the majority is patently without merit. In fact, the judge further charged that each juror had the responsibility to stand by his convictions.

[5] In recounting the evidence, the court made some misstatements. It stated the defendant had a .22 calibre pistol rather than a .22 calibre rifle. It identified the pathologist as Dr. Blanks rather than Dr. Marvin Thompson. It referred to Officer Dudley of the Columbus County Sheriff's Department as Mr. Hudson. None of the statements, however, was a material misstatement of the facts. *Lapsus linguae* are not prejudicial if the defend-

ant fails to call them to the attention of the judge in time to correct them and if it does not appear that the jury could have been misled. *State v. Rudolph*, 39 N.C. App. 293, 250 S.E. 2d 318, *cert. denied*, 297 N.C. 179, 254 S.E. 2d 40 (1979).

Defendant's argument as to the length of the court's review of the evidence is without merit. The court spent more time recounting the State's evidence than it did recounting defendant's simply because the State offered more witnesses.

Defendant excepts to the court's definitions of second degree murder and voluntary manslaughter, and to its relation of the facts to the elements of those offenses. We conclude the court properly defined second degree murder as the unlawful killing of a human being with malice and adequately instructed the jury on the essential features of the case. If defendant desired more elaboration, he should have requested further instruction. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973).

We conclude the court also properly defined voluntary manslaughter as the unlawful killing of a human being without malice and without premeditation and deliberation. Defendant argues the court should not have limited the definition of lack of malice to heat of passion or adequate provocation. Defendant, however, presents no evidence of self-defense which would demand an instruction on imperfect self-defense. Defendant also fails to show that the court inadequately related the facts of the case to the charge.

Finally, defendant argues that the court improperly instructed the jury as to the circumstances under which they could find him not guilty. We do not find the instruction misleading.

No error.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. STEVE KINARD

No. 8126SC390

(Filed 3 November 1981)

1. **Criminal Law § 66.20— identification testimony—findings of court—supported by evidence**

In a breaking or entering and larceny case, the findings of fact were supported by the evidence and supported the trial court's conclusion that identification testimony was properly admissible where the evidence showed two witnesses observed defendant at the victim's apartment from a short distance for two or three minutes, that they left and one of the witnesses returned, saw defendant removing the stereo from the victim's apartment, and upon firing shots, saw defendant drop the stereo, and where both witnesses, separately, chose defendant's photograph from among six photographs.

2. **Criminal Law § 111.1— photographic identification—instructions proper**

Where defendant requested the trial judge read a paragraph of the N.C. P.I. which applied only to a lineup or show-up identification situation and was inapplicable to the photographic identification in the case, the trial court did not err in failing to give it. Further, the trial judge did not have an affirmative duty, absent a request, to specifically instruct the jury to consider the possibility of misidentification where there was little if any evidence to suggest unfairness or likelihood of misidentification in the photographic identification.

APPEAL by defendant from *Davis, Judge.* Judgment entered 3 October 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 October 1981.

Defendant was convicted, as charged, of (1) breaking or entering the residence of Virginia Potts on 19 May 1980, and (2) larceny of a stereo component set from the residence.

Defendant appeals from judgments imposing prison terms of six to ten years and four to five years, the sentences to run consecutively. The court found that defendant would not benefit from a committed youthful offender sentence.

Attorney General Edmisten by Assistant Attorney General Sarah C. Young for the State.

Appellate Defender Adam Stein for defendant appellant.

CLARK, Judge.

[1] The defendant first challenges the admissibility of the identification evidence. At voir dire upon defendant's motion to suppress identification testimony, Katie Glenn and her boyfriend, Willie Simpson, testified that about 8:30 a.m. they were in the duplex apartment adjoining that of Virginia Potts when they saw a young black man pulling on the door of the Potts apartment. They observed him for two or three minutes from a distance of several feet. When Simpson went out the back door, the man left, and, while walking away, looked back at them about five times.

Simpson took Ms. Glenn to work and returned about 40 minutes later. He saw the same man come out of the Potts apartment carrying a stereo set. He told the man to bring it back, but the man would not do so. Simpson got his rifle and fired two shots over the man's head. The man dropped the stereo set and ran.

The following day Simpson and Ms. Glenn went to the Law Enforcement Center where they were shown, separately, six photographs. Both selected the photograph of the defendant, Exhibit 6, as the man they saw at the Potts apartment.

The trial judge made findings of fact and concluded that the identification of the defendant by Ms. Glenn and Simpson was of independent origin, untainted by any pretrial identification procedure which was unnecessarily suggestive and conducive to irreparable mistaken identification.

The findings of fact by the trial judge were supported by clear and convincing evidence, and the findings of fact in turn supported the conclusion that the in-court identification was of independent origin based on their observation of the defendant at the scene of the crime. *See State v. Wilson*, 296 N.C. 298, 250 S.E. 2d 621 (1979). We hold that the identification testimony was admissible.

[2] The defendant assigns as error the failure of the trial court to give the requested portions of N.C.P.I.—Crim. 104.90 relating to identifications made after the crime. The trial court gave the following instructions from N.C.P.I.—Crim. 104.90:

> "I instruct you that the State has the burden of proving the identity of the defendant as the perpetrator of the crime

charged beyond a reasonable doubt. This means that you, the Jury, must be satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged before you may return a verdict of guilty. Now, the main aspects of identification are the observations of the offender by the witnesses before or at the time of the offense. Now, in examining the testimony of the witnesses, as to their observation of the perpetrator before, or at the time of the crime, you should consider such things as the lighting on the front porch of Virginia Potts, the lighting on the back porch, whether it was daylight or dark. You should also consider those things such as the close proximity of the witness, whether or not there was any face to face contact, whether they were able to observe the entire body of the defendant or only a portion of the body, the length of time the defendant may have been in the presence of the witness and the length of time they may have observed his features and his face. Now, the identification witnesses are witnesses just like any other witness. That is, you should assess the credibility of the identification witnesses in the same way that you would any other witness, in determining the adequacy of his observation and his capacity to observe.

As I have instructed you earlier, the State must prove beyond a reasonable doubt that the defendant was the perpetrator of the crime charged. If after weighing all the testimony, you are not satisfied beyond a reasonable doubt that the defendant was the perpetrator of the crime charged, it would be your duty to return a verdict of Not Guilty."

However, the court failed to give, as requested by defendant, the following paragraph from N.C.P.I.—Crim. 104.90:

"(In examining the testimony of the witness as to his observation after the crime you should consider (describe relevant factors).[2] However, your consideration must go further. The identification of the defendant by the witness as the perpetrator of the offense must be purely the product of the witness' recollection of the offender and derived only from the observation made at the time of the offense. In making this determination you should consider the manner in which the witness was confronted with the defendant after

the offense, the conduct and comment of the person in charge of the (describe confrontation, e.g., line-up, show-up, etc.) and any circumstances or pressures which may have influenced the witness in making an identification, and which could cast doubt upon or reinforce the accuracy of the witness' identification of the defendant.)[3]"

We note that footnote 3 to the instruction states that the last quoted paragraph should be used only where the defendant has been identified by the witness at a time after the offense was committed, and while the defendant was in custody or control of law enforcement officers. It is clear from footnote 3 and from the questioned instruction, which refers to "the manner in which the witness was confronted with the defendant," that it applied only to a lineup or show-up situation and not to photographic identification. "Confrontation" is the act of setting a witness face-to-face with the prisoner. *State v. Behrman*, 114 N.C. 797, 19 S.E. 220 (1894); Black's Law Dictionary (4th Ed.). The questioned paragraph was inapplicable to the photographic identification in the case *sub judice*, and the trial court did not err in failing to give it.

The defendant did not request instructions specifically applicable to the photographic identification procedure used in this case. The question then is whether the failure of the court to give such instructions, in the absence of a proper request, was prejudicial error. We think not. Whether the identification issue is such a substantial feature of the case that the trial court is required to give instructions specifically dealing with the relevant factors involved in either a confrontation identification or photographic identification depends on the evidence in each case. If the evidence strongly suggests the likelihood of irreparable misidentification, the identification issue would become a substantial feature of the case, and the trial judge is required, even in the absence of a request, to properly instruct the jury as to the detailed factors that enter into the totality of the circumstances relating to identification.

In the case before us there is little if any evidence to suggest unfairness or likelihood of misidentification in the photographic identification. Though the two witnesses were in the same room when the photographs were given to them for examination, both

testified that they were apart and could not see the photographs while the other made the examination. Both testified that they immediately selected the photograph of the defendant without looking at the back of the photograph where defendant's name appeared. The defendant's confrontation of the two witnesses by cross-examination elicited nothing to support defendant's contention. In light of this evidence we find that the general identification instructions were sufficient to significantly focus the attention of the jury on the issue of identity, that the trial judge did not err in failing to give the N.C.P.I.—Crim. 104.90 instructions relating to confrontation identification, and that the trial judge did not have the affirmative duty, absent a request, to specifically instruct the jury to consider the possibility of misidentification under the circumstances revealed by the evidence of the photographic identification.

We have carefully considered the defendant's other assignments of error and arguments, and we find the alleged errors to be merely technical and not prejudicial. *See* G.S. 15A-1443(a).

No error.

Judges HEDRICK and MARTIN (Harry C.) concur.

IN THE MATTER OF PHILLIP WHARTON, JUVENILE

No. 8118DC465

(Filed 3 November 1981)

1. Appeal and Error § 7; Infants § 21— juvenile court order—requirement that county pay portion of juvenile's attorney fees—no right by county to appeal—exercise of supervisory jurisdiction by appellate court

Guilford County did not have the right to appeal from an order entered by the district court in a juvenile delinquency proceeding directing the county to pay a portion of the juvenile's counsel fees since (1) the county was not a party to the juvenile proceeding, and (2) G.S. 7A-667 did not empower a county to take an appeal in a juvenile proceeding. However, the Court of Appeals will review the district court's order pursuant to its supervisory powers under Art. IV, § 12(1) of the North Carolina Constitution.

2. Infants § 14— counsel fees of juvenile—order requiring payment by county

The district court had no authority under G.S. 7A-646 and G.S. 7A-647 to require Guilford County to pay a portion of the fees of counsel appointed to represent a juvenile, since fees of assigned counsel for indigent juveniles is the responsibility of the State. G.S. 7A-588; G.S. 7A-1452(b).

APPEAL by Guilford County from *Pfaff, Judge.* Order filed 3 November 1980 in District Court, GUILFORD County. Heard in the Court of Appeals 20 October 1981.

On 18 June 1980, a petition was filed alleging that Phillip Wharton was a delinquent. Counsel was appointed for the juvenile. Based upon medical examinations of Phillip, the court found that he was incompetent to stand trial upon the various criminal charges pending against him. Phillip was placed in the custody of the Guilford County Department of Social Services. After several hearings, a dispositional order was entered. The order was dated 27 August 1980 and was based upon a hearing held on 22 August 1980. The 27 August 1980 order found Phillip in need of medical, psychiatric and other care; placed him in the custody of the Guilford County Department of Social Services; and ordered that he be transferred for treatment to the Mandala Center in Winston-Salem for a period of no more than six weeks. The court also ordered:

> [T]hat the Guilford County Department of Social Services shall in conjunction with the Mental Health, Mental Retardation and Substance Abuse Authority implement the creation of a foster home to be found by the County in which appropriate staff are placed and the juvenile and other juveniles like him could be permanently domiciled for program treatment and delivery of services. The agencies are to initiate a coordinated effort with the higher education facilities in the Greensboro community in order to pursue a source of staffing. Graduate or other special education students should be considered to be hired on an independent contracting basis in which they are allowed to reside in the foster home, receive room and board, and gain credit hours for directed individual studies and behavioral management in the home environment and supervision of said juvenile. The students should be under the supervision and guidance of the directors of the different college level programs and under

the direction and supervision of the Department of Social Services through its regulations dealing with foster home parents and special retardation service programming.

No objections or exceptions were entered to this order. Notice of appeal was not given to this order.

On 12 September 1980, the court entered an order requiring "that Guilford County shall pay all reasonable costs and the itemized fees of A. Frank Johns [appointed attorney for the juvenile] in this case not paid for by the Administrative Office of the Courts. The hourly rate for compensation shall be Fifty and no/100 ($50.00) Dollars per hour." From this order, Guilford County entered notice of appeal on 22 September 1980.

Thereafter, a hearing was held concerning the implementation of the 27 August 1980 order. In an order dated 23 October 1980 and filed 3 November 1980, Judge Pfaff found Frank W. Wilson, Director of the Department of Social Services of Guilford County, in contempt of court for failing to comply with the court's order of "August 22 [*sic*], 1980." The order required Wilson to pay a fine of $500. The record on appeal then includes the following: "Notice of Appeal to the entry of the order of October 23 was orally given in open Court."

Guilford County secured an agreed extension of time to prepare and file "its record on appeal." Guilford County and its director of the Department of Social Services petitioned this Court for a writ of supersedeas, which was allowed 12 December 1980. Guilford County secured from this Court an extension of time within which to file its record on appeal.

A brief was filed by Guilford County, and Mr. Johns filed a brief on behalf of the juvenile as appellee.

Margaret A. Dudley, Deputy Guilford County Attorney, for appellant.

Booth, Harrington, Johns & Campbell, by A. Frank Johns, for appellee.

MARTIN (Harry C.), Judge.

[1] This appeal is subject to dismissal. Our Supreme Court has recently stated the law with respect to the right of a county to

take an appeal in a juvenile proceeding. *In re Brownlee,* 301 N.C. 532, 272 S.E. 2d 861 (1981). Here, as in *Brownlee,* the county is not a party to the proceeding. Although the Guilford County Department of Social Services was before the trial court, Guilford County was not. "One who is not a party to an action or who is not privy to the record is not entitled to appeal from the judgment of a lower court." *Id.* at 546, 272 S.E. 2d at 869. *See* N.C. Gen. Stat. § 1-271 (1969). As stated in *Brownlee,* even if Guilford County were a party, it would not have a *right* of appeal. N.C. Gen. Stat. § 7A-667 (Supp. 1979). The county is not a "county agency" within the meaning of the statute. *Brownlee, supra.*

We hold that Guilford County did not have the right to appeal from the challenged orders. A close reading of the record on appeal discloses that Frank W. Wilson did not enter notice of appeal or seek appellate review of the court's order of contempt filed 3 November 1980. Moreover, no brief was filed by him or on his behalf.

Nevertheless, this Court is authorized to exercise its power under our constitution and review questions which are not presented in accordance with the North Carolina Rules of Appellate Procedure. N.C. Const. art. IV, § 12(1); *Brownlee, supra.* We therefore elect, in our discretion, to treat the papers filed before us as a motion requesting the Court to exercise its constitutional powers to enable it to review the order of the trial court, dated 12 September 1980, requiring Guilford County to pay a part of the counsel fees for the juvenile's appointed attorney. We allow the motion for the sole purpose of reviewing the order of 12 September 1980.

[2] The trial court based its order of 12 September 1980 upon N.C.G.S. 7A-646 and -647. In this, the trial court erred. N.C.G.S. 7A-647 allows the judge to charge the county with the "cost of care" of a juvenile if the parent is unable to pay such cost. "Cost of care" does not include counsel fees for the juvenile. Counsel fees for the juvenile are governed by N.C.G.S. 7A-588. Under this section, counsel are to be paid reasonable fees in the same manner as fees for attorneys appointed in cases of indigency. Article 36 of chapter 7A sets out the procedures for payment of such counsel fees. Juvenile proceedings are specifically included in section 451(a)(8) of article 36. Fees of assigned counsel for indigents,

including indigent juveniles, shall be borne by the state. N.C. Gen. Stat. § 7A-452(b) (1969).

The trial court was without authority to enter the order of 12 September 1980 requiring Guilford County to pay part of the counsel fees for the juvenile, Phillip Wharton, and the order is hereby vacated.

Except as to the review of the order of 12 September 1980, the appeal is dismissed.

Order of 12 September 1980 vacated and appeal dismissed. Costs of appeal are to be paid by Guilford County.

Judges HEDRICK and CLARK concur.

STATE OF NORTH CAROLINA v. WAYLAND L. WHITE, JR.

No. 811SC330

(Filed 3 November 1981)

Constitutional Law § 30— failure of officer to retain evidence—no violation of due process

In a prosecution for the felonious larceny of six hogs, the failure of the police officer to retain the hogs in order that defendant be allowed to examine the *corpus delicti* did not act to deny defendant his due process right to investigate the evidence and to confront his accusers where the officer released the hogs in good faith, where there was no evidence or allegations that the officer was attempting to suppress evidence, where evidence resulting from the retention of the hogs was speculative, and where defendant was able to cross-examine the witness identifying the hogs. G.S. 15A-954(a)(4) and G.S. 15A-1414.

APPEAL by defendant from *Britt, Judge.* Judgment entered 2 December 1980 in Superior Court, GATES County. Heard in the Court of Appeals 22 September 1981.

The defendant was indicted for the felonious larceny of six hogs, having a total value of over $600. At his trial, the State presented evidence tending to show that, on 9 November 1980, Shelton Ray Stallings, a farmer in Hobbsville, received a phone call which prompted him to go to his hog house where he discovered that six hogs, worth approximately $660, were miss-

ing. Tire tracks indicated that someone had backed a vehicle up to the hog house from which the hogs had been taken.

Meanwhile, in the nearby town of Aulander, in the early hours of 10 November 1980, an Aulander police officer observed a pickup truck driven by defendant and containing six hogs. Defendant was parked on the traveled portion of the highway, and, as the officer walked toward the truck, defendant started the truck and drove a short distance. After he stopped, defendant beckoned the officer and asked for a light. The officer, observing that defendant was intoxicated, gave him a field sobriety test and placed him under arrest. Immediately after the arrest, the officer seized a set of bolt cutters from defendant's vehicle. He thereafter contacted other law enforcement agencies to determine whether anyone had reported missing hogs. In response to that effort, Stallings came to Aulander and identified the hogs as his. After photographing the hogs, the police officer allowed Stallings to take them back to his farm. The hogs were later disposed of.

The State's evidence tended to incriminate defendant in three ways. First, the farmer identified as his the hogs found in defendant's truck. Secondly, an SBI agent testified that metal particles found at the farmer's gate fitted microscopically and visually the set of bolt cutters found in defendant's truck. Finally, two witnesses testified that, in their opinion, the tire tracks imprinted at the hog house were made by the tires on defendant's truck.

The defendant presented no evidence. The jury returned a verdict of guilty, and, from the imposition of a prison term of not less than ten years nor more than ten years, the defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Taylor and McLean, by Mitchell S. McLean, for defendant-appellant.

VAUGHN, Judge.

The defendant's sole assignment of error pertains to the trial court's denials of defendant's pretrial motion to dismiss and his post-verdict motion for appropriate relief. The motions to which

defendant refers were based on his inability to observe and test the *corpus delicti* of the alleged larceny, to wit, the six hogs.

Under G.S. 15A-954(a)(4), the trial court, on motion of the defendant, must dismiss the charges contained in a criminal pleading if the court determines that "[t]he defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." G.S. § 15A-1414 allows the defendant to file a post-verdict motion seeking relief from the court's erroneous failure to dismiss the charge in response to defendant's G.S. 15A-954 motion. The question in the instant case, therefore, is whether there were flagrant violations of defendant's constitutional rights which caused such irreparable prejudice to the preparation of his case that there was no remedy other than the dismissal of the prosecution.

The crux of defendant's argument is that he should have been allowed to examine the *corpus delicti* of the alleged larceny. He contends that visual examination may have led to the discovery that the hogs on defendant's truck were of a different breed from those found in the pen from which the hogs were allegedly taken, that a digestive or urinary analysis may have shown recent dietary intake different from that of the hogs remaining in the pen; and that blood grouping tests may have been used to distinguish the hogs.

This Court accepts the principle advocated by the defendant and well-established in our courts that due process requires that every criminal defendant be allowed a reasonable time and opportunity to investigate competent evidence, if he can, in order to defend the crime with which he is charged and to confront his accusers with other testimony. *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526 (1970). This principle, however, does not require police officers to retain items when the probative value of laboratory examinations of such items is speculative. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), death sentence vacated, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1205 (1976).

In the present case, we find that the failure of the police officer to retain the hogs for the testing defendant proposed did not act to deny defendant his due process right to investigate the evidence and to confront his accusers. Photographs were taken of

the hogs and introduced at trial. Defendant was able to cross examine the owner concerning his identification of the hogs and was free to use the photographs to attempt to impeach the witness. The tests he proposed, on the other hand, were highly speculative in nature. Where, as here, the officer released the hogs in good faith, where there was no evidence or allegation that the officer was attempting to suppress evidence, where evidence resulting from the retention of the hogs was so speculative, and where defendant was able to cross-examine the witness identifying the hogs, we can find no violation of defendant's due process rights.

The motions to dismiss were properly denied, and we find that defendant's trial contained

No error.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. DUSTIN McNEILL

No. 8112SC357

(Filed 3 November 1981)

1. **Searches and Seizures § 12— investigatory stop—subsequent arrest—probable cause—admissibility of evidence resulting from arrest**

An officer had probable cause to detain defendant for questioning where two other officers, at 11:25 p.m., saw one black male carrying a television set and another carrying an armful of clothing; when the officers shined their headlights on defendant, he dropped the clothing and ran; one officer broadcast that the officers were pursuing a breaking and entering suspect wearing a red tee shirt with white lettering on the back; almost immediately the first officer spotted a black male who fit the description of the suspect walking along the road; the suspect, later identified as defendant, was breathing hard and sweating profusely; and the officer pulled his vehicle in front of defendant and asked him to place his hands on the car. Furthermore, the officer had probable cause to arrest defendant for obstructing his investigation when defendant ran as the officer attempted to radio other officers that he had the suspect, and evidence obtained as a result of the detention and arrest of defendant was admissible at defendant's trial.

2. **Criminal Law § 118.1— failure to state defendant's contentions—absence of prejudice**

Defendant was not prejudiced by the trial court's failure to state his contentions after summarizing the contentions of the State where defendant

presented no evidence and evidence elicited on cross-examination of the State's witnesses did not tend to exculpate defendant.

3. Criminal Law § 145.5— court's recommendation of restitution before parole— validity

Where a judgment and commitment contained a recommendation by the trial court that defendant be required to make specific restitution payments as a condition of work release or parole, the further statement that "All monies are to be paid prior to the defendant's consideration for parole" did not usurp the power of the N.C. Parole Commission since such statement was simply an elaboration upon and part of the court's recommendation. G.S. 148-57.1.

APPEAL by defendant from *Wood, Judge.* Judgment entered 14 November 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 September 1981.

Defendant was indicted on charges of second degree burglary and larceny, and a jury found him guilty of felonious breaking or entering and felonious larceny. From a judgment imposing consecutive prison terms, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel C. Oakley, for the State.

Assistant Public Defender John G. Britt, Jr., for defendant-appellant.

WELLS, Judge.

[1] Defendant first assigns error to the denial of his pre-trial motion to suppress any evidence obtained as a result of his arrest on 20 August 1980. Defendant contends that there was no probable cause for his detention or arrest. Without probable cause a warrantless arrest is illegal under G.S. 15A-401(b), and as a general rule, G.S. 15A-974, evidence obtained therefrom is inadmissible. *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961), *Wong Sun v. U.S.,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963).

The trial judge made a finding of fact that defendant's detention and arrest were supported by probable cause. This finding is conclusive on appeal if supported by competent evidence. *In re Gardner,* 39 N.C. App. 567, 251 S.E. 2d 723 (1979), *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971), *State v. Small,* 293 N.C. 646, 239 S.E. 2d 429 (1977).

The State's evidence adduced at the *voir dire* on the motion to suppress tends to show that around 11:25 p.m. on 20 August 1980, Officers Dumas and McDaniel were on patrol in a marked patrol car. Officer Dumas noticed two black males walking at a fast pace. One was carrying a television set, and the other was carrying an armful of clothing. The officers immediately turned around to investigate. The two officers then observed only the man carrying clothing, who was later identified as defendant. When the officers shined their headlights on defendant, he dropped the clothing and ran. Officer McDaniel immediately broadcast over his radio that he and Officer Dumas were "in foot pursuit of a B&E suspect wearing a red tee shirt with white lettering on the back." Officer Sweet, who was on patrol nearby, received the radio transmission from his marked patrol car and began searching the area. Almost immediately he spotted a black male who fit the description of the suspect. The man, identified as defendant, was walking on the wrong side of the road. He was breathing hard and sweating profusely. Officer Sweet pulled his vehicle in front of the defendant and asked him to place his hands on the car. As he attempted to radio the other officers that he had the possible suspect, defendant ran. Officer Sweet caught and arrested defendant for obstructing and delaying his investigation. Under the circumstances, Officer Sweet had the right to detain defendant for questioning. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968), *Adams v. Williams*, 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972), *State v. Streeter*, 283 N.C. 203, 195 S.E. 2d 502 (1973). When defendant fled, Sweet then had probable cause to arrest him for obstructing his investigation. G.S. 14-223. *State v. Rudolph*, 39 N.C. App. 293, 250 S.E. 2d 318 (1979). There is ample evidence to support the trial judge's finding of probable cause. *State v. Sadler*, 40 N.C. App. 22, 251 S.E. 2d 902 (1979). Defendant's motion to suppress was properly denied. *See State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). We overrule this assignment.

[2] In his third assignment of error, defendant argues that the trial judge erred by summarizing the State's contentions in its jury instructions, while omitting defendant's contentions. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978). Although defendant presented no evidence, he had the right to have the jury instructed of his contentions raised by any favorable evidence

elicited on cross-examination of a State's witness. *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979). The only evidence for defendant was the cross-examination testimony of Officer Sweet, who testified that though he conducted a pat-down search of defendant, the stolen goods were found under the back seat of the patrol car, where defendant alone had been sitting. Since this evidence does not tend to exculpate defendant, the failure of the trial judge to discuss it did not prejudice defendant. This assignment is overruled.

[3] Defendant's final assignment of error involves alleged error in the judgment and commitment order. Judge Wood ordered:

> As to restitution or reparation as a condition of attaining work release privilege or parole, the Court recommends that the defendant pay restitution in the sum of $417.50, for benefit of Jeffery Trent Lloyd, . . . and pay to the Administrative Office of the Courts the sum of $250.00 for court appointed Counsel. All Monies are to be paid prior to the defendant's consideration for parole.

Defendant argues that in the last sentence of this paragraph, the trial judge violated defendant's constitutional rights of due process and equal protection and usurped the power of the North Carolina Parole Commission. He contends that the statute only allows the court to recommend restitution prior to consideration of parole. G.S. 148-57.1, Restitution as a condition of parole, provides in pertinent part:

> (b) As a rehabilitative measure, the Parole Commission is further authorized and empowered to impose as a condition of attaining parole that the prisoner make restitution or reparation to an aggrieved party when such restitution or reparation is *recommended* (emphasis added) by the sentencing court as a condition of attaining parole. The Parole Commission shall not be bound by such recommendation, but if it elects not to implement the recommendation, it shall state in writing the reasons therefor, and shall forward the same to the sentencing court.
>
> (c) When an active sentence is imposed, the court shall consider whether, as a rehabilitative measure, restitution or reparation should be *ordered* (emphasis added) or recom-

mended to the Parole Commission to be imposed as a condition of parole. If the court determines that restitution or reparation should not be *ordered* (emphasis added) or recommended as a condition of parole, it shall so indicate on the commitment. If, however, the court determines that restitution or reparation should be *ordered* (emphasis added) or recommended as a condition of parole, it shall make its order or recommendation a part of the order committing the defendant to custody.

In light of these statutory provisions, we interpret the language of the judgment and commitment order to mean that, should the Parole Commission accept the court's recommendation of the specific restitution payments as a condition of attaining parole, then this money must be paid prior to the consideration of defendant's parole by the Commission. We view the last sentence in the order as simply an elaboration upon and part of the court's recommendation. This assignment of error is, accordingly, overruled.

No error.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. THOMAS E. ROWLAND

No. 819SC388

(Filed 3 November 1981)

1. **Assault and Battery § 14.6— assault on law enforcement officer—sufficiency of the evidence**

The evidence was sufficient to require submission of the case to the jury on the charge that defendant violated G.S. § 14-33(b)(4) where the State offered evidence tending to show that the prosecuting witness was a law enforcement officer, that he identified himself as such to defendant, that he was in the performance of his duty as an officer, and that defendant assaulted him by hitting him the face.

2. **Assault and Battery § 16— failure to submit lesser offense of simple assault—error**

Where defendant was charged and convicted of assaulting an officer in the performance of his duty, it was error for the trial court to fail to submit the

lesser included offense of simple assault where there was conflicting evidence in the record whether the defendant knew the prosecuting witness was a law enforcement officer.

APPEAL by defendant from *Lamm, Judge.* Judgment entered 9 December 1980 in Superior Court, PERSON County. Heard in the Court of Appeals on 13 October 1981.

Defendant was charged in a warrant with willfully assaulting a law enforcement officer by hitting him in the eye and mouth with his fist while that officer was performing the duties of his office. The warrant charged defendant with a violation of G.S. § 14-33(b)(4), a misdemeanor.

Upon defendant's plea of not guilty, the State offered evidence tending to show the following: On 3 May 1980, defendant was staggering outside the D & M Grocery in Roxboro when he was approached by W. C. Chandler, an officer of the Division of Alcohol Law Enforcement of the Department of Crime Control; Chandler, seeking to investigate whether D & M Grocery had sold beer to a person under age, presented his identification folder and identified himself as an Alcohol Law Enforcement Agent and requested identification from the defendant; the defendant stated that he had no identification and after Chandler requested that he go into the D & M Grocery to point out who sold him beer, defendant refused and began to curse; Chandler then placed defendant under arrest for being intoxicated and disruptive; defendant went across the street and got inside a truck; defendant refused to get out of the truck, and then slapped Chandler with his open hand; after Chandler "countered" by striking defendant with a defensive baton, defendant then hit Chandler in the face with his right fist.

Defendant testified that when he was approached by Chandler, Chandler wore jeans, a t-shirt, and a sweater, and that Chandler's car gave no indication that he was a law enforcement officer. Defendant's testimony also included the following:

> I was in the truck alone when I next saw Chandler standing at the door talking to somebody standing out beside the truck. I heard him tell someone to get out of the way, so I opened the door and got out. He said, "You are under arrest." [A]nd I said, "Look, show me some ID and I will go with you."

He said, "I ain't got to show you nothing."

I responded, "Then I ain't going with you." I did not know that he was a Law Enforcement Officer. I have been arrested by other Law Enforcement Officers in this town, but never by anyone wearing this type of dress. After I said I wasn't going, he hit me with the black stick on the forehead. . . . I had not struck him before he hit me. After he hit me, I stepped back, took my shirt off and hit him.

The jury found defendant guilty as charged, and from a judgment imposing a prison sentence "not to exceed two (2) years," defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Kucharski, for the State.

Ramsey, Hubbard & Galloway, by Mark Galloway; and Burke & King, by Ronnie P. King, for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the court's failure to grant his timely motions as of nonsuit. G.S. § 14-33 in pertinent part provides:

(b) Unless his conduct is covered under some other provision of law providing greater punishment, any person who commits any assault, assault and battery, or affray is guilty of a misdemeanor punishable by a fine, imprisonment for not more than two years, or both such fine and imprisonment if, in the course of the assault, assault and battery, or affray, he:

. . .

(4) Assaults a law-enforcement officer . . . while the officer . . . is discharging or attempting to discharge a duty of his office.

The evidence is clearly sufficient to require submission of the case to the jury on the charge that defendant violated G.S. § 14-33(b)(4). The State offered evidence tending to show that W. C. Chandler was a law enforcement officer, that he identified himself as such to defendant, that he was in the performance of his duty as an officer, and that defendant assaulted him by hitting him in the face.

Defendant's fifth assignment of error has no merit.

[2] By his fourth assignment of error, the defendant contends the court erred in not submitting to the jury as a possible verdict the lesser included offense of simple assault. It is well settled in this State that when a defendant is indicted for a criminal offense he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). Further,

> [w]hen there is conflicting evidence of the essential elements of the greater crime and evidence of a lesser included offense, the trial judge *must* instruct on the lesser included offense even where there is no specific request for such instruction. An error in this respect will not be cured by a verdict finding a defendant guilty of the greater crime.

State v. Brown, 300 N.C. 41, 50, 265 S.E. 2d 191, 197 (1980) [Emphasis added.]

In the present case, the charge set out in the warrant embodies the lesser included offense of simple assault. Each element of simple assault is included in the charge of assaulting an officer in the performance of his duty, G.S. § 14-33(b)(4). In *State v. Mayberry*, 38 N.C. App. 509, 248 S.E. 2d 402 (1978), this Court discussed whether the trial court erred in not instructing the jury on the lesser included offense of assault when defendant had been charged with assault with a firearm upon a law enforcement officer. The Court there stated:

> The State's uncontroverted evidence in this case tended to show that the defendant pointed a shotgun in the direction of the Sheriff and was weaving back and forth. . . . The uncontroverted evidence of the State also indicated that the Sheriff was in the performance of his duties of investigating the alleged crime of assault with intent to commit rape. The State's evidence also indicated that the defendant had been previously arrested by the Sheriff and, therefore, knew he was a law enforcement officer. . . .
>
> No evidence before the trial court tended to indicate that the defendant did not know that the Sheriff was a law enforcement officer or that he was acting in the performance

of his duties. No evidence of a lesser included offense having been presented, the trial court correctly declined to instruct the jury with regard to any lesser included offense.

State v. Mayberry, supra at 512, 248 S.E. 2d at 404.

In the present case, there is plenary evidence from the defendant that he did not know that Chandler was a law enforcement officer, that the officer was not in uniform and had about him no indicia of official authority, that defendant repeatedly requested identification from Chandler but was not shown any, and that Chandler actually struck defendant about the head before defendant struck him.

In order to obtain a conviction under G.S. § 14-33(b)(4), the burden is on the State to satisfy the jury from the evidence and beyond a reasonable doubt that the party assaulted was a law enforcement officer performing the duty of his office, and that the defendant knew his victim was a law enforcement officer. *See State v. Atwood*, 290 N.C. 266, 273-76, 225 S.E. 2d 543, 547-48 (1976) (Exum, J., concurring) and *State v. Powell*, 141 N.C. 780, 53 S.E. 515 (1906). Therefore, since there was conflicting evidence in the record as to whether the defendant knew Chandler was a law enforcement officer, it was the duty of the trial judge to submit to the jury the possible verdict of simple assault.

New trial.

Judges CLARK and MARTIN (Harry C.) concur.

IN THE MATTER OF: CONAN GUFFEY

No. 8129DC377

(Filed 3 November 1981)

Insane Persons § 1.2— findings of mental illness, dangerousness to others—sufficiency of evidence

The trial court's finding that respondent was mentally ill was supported by medical evidence that respondent suffered from a manic depressive condition, manic phase, which was manifested by overtalkativeness and poor judgment. However, the trial court's determination that respondent was dangerous

to others was not supported by the record where the evidence showed only that respondent had engaged in an altercation with his landlord and respondent's testimony that he engaged in the fight only upon provocation from the landlord was uncontradicted, and the court failed to record sufficient facts to support its conclusion that respondent was dangerous to others.

APPEAL by respondent from *Tate, Judge.* Judgment entered 5 March 1981 in District Court, BURKE County. (Action docketed in Henderson County.) Heard in the Court of Appeals 12 October 1981.

Respondent appeals from an order of commitment issued pursuant to a petition by an unrelated individual. After hearing evidence from the State and the respondent, the court entered its order committing the respondent to Broughton Hospital for a period not exceeding 90 days. The court found that the respondent was mentally ill and that he was dangerous to others.

Howard C. McGlohon, Special Counsel for the Mentally Ill, for the respondent-appellant.

Attorney General Edmisten, by Associate Attorney General Max A. Garner, for the State.

BECTON, Judge.

The respondent raises three arguments on this appeal: (1) that there is insufficient evidence to support the trial court's finding that respondent is dangerous to himself and others; (2) that the trial court failed to record sufficient facts to support its findings of fact and conclusion of law that the respondent was dangerous to others; and (3) that there was insufficient evidence to support the court's findings and conclusion that the respondent was mentally ill.

"Our function on appeal is simply to determine whether there was any competent evidence to support the factual findings [of the trial court]." *In re Monroe,* 49 N.C. App. 23, 28, 270 S.E. 2d 537, 539 (1980) (citations omitted). "It is for the trier of fact to determine whether the evidence offered . . . is clear, cogent and convincing." *Id.,* 270 S.E. 2d at 539.

I

We agree with respondent that the trial court's finding that the respondent was dangerous to others is not supported by the record. This Court, in *In re Monroe*, enumerated three elements which must be found before a respondent can be declared dangerous to others. The trial court must find that

(1) Within the recent past

(2) Respondent has

(a) inflicted serious bodily harm on another, *or*

(b) attempted to inflict serious bodily harm on another, *or*

(c) threatened to inflict serious bodily harm on another, *or*

(d) has acted in such a manner as to create a substantial risk of serious bodily harm to another and

(3) There is reasonable probability that such conduct will be repeated.

Id. at 30-31, 270 S.E. 2d at 541.

The record before us shows only that the respondent had engaged in an altercation with his landlord. The evidence does not show that the respondent threatened to inflict, attempted to inflict, or in fact, inflicted serious bodily harm on the landlord. The evidence offered by the respondent shows that he engaged in the fight only upon provocation from the landlord. The respondent's testimony that he was not the aggressor and that he was provoked was not countered by the State. The State, having failed to show any specific details of the fight, has not shown by clear, cogent and convincing evidence, that the respondent is dangerous to others under G.S. 122-58.2(1)(b).

II

The respondent next argues that the trial court erred in failing to record sufficient facts to support its conclusions. We agree with the respondent.

G.S. 122-58.7(i) provides that the district court must record facts which support its conclusions. In *In re Jacobs*, 38 N.C. App.

573, 575, 248 S.E. 2d 448, 449 (1978) we said: "[t]his Court has held on numerous occasions that the district court must record the facts necessary to support its findings. [Citations omitted] . . . Merely placing an 'X' in the boxes on the commitment form does not comply with the statute."

The order issued by the trial court in this case contains the brief facts set out below in addition to "x's" in boxes on the commitment form.

> After hearing and considering all the evidence presented and the legal arguments of counsel, the court finds, by clear, cogent, and convincing evidence, that respondent is:
>
> (1) (x) Mentally Ill
>
> and that respondent is dangerous to:
>
> (f) (x) Others because, within the recent past, he has acted in such a way as to created [sic] a *substantial risk* of serious bodily harm to another, and there is a reasonable probability that he will repeat his conduct;
>
> Amont [sic] the evidentiary facts which support the above findings are the following:
>
> Several days prior to admission, Respondent engaged in a physical altercation with his landlord, and, although Respondent testified in Court of the incident, was unable to state whether he or his landlord had caused it, and what the reason for it was. Respondent is diagnosed as suffering from Depression, and is in need of continued in-patient treatment, in the opinion of Doctor Boyer, his physician.

We hold that these findings are insufficient to comply with G.S. 122-58.7(i).

III

The respondent also argues that the court's finding that he was mentally ill as defined by G.S. 122-36(d)(i) is not supported by the evidence. We disagree.

G.S. 122-36(d)(i) states:

> The words "mental illness" shall mean: When applied to an adult, an illness which so lessens the capacity of the per-

son to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary and advisable for him to be under treatment, care, supervision, guidance or control. The words "mentally ill" shall mean an adult person with a mental illness. . . ."

Although the respondent offered evidence showing that prior to his admission he was able to provide himself with all his basic necessities, the State presented evidence in the form of testimony from Dr. Boyer showing that the respondent suffered from a manic depressive condition, manic phase, which was manifested by overtalkativeness and poor judgment. Thus, there is competent evidence in the record to support the trial court's findings and conclusions that the respondent was mentally ill.

Even though the court's finding that the respondent was mentally ill is supported by some competent evidence, we must reverse the court's order. G.S. 122-58.7(i) requires that to support an order of involuntary commitment, "the district court must find two distinct facts by clear, cogent and convincing evidence: first, that the respondent is mentally ill; . . . and second, that the respondent is dangerous to himself or others. 49 N.C. App. at 27-28, 270 S.E. 2d at 539. It is not enough to prove one or the other. *In the Matter of Holt,* --- N.C. App. --- , --- S.E. 2d --- (filed 20 October 1981). In this case we have a proper finding that respondent is mentally ill, but we do not have a proper finding that he is dangerous to others.

Because the State has failed to prove that the respondent was mentally ill *and* that he was dangerous to others, the order below is

Reversed.

Chief Judge MORRIS and Judge ARNOLD concur.

LUCIUS M. CHESHIRE, SR. v. CAROLINA POWER & LIGHT COMPANY

No. 8115SC147

(Filed 3 November 1981)

Attorneys at Law § 7.1; Limitation of Actions § 4.6— clearing title to land—agreement to pay attorney fees—statute of limitations

Where defendant power company agreed in an option to purchase land that it would pay all costs associated with legal proceedings necessary to clear title to the land, a special proceeding was brought before the clerk to authorize the sale of the land, plaintiff attorney was employed to represent three respondents who claimed an interest in the land, the sale was authorized and conducted, the commissioner's final account was approved by the clerk, and after the final accounting plaintiff continued to represent his clients with respect to their interests in the proceeds of the sale, it was *held* that defendant's obligation as to legal fees culminated when clear title was established and did not include legal fees incurred in proceedings involving the distribution of the proceeds of the sale, plaintiff's claim against defendant for legal fees accrued when the commissioner's final account was filed and approved, and plaintiff's action instituted more than three years after the final account was approved was barred by the statute of limitations of G.S. 1-52.

APPEAL by defendant from *Brewer, Judge* and *Bailey, Judge.* Judgments entered in ORANGE County, Superior Court 13 October 1980 and 20 November 1980. Heard in the Court of Appeals 16 September 1981.

Plaintiff brought this action to recover compensation for legal services performed for defendant's benefit. Judge Brewer entered partial summary judgment in plaintiff's favor, establishing liability. Judge Bailey subsequently entered summary judgment in plaintiff's favor awarding plaintiff the sum of $5,085.00 for his services. Defendant appealed from both judgments.

Graham & Cheshire, by D. Michael Parker, for plaintiff-appellee.

Andrew McDaniel, Associate General Counsel, for defendant-appellant.

WELLS, Judge.

In one of its assignments of error, defendant contends that plaintiff's claim is barred under the applicable statute of limita-

tions, G.S. 1-52, because his action was not commenced within three years after it accrued. We agree, reverse the actions of the trial court, and hold that defendant was entitled to summary judgment in its favor.

The facts as they appeared in the materials properly considered by the trial court show that defendant offered to purchase a tract of land in Person County from Ruth Harris Crumpton. Ruth Crumpton owned a life estate in the property and could not therefore convey a marketable fee simple title to defendant. As part of the consideration to be paid by defendant for the property, defendant offered to pay all costs associated with the legal proceedings necessary to clear title to the property. Plaintiff was employed to represent three persons claiming an interest in the property. A special proceeding was brought before the Clerk of Superior Court of Person County to authorize the sale of property. Plaintiff's clients were named as respondents in the petition for sale. The special proceedings resulted in an order of sale by the Clerk on 7 May 1975. On 2 June 1975, the Clerk's original order was confirmed by the Clerk and approved by a Superior Court Judge. The Commissioner, who was authorized and directed by the Clerk's order to complete the sale, filed his final account on 20 August 1975, and the final account was approved by the Clerk on 21 August 1975. The final account discloses that a deed to the property was executed and delivered to defendant. Defendant paid the purchase price required by the Clerk's order of sale, and the Commissioner paid the net funds received from the sale to the Clerk for final distribution.

Subsequent to the final accounting to the Clerk, plaintiff continued to represent his clients with respect to their interest in the proceeds of the sale. Plaintiff contends that defendant obligated itself to pay legal fees incurred in the special proceedings from beginning to end. Defendant contends that its obligations as to legal fees culminated when clear title was established and that it is not obligated for any legal fees incurred in proceedings involving the distribution of the proceeds of the sale. If defendant is right, plaintiff's cause of action accrued when the final account was filed and approved. The answer to this question is to be found in the provisions of the option agreement, where defendant made its promise upon which plaintiff relies. The operative paragraph of the option agreement is as follows:

> In the event that, in the opinion of counsel for COMPANY, the parties of the first part shall be unable to convey merchantable title to said lands at the time COMPANY exercises this option and makes tender of payment as provided in the preceding paragraph, the parties of the first part agree to cooperate with COMPANY in removing any defects in title including the institution of appropriate legal proceedings, the last of which will be paid for by COMPANY.

Our Supreme Court, in *Crumpton v. Crumpton*, 290 N.C. 651, 227 S.E. 2d 587 (1976) made it clear that the statutory scheme as set forth in G.S. 41-11[1] was intended "not to obtain predictive declarations of future rights of the parties [to the sale], *inter se*, but rather to promote the interest of all the parties by allowing the sale of desirable land free from restrictions imposed by the presence of uncertainties as to whom the land will ultimately belong." Our interpretation of *Crumpton* leads to the inevitable conclusion that once the title has been cleared by the order of sale and final accounting, the purchaser has no further interest or responsibility in the special proceedings. We find the language of the option agreement to be clear and unambiguous. Defendant obligated itself to pay the expenses incurred in such proceedings as might be necessary to enable the optionee to convey merchantable title to defendant, nothing more. Thus, when the final account was filed, showing title conveyed and the deed delivered, defendant's promise to pay for legal fees in establishing title ripened into an obligation to pay plaintiff such fees as he was entitled to for his work in the process of establishing merchantable title. We hold, therefore, that plaintiff's cause of action accrued no later than 21 August 1975, the date the final account was approved. This action being one in contract, it is controlled by the three year statute of limitations set out in G.S. 1-52. Since plaintiff did not institute his action until 27 March 1979, plaintiff's action was barred under the statute.

In its answer, defendant properly asserted the statute of limitations as an affirmative defense. The undisputed facts properly before the trial court show that plaintiff's claim was barred,

1. Providing for the sale, lease or mortgage of estates in land in case of remainders.

and defendant was, therefore, entitled to judgment as a matter of law. *Jarrell v. Samsonite Corp.*, 12 N.C. App. 673, 184 S.E. 2d 376 (1971) *cert. denied*, 280 N.C. 180, 185 S.E. 2d 704 (1971), *Poston v. Morgan-Schultheiss, Inc.*, 46 N.C. App. 321, 265 S.E. 2d 615 (1980) *cert. denied*, 301 N.C. 95, 273 S.E. 2d 300 (1980). Accordingly, the judgments of the trial court must be reversed and this matter remanded for entry of summary judgment for defendant.

Reversed and remanded.

Chief Judge MORRIS and Judge MARTIN (H.) concur.

ALICE H. ATHEY v. JAMES K. ATHEY

No. 8121DC238

(Filed 3 November 1981)

Husband and Wife § 12— separation agreement—rescission of the terms—question of material fact—summary judgment improper

In an action wherein plaintiff wife was seeking alimony and possession of personal property among other things, the court erred in granting summary judgment for defendant on the basis of a separation agreement where plaintiff claimed that the parties' reconciliation and change of circumstances following execution of the separation agreement constituted rescission of the terms of their agreement and also claimed that defendant had breached the agreement as both claims presented questions of material fact.

APPEAL by plaintiff from *Alexander, Judge.* Judgment entered 23 January 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 14 October 1981.

Plaintiff brought this action seeking alimony *pendente lite*, permanent alimony, attorney's fees, possession and ownership of specified personal property and one-half of all remaining personal property of the parties.

The uncontroverted facts are as follows: The parties first separated in August, 1978, and entered into a Deed of Separation which provided that defendant would "make all payments required by the present conditional sales contract" on plaintiff's car. In consideration of this provision and sole ownership by her of

certain of the parties' personalty, plaintiff released her right to future support and conveyed to defendant her interest in the marital home. In February, 1979, defendant ceased making payments on plaintiff's car and has made none since. In April, 1979, the parties reconciled and resumed cohabitation. In October, 1980, they again separated, and plaintiff instituted this action four months later.

In her complaint, plaintiff claimed defendant had locked her out of the marital home and had retained possession of her clothes and other property belonging to her. Defendant alleged that plaintiff had deserted him and pleaded the parties' separation agreement as a bar to plaintiff's action. The presiding judge found as a matter of law that there was no genuine issue of material facts and granted defendant's motion for a summary judgment. Plaintiff appeals.

Meyressa H. Schoonmaker for plaintiff appellant.

Morrow and Reavis, by John F. Morrow, for defendant appellee.

ARNOLD, Judge.

Plaintiff wife argues that the trial court erred in ordering that the parties' separation agreement entitled defendant husband to a summary judgment notwithstanding the parties' reconciliation or the defendant's breach of the terms of the agreement. She contends that the separation agreement was not a bar to her action because the parties had rescinded the agreement as to executory provisions when they reconciled and returned their separate property to the joint possession of both parties. Plaintiff further contends that the defendant had breached the agreement when he ceased making car payments six months after the parties separated, and that this breach relieved her from her covenant not to seek alimony.

Defendant husband cites this Court's holding in *Potts v. Potts*, 24 N.C. App. 673, 211 S.E. 2d 815 (1975), for the rule that any provision of a separation agreement, including waiver of the wife's right to support, which has been fully executed prior to a reconciliation of the parties is unaffected by such a reconciliation. Conversely, any provision which has not been fully performed is

deemed waived by reconciliation of the parties. The defendant claims the terms of the separation agreement at issue here were fully executed prior to the reconciliation except for the requirement that he make plaintiff's car payments and that only this term was waived by the reconciliation since each provision of the agreement was independent.

We find defendant's reliance on *Potts* to be misplaced since the present case is distinguishable on its facts from the *Potts* case. In *Potts*, the parties had entered into a consent decree which could not be altered without court approval. *See Kiger v. Kiger*, 258 N.C. 126, 128 S.E. 2d 235 (1962). In the case at bar, the parties executed only a Deed of Separation, a contract which could be altered or rescinded by the parties at any time. Plaintiff's claim that the parties' reconciliation and change of circumstances following execution of the separation agreement constituted rescission of the terms of the agreement presents a question of material fact which should have been submitted to the fact finder. Moreover, *Potts* involved an agreement which had been fully executed as to all of its terms. Here, defendant is attempting to rescind his own obligation under the agreement while he attempts to hold plaintiff to her covenants. Defendant's breach of his obligation to make plaintiff's car payments raises an issue of material fact as to whether plaintiff was thereby relieved of her obligation not to sue for alimony.

For the foregoing reasons, we hold that the trial court erred in entering summary judgment. Accordingly, the case is reversed and remanded for trial.

Reversed.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. DAVID RAY

No. 8114SC459

(Filed 3 November 1981)

Automobiles § 127.3— driving under the influence—insufficient evidence of defendant as driver

The State's evidence was insufficient to show that defendant drove or operated a vehicle so as to support his conviction for driving under the influence of intoxicants in violation of G.S. 20-138(a) where the only evidence presented by the State connecting defendant with the vehicle was an officer's testimony that the vehicle struck two parked cars and that when he arrived on the scene he observed defendant sitting in the vehicle "approximately halfway in the front seat, between the driver and passenger area in the front seat."

APPEAL by defendant from *Brewer, Judge.* Judgment entered 3 December 1980 in Superior Court, DURHAM County. Heard in the Court of Appeals 19 October 1981.

The defendant appeals from a conviction of driving under the influence, second offense, in violation of G.S. 20-138(a) for which he was given a six-month jail sentence suspended for twelve months upon compliance with certain conditions. The State's evidence tended to show that a Durham Public Safety Officer answered an accident call on the night of 12 July 1980. When he arrived at the scene, he found a three-car accident. Two of the cars were unoccupied and parked alongside the curb. The third car was occupied by the defendant and had apparently run into the other cars. The officer observed the defendant sitting "approximately halfway in the front seat, between the driver and passenger area in the front seat." The officer observed a gash above the defendant's nose and that the defendant smelled of alcohol. After being taken to the Durham County Hospital where he was treated for his injuries, the defendant was taken to the Magistrate's office and was given a breathalyzer test. The breathalyzer showed a 0.19 reading. The defendant offered no evidence.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Archbell and Cotter, by James B. Archbell, for defendant appellant.

BECTON, Judge.

The defendant raises two arguments on this appeal: (1) that the trial court should have granted his motion for mistrial based on erroneous and inflammatory remarks in the opening statement by the district attorney; and (2) that the trial court erred in denying his motion for nonsuit. Because we reverse based on the nonsuit issue, we do not address the defendant's first argument.

A motion for nonsuit "requires the trial court to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. Biggs*, 289 N.C. 522, 527, 223 S.E. 2d 371, 375 (1976) *quoting, State v. Goines*, 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968); *see State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974). This same rule regarding direct evidence is applicable when circumstantial evidence is offered. *State v. Abrams*, 29 N.C. App. 144, 223 S.E. 2d 516 (1976). However, "[w]hen the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt, they are insufficient to make out a case and a motion to dismiss should be allowed." *State v. Blizzard*, 280 N.C. 11, 16, 184 S.E. 2d 851, 854 (1971).

G.S. 20-138(a) provides that "[i]t is unlawful and punishable as provided in G.S. 20-179 for any person who is under the influence of intoxicating liquor to drive or operate any vehicle upon any highway or any public vehicular area within this State." "Driver" is defined under G.S. 20-4.01(7) as "the operator of a vehicle." G.S. 20-4.01(25) defines "operator" as "a person in actual physical control of a vehicle which is in motion or which has the engine running." To prosecute successfully under G.S. 20-138, the State must show that the defendant "(1) [drove or operated] a vehicle, (2) upon a highway within the State, (3) while under the influence of intoxicating liquor." *State v. Kellum*, 273 N.C. 348, 160 S.E. 2d 76 (1968), *citing, State v. Haddock*, 254 N.C. 162, 118 S.E. 2d 411 (1961); *State v. McLawhorn*, 43 N.C. App. 695, 260 S.E. 2d 138 (1979), *disc. rev. denied*, 299 N.C. 123, 261 S.E. 2d 925 (1980).

In the case before us, the evidence presented at trial satisfies the requirement that the defendant was under the influence of intoxicating liquor and that the accident occurred on a public highway. The State has been unsuccessful, however, in proving that the defendant drove or operated the vehicle. The only

evidence presented by the State connecting the defendant with the automobile was the Public Safety Officer's testimony that he observed the defendant "halfway the front seat." This circumstantial evidence alone is insufficient to support a conclusion that the defendant was the driver. The State offered no evidence that the car had been operated recently or that it was in motion at the time the officer observed the defendant. *See State v. Haddock.* Nor did the State offer evidence that the motor was running with the defendant sitting under the steering wheel at the time the officer came upon the scene as was the case in *State v. Carter*, 15 N.C. App. 391, 190 S.E. 2d 241 (1972). It is possible that other circumstantial evidence—such as testimony that the defendant was seen driving the car at some point immediately prior to the accident or evidence as to the ownership of the automobile—in addition to the testimony of the officer would have bolstered the State's case. However, no other such evidence was presented.

Because the evidence, taken in a light most favorable to the State, does not establish an essential element of the crime charged, the motion for nonsuit should have been granted. Accordingly, the judgment below is

Reversed.

Chief Judge MORRIS and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. CLETUS JEROME McKINNON

No. 8125SC442

(Filed 3 November 1981)

1. Assault and Battery § 15.2— no error in failing to submit lesser offense of misdemeanor assault

In a prosecution for assault with a deadly weapon resulting in serious bodily injury, there was no error in the court's failure to submit the lesser offense of misdemeanor assault as the trial court should have held that the pocketknife, as used by defendant to inflict a chest injury causing the victim's lung to collapse, was a deadly weapon as a matter of law.

2. Assault and Battery § 15.7— instruction on self-defense not required

In a prosecution for assault with a deadly weapon resulting in serious bodily injury, where there was no evidence from which a jury might infer that

defendant abandoned and withdrew from the confrontation which he unquestionably initiated, he was not entitled to a charge on self-defense.

APPEAL by defendant from *Friday, Judge.* Judgment entered 3 December 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 15 October 1981.

Defendant was convicted of assault with a deadly weapon resulting in serious bodily injury. A judgment imposing a prison sentence was entered.

The evidence tends to show the following. Defendant is the father of Bennie McKinnon. On 9 August 1980, defendant went over to his father-in-law's house in an attempt to locate Bennie. Defendant believed his son had taken his shotgun. Defendant was drunk, had a knife in his hand, and threatened to kill his son.

Around 4:00 p.m., Bennie McKinnon drove up to his grandfather's house. When he got out of the car, defendant approached him and struck at him with a small pocketknife. Bennie picked up a rock and threw it at defendant's foot. Defendant then stabbed Bennie in the chest, causing his lung to collapse. Bennie's wound required stitches and three days of hospitalization.

At trial, the court charged the jury on the elements of assault with a deadly weapon with intent to kill, assault with a deadly weapon resulting in serious bodily injury, and assault with a deadly weapon. The jury found defendant guilty of assault with a deadly weapon resulting in serious bodily injury.

Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the State.

Appellate Defender Project for North Carolina, by Malcolm R. Hunter, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant brings forward three assignments of error. None discloses prejudicial error.

[1] Defendant first argues that having submitted to the jury the question of the alleged deadly character of the knife, the court was then required to charge the jury as to the lesser included of-

fense of assault inflicting serious injury. *State v. Whitaker*, 29 N.C. App. 602, 225 S.E. 2d 129 (1976).

It is well established in North Carolina that when there is some evidence to support a lesser included offense of the one charged, defendant is entitled as a matter of law to have the jury instructed on that lesser offense. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Williams*, 51 N.C. App. 397, 276 S.E. 2d 715 (1981). In this cause, however, there is no evidence to support a charge of misdemeanor assault.

A knife may or may not be considered a deadly weapon depending upon the manner in which it is used or the part of the body at which its force is aimed. *State v. Carson*, 296 N.C. 31, 249 S.E. 2d 417 (1978). The evidence presented shows that defendant purposefully stabbed Bennie McKinnon in the chest. He was not injured by a wild swing of defendant's knife during a scuffle. The actual results caused by the weapon may be considered in determining whether the weapon is deadly. *State v. Roper*, 39 N.C. App. 256, 249 SE. 2d 870 (1978). Here, there was uncontradicted testimony that defendant's blow caused Bennie McKinnon's lung to collapse.

Where the circumstances of the use of an alleged deadly weapon admit of but one conclusion, the question of the weapon's character is one of law for the court to declare.

> "Any instrument which is likely to produce death or great bodily harm, under the circumstances of its use, is properly denominated a deadly weapon. *S. v. Craton*, 28 N.C., p. 179. The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself. *S. v. Archbell*, 139 N.C., 537; *S. v. Sinclair*, 120 N.C., 603; *S. v. Norwood*, 115 N.C., 789.
>
> Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. *S. v. Sinclair*, supra. But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at

> which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury. . . . *Krchnavy v. State*, 43 Neb., 337. A pistol or a gun is a deadly weapon (*S. v. Benson*, 183 N.C., 795); and we apprehend a baseball bat should be similarly denominated if viciously used, as under the circumstances of this case."

State v. Smith, 187 N.C. 469, 470, 121 S.E. 737 (1924) (holding that the vicious use of a baseball bat made it a deadly weapon as a matter of law). We conclude the trial court should have held that the pocketknife as used by defendant was a deadly weapon as a matter of law. There was, therefore, no error in the court's failure to submit the lesser offense of misdemeanor assault. *State v. Roper, supra.*

[2] Defendant next argues that he was entitled to an instruction on self-defense. The right to self-defense is only available to a person who is without fault. If defendant is the aggressor in a fight, he can invoke the defense only if he abandons the fight, withdraws, and gives notice to his adversary. *State v. Robinson*, 40 N.C. App. 514, 253 S.E. 2d 311 (1979). In the present cause, we find no evidence from which a jury might infer that defendant abandoned and withdrew from the confrontation which he unquestionably initiated. Defendant, therefore, was not entitled to a charge on self-defense.

Defendant's final exception is to testimony by Bennie McKinnon that his lung collapsed from the knife wound. Defendant argues the statement was inadmissible hearsay. At trial, the court overruled defense attorney's objection if the witness was speaking from personal knowledge. The burden was on defense attorney to establish on voir dire or cross-examination that the witness was repeating what someone else told him. Defendant did not do so. We must conclude that Bennie McKinnon was testifying of his own knowledge. Such testimony is not hearsay and is properly admitted into evidence.

No error.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. DANIEL L. PERRY

No. 819SC276

(Filed 3 November 1981)

1. Criminal Law § 73— hearsay testimony

An officer's testimony that defendant's wife told him that defendant had told her that "he had beat up Ben Fish and had chased him into the intersection at Harris Crossroads and killed him" constituted inadmissible hearsay.

2. Homicide § 21.9— voluntary manslaughter—sufficiency of evidence

The State's evidence was sufficient for the jury on issues of defendant's guilt of three charges of involuntary manslaughter where it tended to show that defendant had threatened to kill one victim; defendant beat up such victim and began chasing him; and while a vehicle operated by such victim was being chased by a vehicle occupied by defendant at a high rate of speed, it ran a stop sign at an intersection and struck a vehicle occupied by the other two victims; and all three victims were killed in the collision.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 8 October 1980 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 16 September 1981.

The defendant was charged in three bills of indictment with murder. From a verdict of guilty of involuntary manslaughter on all three counts and a sentence of seven years imprisonment for each count, the sentences to run consecutively, the defendant appeals.

On the morning of 13 October 1979, there was a collision in an intersection between a vehicle being operated on S.R. 1100 by Ben Fish and a vehicle occupied by Harry and Karen Crowder travelling south on U.S. Highway 401. The State's evidence tended to show that the vehicle being operated by Ben Fish approached the intersection at a high rate of speed and did not stop at the posted stop sign. Further evidence indicated that immediately prior to the collision the defendant, Dan Perry, was observed operating his vehicle immediately behind the vehicle operated by Ben Fish and was also travelling at a high rate of speed. Immediately following the collision, the vehicle operated by the defendant turned around and proceeded back toward Youngsville. As a result of the collision, Ben Fish, Harry Crowder and Karen Crowder died.

Approximately two and one-half hours later, two officers of the State Highway Patrol were flagged down by a service station operator. The wife of the defendant, Marie Perry, was at the station bleeding from injuries that she alleged were inflicted by her husband. Marie Perry told the officers that the defendant had told her that "he had beat up Ben Fish and had chased him into the intersection at Harris Crossroads and killed him."

The State also presented evidence that the wife, in the presence of her sister and the defendant, accused the defendant of killing Ben Fish, and that usually he did not deny the accusation. Another State's witness testified that twelve days prior to the fatal collision, the defendant had called him and told him that Ben Fish had stolen his bicycle and was "shacking" with his wife and that if Ben Fish came back into his yard, he would kill him.

The defendant presented no evidence.

After the collision but before warrants were issued in this case, the defendant was convicted of the voluntary manslaughter of his wife.

Attorney General Edmisten by Assistant Attorney General Robert G. Webb for the State.

Earle R. Purser and Becky Matthews for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] The defendant assigns as error the refusal of the trial court to suppress Officer Roberts' testimony as to what Marie Perry had told him. We agree with the defendant that this testimony was hearsay, and did not fall within any of the recognized exceptions to the hearsay rule.

Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the assertion so offered is hearsay. 1 Stansbury's N.C. Evidence § 138 (Brandis Rev. 1973). Marie Perry told Officer Roberts that Daniel Perry had told her that "he had beat up Ben Fish and had run him into an intersection and killed him." There are two out-of-court statements here, the one by Daniel Perry to his wife, and the one by his wife to Officer

Roberts. Because both out-of-court statements are offered for the truth of the matter, that is to prove that the defendant killed Ben Fish, this is a double hearsay situation. Each statement, therefore, must fall within an exception to the hearsay rule in order to be admissible. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971), *cert. denied* 414 U.S. 874 (1973).

Regardless of whether the admission by Daniel Perry to his wife would be admissible if offered by Marie Perry, in light of *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981), Officer Roberts cannot testify as to what Marie Perry told him. That statement depends completely on the competency and credibility of Marie Perry. She is not available to testify and her out-of-court statement to Officer Roberts does not fall within any exception to the hearsay rule. It was prejudicial error to admit the testimony of Officer Roberts.

[2] The defendant's remaining assignment of error concerns the trial court's denial of the defendant's motion to dismiss at the close of the State's evidence and again at the close of all the evidence. A motion of nonsuit in a criminal action requires consideration of the evidence 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). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Considering all the evidence in this case, including the improperly admitted hearsay evidence, the State offered substantial evidence to support a finding that the offense charged had been committed and that the defendant committed it, so that a case for the jury was made and nonsuit was properly denied. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968).

Because of the prejudicial error caused by the trial court's erroneous admission of the hearsay testimony offered by Officer Roberts, the defendant is entitled to a new trial on the charges of involuntary manslaughter.

New trial.

Judges MARTIN (Harry C.) and BECTON concur.

STATE OF NORTH CAROLINA v. JAMES ARTHUR JONES

No. 8116SC477

(Filed 3 November 1981)

1. **Criminal Law § 54— medical expert testimony—poisons—admissible**

A medical doctor's opinion that the prosecuting witness suffered from arsenic poisoning was properly admitted even though his opinion was based upon the results of tests he ordered and other information contained in the patient's official hospital records which had not been introduced into evidence.

2. **Criminal Law § 122.1— jury's request to reread testimony—no prejudicial error in reading stricken portion**

There was no prejudicial error in the reporter's reading a portion of testimony that had been stricken upon complying with a jury's request during their deliberation that a witness's testimony be reread as defendant was present and failed to object while it was being read and as the reporter reread that portion of the testimony and included defendant's objection and motion to strike, and the court's instruction to the jury to disregard the comment. G.S. 15A-1233(a).

APPEAL by defendant from *Battle, Judge.* Judgment entered 20 November 1980 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 20 October 1981.

Defendant was convicted of assault with a deadly weapon with intent to kill. The evidence tends to show that defendant, on several occasions, tried to kill his wife by secretly putting poison in her food and drink.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Nance, Collier, Herndon and Ciccone, by James R. Nance, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant brings forward two assignments of error which relate to exceptions to rulings of the trial judge during the examination of medical experts. Neither discloses prejudicial error.

[1] Dr. Richard Paige Hudson, Jr., Chief Medical Examiner for North Carolina, testified for the State. As a specialist in forensic pathology, he was called in to examine Adleaner Jones who was

suffering from peripheral neuropathy. Defendant objects to the following testimony:

> "Q: . . . Doctor Hudson, in your investigation did you consult the medical history of Mrs. Adleanor Jones?
>
> A: I did.
>
> Q: . . . based upon your physical examination and your consultation of her medical history, do you have an opinion satisfactory to yourself as to the origin of the malaise from which she suffered as you saw her there in North Carolina Memorial Hospital?
>
> Objection overruled.
>
> A: Yes Sir.
>
> Q: What is your opinion, sir?
>
> Objection overruled.
>
> A: My opinion is she was a victim of arsenic poisoning.
>
> Q: Alright sir what is the basis of your opinion?
>
> Objection overruled.
>
> A: It is based on a variety of things, based on my experience with numerous cases of arsenic poisoning. . . . It was based upon examination of hospital charts and records Moore County Hospital, the chart and records at the North Carolina Memorial Hospital, examination of biopsy that was taken of her liver . . . and the results of the chemical and toxicological tests, both of those performed at our laboratories and those performed elsewhere."

Defendant argues that the opinion should not have been admitted since it was based on factors not in evidence, not within the witness's personal knowledge, and not presented in the form of a hypothetical question.

It is well settled in North Carolina that an expert can express an opinion without use of the hypothetical question if the opinion is based on facts within his personal knowledge. *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979); 1 Stansbury, N.C. Evidence § 136 (Brandis rev. 1973). Personal knowledge is not

limited to facts derived *solely* from personal observations. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974). Modern medicine requires specialized fields of study, and physicians often must rely on the results of tests performed by others in diagnosing or treating their patients. Our courts, therefore, have held that hospital records which are sufficient for diagnosis are sufficient for medical opinion testimony in the courtroom. *Id.; State v. Wright*, 29 N.C. App. 752, 225 S.E. 2d 645 (1976).

In the present cause, Dr. Hudson personally examined Adleaner Jones and requested urine samples to be taken. His opinion is based upon the results of tests he ordered and upon other information contained in the patient's official hospital records. It is, therefore, properly admitted without use of a hypothetical question.

If an opinion is properly admitted, the expert may then testify as to its basis. *State v. Wade, supra.* The basis of the opinion may include matters inadmissible or not in evidence. Since these matters are received only to give the jury information upon which to evaluate the validity of the doctor's opinion, there is no hearsay violation. Defendant's assignment of error is overruled.

Defendant makes essentially the same argument concerning testimony by Dr. David J. Allen, an internist who examined the victim at Moore Memorial Hospital. At trial, defendant did not object to Dr. Allen's testimony concerning results of a urine test or his opinion that Mrs. Jones' illness was due to arsenic intoxification. Defendant, therefore, cannot complain on appeal. Defendant did object, however, to the following examination:

> "Q: . . . did you or any pathologist at the hospital, to your knowledge, cause another sample of her urine to be sent to Chapel Hill along with her?
>
> A: There was more than one sample. I do not recall the date or who ordered it. It was reconfirmed, however."

The court struck the last statement concerning the results of this later test and instructed the jury to ignore it. We fail to see how the remaining answer prejudices defendant.

[2] Defendant's third assignment of error is that the court erred in permitting the court reporter to read back the testimony of Dr.

Allen upon the jury's request during their deliberations. The reporter began reading at a point after testimony concerning the physician's education and training. He failed to note that the court had allowed defendant's motion to strike Dr. Allen's statement that a urine sample was "reconfirmed." After a discussion between the judge and defendant's attorney, the reporter reread that portion of the testimony. He included defendant's objection and motion to strike, and the court's instruction to the jury to disregard the comment.

Defendant first argues that the court improperly allowed the court reporter to read back testimony without consulting defendant. G.S. 15A-1233(a) provides that "the judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury. . . ." In the present cause, the record indicates that defense counsel was present during the reading back of the testimony and, therefore, had proper notice. Defendant also argues that the court reporter gave undue prominence to certain portions of Dr. Allen's testimony, thereby prejudicing defendant. The jury requested the entire testimony of Dr. Allen, and that is essentially what was read. The reporter's omission of opening testimony concerning the physician's education and training was not prejudicial to defendant. Defendant's argument with reference to the reporter reading that portion of the testimony that had been stricken also fails to disclose prejudicial error. Defendant was present and failed to object while it was being read. Moreover, the reporter also read the judge's original order striking the testimony and instructing the jury to disregard the testimony.

The appeal fails to disclose prejudicial error.

No error.

Judges HILL and WHICHARD concur.

ROBERT L. SHAVER v. N. C. MONROE CONSTRUCTION COMPANY AND N. CARL MONROE, INDIVIDUALLY

No. 8118SC205

(Filed 3 November 1981)

Appeal and Error § 6.3— motion to dismiss—subject matter jurisdiction—interlocutory order—no right of appeal

The trial court's order denying a motion to dismiss certain of plaintiff's claims for lack of subject matter jurisdiction is interlocutory and not immediately appealable.

APPEAL by defendants from *Helms, Judge.* Order entered 10 December 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 24 September 1981.

Smith, Moore, Smith, Schell & Hunter, by McNeill Smith and Ben F. Tennille, for plaintiff appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Michael D. Meeker and Howard L. Williams, for defendant appellants.

HEDRICK, Judge.

Defendants have attempted to appeal from an order denying their motion to dismiss plaintiff's first, second, and fifth causes of action "for lack of subject matter jurisdiction." "Ordinarily, there is no right of appeal from the refusal of a motion to dismiss." *Godley Auction Co. v. Myers,* 40 N.C. App. 570, 573, 253 S.E. 2d 362, 364 (1979). The rule barring immediate appeals from such interlocutory orders serves to eliminate the unnecessary delay and expense of repeated fragmentary appeals and to present the whole case for determination in a single appeal from the final judgment; permitting parties to bring cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders would effectively procrastinate the administration of justice. *Godley Auction Co. v. Myers, supra.*

An order overruling an objection to the court's jurisdiction is ordinarily not immediately appealable, any error in the decision thereon being reviewed only on appeal from the final judgment; this rule of nonappealability, however, may be subject to certain exceptions under particular controlling statutes. 4 Am. Jur. 2d *Appeal and Error* § 87 (1962). The controlling statute in North

Carolina is G.S. § 1-277(b), which states, "Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." This statute, however, has no application in the denial of a motion challenging "subject matter" jurisdiction. A trial judge's order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable. *Allen v. Wachovia Bank and Trust Co.*, 35 N.C. App. 267, 241 S.E. 2d 123 (1978), *American Health Association v. Helprin*, 357 So. 2d 204 (Fla. Ct. App. 1978).

The defendants' motion challenged the state court's subject matter jurisdiction. Indeed, both parties' briefs deal exclusively with the question of whether 29 U.S.C.A. § 1132(e)(1) confers upon United States district courts exclusive subject matter jurisdiction to determine certain claims related to an employee pension plan.

Defendants may preserve their exception to the court's refusal to dismiss for lack of subject matter jurisdiction and assign that as error upon an appeal from a final judgment entered in the cause. When inquiry was made by the court at oral argument as to whether this appeal was subject to dismissal as being from an interlocutory order, counsel for the defendants requested and received permission to file a memorandum of authority as to the appealability of an order denying defendants' motion to dismiss. By such memorandum we are cited by defendants to *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974), *Eller v. Coca-Cola Co.*, 53 N.C. App. 500, 281 S.E. 2d 81 (1981), *Broaddus v. Broaddus*, 45 N.C. App. 666, 263 S.E. 2d 842 (1980), and *Kilby v. Dowdle*, 4 N.C. App. 450, 166 S.E. 2d 875 (1969). With respect to the appealability issue, these four cases stand for the proposition that the appellate courts will entertain an appeal from an order denying a motion to dismiss in some cases and *elect* to review some cases on their merits, but this does not mean that the appeal from such interlocutory orders is any less fragmentary. Sound policy exists for the refusal of the appellate courts to entertain appeals from interlocutory orders. This same sound policy requires the appellate courts to make inquiry as to the appealability of a case even though the question is not raised by the parties.

Defendants' appeal is

Dismissed.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. CALVIN ANGELO COWARD

No. 818SC338

(Filed 3 November 1981)

Criminal Law § 115.1— unauthorized use of motor conveyance—failure to instruct—error

It was reversible error to fail to submit to the jury an instruction on the lesser included offense of unauthorized use of a motor vehicle where defendant was charged with felonious larceny of an automobile as defendant presented evidence that he did not intend to steal the victim's car.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 4 December 1980 in Superior Court, LENOIR County. Heard in the Court of Appeals 23 September 1981.

Defendant was charged with and convicted of felonious larceny of an automobile. From a sentence of a minimum of two years and a maximum of five years imprisonment, defendant appeals.

The State's evidence tended to show that Dwayne Smith picked up two hitchhikers, the defendant and Nate Mitchell, on 30 September 1980. They rode around for about 45 minutes at which time Smith drove the two men to a specific address and waited in the car at their request. The defendant and Mitchell went to the back of this house and after a few minutes Smith followed. Smith testified that he was then robbed by the two men and that they stole his car.

The defendant presented evidence that he was at home when Mitchell arrived with Smith in Smith's car. Mitchell said that Smith wanted to buy some marijuana and the defendant agreed to ride with them to help them find some. At one point Smith gave Mitchell money for marijuana and Mitchell and the de-

fendant alone drove Smith's car to pick up the drugs. As they were driving off, Mitchell told the defendant that he had no intention of returning with the money or marijuana. The defendant rode with Mitchell to a place near the defendant's home. Mitchell parked the car and the defendant walked home.

Attorney General Edmisten by Assistant Attorney General Douglas A. Johnston for the State.

Appellate Defender Adam Stein by Assistant Appellate Defenders Marc D. Towler, Malcolm R. Hunter, Jr., and M. Christopher Kemp for the defendant-appellant.

MARTIN (Robert M.), Judge.

Defendant assigns as error the failure of the trial judge to submit to the jury the offense of unauthorized use of a motor vehicle, N.C. Gen. Stat. § 14-72.2(a), as a lesser included offense. We agree with the defendant and for this reason the defendant is entitled to a new trial.

All of the essential elements of the crime of unauthorized use of a motor conveyance, N.C. Gen. Stat. § 14-72.2(a) are included in larceny, N.C. Gen. Stat. § 14-72, and this Court has held that it may be a lesser included offense of larceny where there is evidence to support the charge. *State v. Ross*, 46 N.C. App. 338, 264 S.E. 2d 742 (1980); *State v. Reese*, 31 N.C. App. 575, 230 S.E. 2d 213 (1976).

This case is very similar to *Ross, supra*, in which the defendant offered evidence to show that he had no intent to steal the car involved. Ross was found in possession of a stolen automobile. As an officer approached the car, the defendant tried to drive away, but the car was out of gasoline. The defendant testified that he had been picked up by some other people who left the car when it ran out of gas, that he did not know the car was stolen, and that he had no interest in keeping the car. That defendant was entitled to a new trial because of the failure of the judge to instruct on the lesser included offense of unauthorized use of a motor vehicle.

Here the evidence supports the charge on the lesser included offense. The defendant presented evidence that he did not intend to steal Smith's car. It is reversible error to fail to submit to the

jury an instruction on a lesser included offense supported by the evidence, even without a specific request by the defendant for the instruction, and the error is not cured by the conviction of defendant for the greater offense. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970).

We do not pass on defendant's remaining assignments of error because they may not recur on retrial.

New trial.

Judges MARTIN (Harry C.) and BECTON concur.

JOE HOLLAND v. MATTHEW D. GRYDER AND DRYMATIC LUMBER SYSTEMS, INC.

No. 8123DC273

(Filed 3 November 1981)

Venue § 8— motion to change venue for convenience of parties and witnesses—denial not abuse of discretion

In an action to recover the balance allegedly due under a contract, the trial court did not abuse its discretion in the denial of defendants' motion for a change of venue from Wilkes County to Buncombe County to promote the convenience of the witnesses and the parties where plaintiff was a resident of Wilkes County and defendants were residents of Buncombe County, and defendants contended that the contract was formed in Buncombe County, that the alledged performance occurred in Buncombe County, that defendants at trial planned to call seven witnesses from Buncombe County whereas plaintiff planned to call five, and that defendants intended to request a jury view of the rejected lumber which is the subject of this controversy and which is located in Buncombe County. G.S. 1-83(2).

APPEAL by defendants from *Davis, Judge.* Judgment entered 14 January 1981 in District Court, WILKES County. Heard in the Court of Appeals 20 October 1981.

The appeal is from an order denying defendants' motion for a change of venue.

Plaintiff initiated an action in Wilkes County to recover the alleged balance due under a contract he had with defendants.

Defendants thereafter moved for a change of venue to Buncombe County, their county of residence. Judge Osborne, scheduled to hear the motion, disqualified himself because of family connections with plaintiff. The motion was then heard by Judge Davis who entered judgment denying defendants' motion.

Moore and Willardson, by Larry S. Moore, for plaintiff appellee.

Horton, Horton and Moore, by Shelby E. Horton, for defendant appellants.

VAUGHN, Judge.

A ruling on a motion for change of venue is within the sound discretion of the trial judge and is not subject to reversal absent a manifest abuse of discretion. *Construction Co. v. McDaniel*, 40 N.C. App. 605, 253 S.E. 2d 359 (1979). The issue, therefore, is whether defendants have demonstrated such an abuse of discretion. We conclude they have not.

Although defendants moved for a change of venue pursuant to several provisions of law, the only applicable provision is G.S. 1-83. That statute states that 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.

(3) When the judge has, at any time, been interested as party or counsel.

(4) When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons."

According to G.S. 1-82, the county in which either party resides is a proper place for the trial to occur. Since plaintiff resides in Wilkes County, G.S. 1-83(1) is inapplicable. G.S. 1-83(3) and (4) likewise fail to apply. There is no evidence that Judge Davis is interested as a party or counsel in this cause, nor is this an action for divorce. We assume, therefore, that defendants moved for a change of venue pursuant to G.S. 1-83(2).

At the hearing on their motion, defendants argued that the contract was formed in Buncombe County, that the alleged performance occurred in Buncombe County, that defendants at trial plan to call seven witnesses from Buncombe County whereas plaintiff plans to call five, and that defendants intend to request a "jury view" of the rejected lumber which is the subject of this controversy and which is located in Buncombe County. Defendants contend that the denial of their motion in the face of such factors amounts to an abuse of discretion. We do not agree.

This Court has stated that a trial court does not manifestly abuse its discretion in refusing to change the venue for trial pursuant to G.S. 1-83(2) "unless it appears from the matters and things in evidence before the trial court that the ends of justice will not merely be promoted by, but in addition demand, the change of venue (G.S. 1-85) or that failure to grant the change of venue will deny the movant a fair trial (G.S. 1-84)." *Construction Co., Inc. v. McDaniel*, 40 N.C. App. at 608-609, 253 S.E. 2d at 361. Defendants have failed to produce such evidence.

Defendants additionally argue that the order is an abuse of discretion because Judge Davis' judgment was "clouded" when he denied the motion. Defendants contend that knowledge of Judge Osborne's reason for recusing himself prejudiced Judge Davis against them and will likewise prejudice any Wilkes County jury. We find absolutely no evidence to support such claims.

The judgment denying defendants' motion for a change of venue is affirmed.

Affirmed.

Judges HILL and WHICHARD concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 NOVEMBER 1981

BONDURANT v. BONDURANT No. 8125DC142	Catawba (78CVD587)	Affirmed in part; Reversed in part
GARNER v. SHAW No. 8120SC111	Moore (78CVS39)	Reversed
IN RE BARNES No. 8112DC399	Cumberland (81SP80)	Affirmed
PLOTT v. PLOTT No. 8121DC210	Forsyth (80CVD3661)	Reversed
POPE v. PETERS No. 8111SC252	Harnett (80CVS258)	Affirmed
STATE v. BANKS No. 8110SC351	Wake (80CRS55768)	No Error
STATE v. BARTLETT No. 8127SC428	Gaston (80CRS13493)	No Error
STATE v. LINEBERGER No. 8125SC443	Catawba (80CRS15247) (80CRS15248)	In 80CRS15248, No Error In 80CRS15247, No Error in trial; Error in sentencing Remanded for proper sentence.
STATE v. SAMUELS No. 814SC360	Onslow (80CRS17247)	No Error
STATE v. SMITH No. 813SC413	Pamlico (78CRS470) (77CRS977)	Affirmed
STATE v. SNIPES No. 8118SC282	Guilford (80CRS25922)	No Error
STATE v. SUMMERS No. 8127SC414	Cleveland (80CRS8859)	No Error
WALLACE v. STATEN No. 8126DC246	Mecklenburg (79CVD2116)	Affirmed

STATE OF NORTH CAROLINA v. HARRY EUGENE GRIMMETT

No. 8126SC387

(Filed 17 November 1981)

Searches and Seizures §§ 10, 13— detention of suspect justifiable—search and seizure of controlled substances pursuant to consent

The trial court's denial of defendant's motion to suppress evidence of cocaine was proper where the evidence showed that, based upon an officer's conclusion defendant's "behavior pattern" fell within the "drug courier profile," the officer approached defendant outside an airport terminal, identified himself, stated the purpose of his approach, and asked defendant if he would talk with him; that defendant agreed to talk with the officer, agreed to accompany the officer into the terminal, agreed to produce identification from his companion's luggage and consented to move with the officer to the basement area of the terminal; that in the basement, defendant consented to the search of the suitcase containing his identification and identified a substance in the suitcase as a controlled substance; and that upon defendant's subsequent arrest and search of defendant's person, the officer found two bags of cocaine in defendant's boot. Upon these facts, even though there was a seizure of defendant without a reasonable and articulable suspicion of criminal activity after the initial encounter within the meaning of the Fourth Amendment, the detention was justifiable as defendant accompanied the officer "voluntarily in a spirit of apparent cooperation." Further, the evidence supports the court's finding that the consent to search the suitcase was given voluntarily and once defendant identified the substance in the suitcase as a controlled substance, the officer had probable cause to arrest defendant and the subsequent search of defendant's person was incident to a lawful arrest.

APPEAL by defendant from *Thornburg, Judge*. Order entered 9 October 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 October 1981.

On 7 February 1980, the defendant, Harry Eugene Grimmett, a commercial airline passenger, was questioned by law enforcement officers at Douglas Municipal Airport in Charlotte, North Carolina, based on the officers' conclusion that his "behavior pattern" fell within the "drug courier profile."[1] As a result of a

1. "Since 1974, the federal Drug Enforcement Administration has assigned agents to certain airports as part of a nationwide program to intercept drug couriers transporting narcotics between major drug sources and distribution centers in the United States. Federal agents have developed 'drug courier profiles' describing the characteristics generally associated with narcotics traffickers, and travelers with some of those characteristics are occasionally stopped at these airports for further investigation." 3 W. LaFave, Search & Seizure; A Treatise on the Fourth Amendment, § 9.3 (Supp. 1981).

subsequent search of his person, Grimmett was charged with possession of one gram or more of cocaine. Grimmett's attorney filed a Motion to Suppress the cocaine, and a suppression hearing was held on 6 October 1980. From an Order denying his Motion to Suppress, Grimmett gave notice of appeal. Thereafter, Grimmett pleaded guilty to the charged offense, reserving his right to submit for appellate review the Order denying his suppression motion.

Attorney General Edmisten, by Associate Attorney G. Criston Windham, for the State.

Lila Bellar, for defendant appellant.

BECTON, Judge.

We must determine (1) whether Grimmett was seized within the meaning of the Fourth Amendment; (2) if a seizure occurred, whether a reasonable and articulable suspicion of criminality existed at the time of the seizure; (3) whether Grimmett voluntarily consented (a) to accompany the law enforcement officers inside the terminal, and (b) to the search of his belongings; and (4) if Grimmett gave his consent after he was illegally seized, whether the search of his belongings was the tainted product of the illegal seizure and rendered inadmissible the cocaine seized from his person.

Grimmett contends (1) that the profile traits he allegedly exhibited provided neither probable cause to arrest him nor a reasonable and articulable suspicion that he was engaged in criminal activity; and (2) that even if the initial stop by the officers was justifiable, the officers, nevertheless, deepened the intrusion and effectively took him into custody by requesting that he accompany them to their basement office so as to render illegal the subsequent search of his belongings and person. We reject these contentions, and affirm the order of the trial court.

I

Grimmett was first observed by Special Agent J. A. Davis of the State Bureau of Investigation, and Officer D. R. Harkey of the Charlotte Police Department on 4 February 1980 at the Eastern Airlines ticket counter at Douglas Municipal Airport. Grimmett and his companion, Randy Huss, appeared to be "in a big hurry"

to catch their flight. An Eastern Airline ticket agent informed Davis that Grimmett and Huss had purchased their tickets with cash, that they were travelling to Daytona Beach, Florida, and that they were ticketed to return on 5 February 1980.

Grimmett did not return to Charlotte until 7 February 1980. On this occasion he was observed by Davis and Harkey leaving Eastern Airlines' baggage pick-up area. The officers had not seen Grimmett deplane, nor had they observed him as he moved from the concourse to the baggage area. When first observed, Grimmett was approximately five to eight feet behind Huss and a female friend of Huss' who had met Huss in the baggage pick-up area. As Huss and his female friend exited the terminal building, Huss was stopped by Davis. Simultaneously, Grimmett was stopped by Harkey.

Upon approaching Grimmett, Harkey identified himself and informed Grimmett that he was conducting a narcotics investigation. Grimmett appeared extremely nervous. Harkey then requested, first, to talk with Grimmett; second, that Grimmett give him some identification; and third, that Grimmett accompany him inside the terminal to continue their conversation. Grimmett assented to all requests and was first led to the airport police office about twenty feet away. Because that office was crowded, Grimmett was then led downstairs, approximately 150 feet, to a hallway outside a room the officers were using as an office. There, Grimmett opened the suitcase that the officers had taken from Huss and produced identification. When asked by Officer Harkey if he were carrying contraband, Grimmett said, "No, go ahead and search the suitcase if you want to." In the suitcase a tinfoil package was discovered, and Grimmett was asked what it contained. He replied, "Crystal Meth," (a street name for a controlled substance). Grimmett was then placed under arrest and searched. Two bags of cocaine were found in his boot.

II

Two cases involving the "drug courier profile" have reached the United States Supreme Court. The facts in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980)

are strikingly similar to the facts in the case *sub judice*.[2] Ms. Mendenhall's alleged behavior pattern fell within the "drug courier profile," and she was, therefore, stopped and asked if she would talk to Drug Enforcement Administration (DEA) agents. She agreed to talk with the agents and was then taken to a DEA office and questioned. She later consented to a search. Grimmett's actions so closely parallel those of Ms. Mendenhall that one might think *United States v. Mendenhall* is totally dispositive of the issues we now address. A more thorough analysis of *Mendenhall*, however, convinces us that it is only dispositive of the consent issue which we address in Part V, *infra*; it does not resolve the "seizure" and "reasonable and articulable suspicion" issues.

United States v. Mendenhall is inapposite for two reasons. First, the "seizure" issue in *United States v. Mendenhall* was not raised until the case reached the Supreme Court, and, consequently, a majority of the Members of the Court *assumed* Ms. Mendenhall was "seized."[3]

Second, the suggestion in *United States v. Mendenhall* that behavior consistent with the "drug courier profile" provides DEA

2. Indeed, almost all airport search cases based on the drug courier profile have interestingly similar facts. For example, *see Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980); *State v. Cooke*, 54 N.C. App. 33, 282 S.E. 2d 800 (1981); *United States v. Herbst*, 641 F. 2d 1161 (5th Cir., Unit B, 1981); *United States v. Berry*, 636 F. 2d 1075 (5th Cir. 1981); *United States v. Pulvano*, 629 F. 2d 1151 (5th Cir. 1980); *United States v. Robinson*, 625 F. 2d 1211 (5th Cir. 1980); *United States v. Vasquez-Santiago*, 602 F. 2d 1069 (2nd Cir. 1979), *cert. denied* 447 U.S. 911, 447 L.Ed. 2d 911, 100 S.Ct. 2998 (1980); *United States v. Elmore*, 595 F. 2d 1036 (5th Cir. 1979), *cert. denied* 447 U.S. 911, 64 L.Ed. 2d 861, 100 S.Ct. 2998 (1980); *United States v. Ballard*, 573 F. 2d 913 (5th Cir. 1978); *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977).

3. Justice Stewart, in a portion of the majority opinion (Part IIA) that only Justice Rehnquist joined, determined that Ms. Mendenhall had *not* been "seized." Justice Powell, with whom the Chief Justice and Justice Blackmun joined, concurred in the judgment but assumed that the stop of Ms. Mendenhall constituted a "seizure" and believed "that the federal agents had reasonable suspicion that [Ms. Mendenhall] was engaged in criminal activity . . . ." 446 U.S. at 560, 64 L.Ed. 2d at 513, 100 S.Ct. at 1880. The dissenting Justices White, Brennan, Marshall and Stevens, felt that Ms. Mendenhall had been "seized" and that the federal agents were not justified in seizing her. Mr. Justice White begins the dissenting opinion thusly:

> The Court today concludes that agents of the Drug Enforcement Administration (DEA) acted lawfully in stopping a traveler changing planes in an airport terminal and escorting her to a DEA office for a strip search of her person.

agents with a reasonable and articulable suspicion of criminality has been substantially undermined by *Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980). Significantly, thirty-four days after its decision in *United States v. Mendenhall*, the Supreme Court considered an almost identical factual situation in *Reid v. Georgia* and determined, with only Justice Rehnquist dissenting, that the DEA agents in *Reid v. Georgia* did not have a reasonable and articulable suspicion that criminal activity was afoot.

A.

Because airport search cases based on the "drug courier profile" must be considered on a case by case basis, and because *United States v. Mendenhall* is not totally dispositive, we consider the following general principles in determining whether Grimmett was "seized" when he was first approached and questioned by Harkey.

1. *Police Questioning*

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. 1, 34, 20 L.Ed. 2d 889, 913, 88 S.Ct. 1868, 1886 (1968) (White, J., concurring). Indeed, it is the governmental interest in effective crime prevention and detention that allows law enforcement officers in appropriate circumstances and in an appropriate manner to direct questions to citizens, even though there is no probable cause for an arrest. 392 U.S. at 22, 20 L.Ed. 2d at 906, 88 S.Ct. at 1880. And while it may be "an act of responsible citizenship for individuals to" cooperate with law enforcement officers, *Miranda v. Arizona*, 384 U.S. 436, 477-78, 16 L.Ed. 2d 694, 725-26, 86 S.Ct. 1602, 1629-30 (1966), a citizen may refuse to cooperate and go his way. That is, "the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." 392 U.S. at 34, 20 L.Ed. 2d at 913, 88 S.Ct. at 1886 (White, J., concurring).

This result is particularly curious because a majority of the Members of the Court refuse to reject the conclusion that Ms. Mendenhall was "seized," while a separate majority declined to hold that there were reasonable grounds to justify a seizure.

446 U.S. at 566, 64 L.Ed. 2d at 517, 100 S.Ct. at 1883.

2. *Seizures*

Our Constitution prohibits investigatory seizures. "[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment." *Davis v. Mississippi*, 394 U.S. 721, 726, 22 L.Ed. 2d 676, 680, 89 S.Ct. 1394, 1397 (1969). "[W]henever a police officer accosts an individual *and restrains his freedom to walk away*, he has 'seized' that person." 392 U.S. at 16, 20 L.Ed. 2d at 903, 88 S.Ct. at 1877 (emphasis added). And, even though an intrusion upon the personal security of a citizen stops short of a "technical arrest," the Fourth Amendment requires that the intrusion be reasonable. *United States v. Brignoni-Ponce*, 422 U.S. 873, 45 L.Ed. 2d 607, 95 S.Ct. 2574 (1075); *Terry v. Ohio*. The reasonableness requirement for seizures that are less intrusive than traditional arrests are (a) that they be supported by articulable and objective facts, *Brown v. Texas*, 443 U.S. 47, 61 L.Ed. 2d 357, 99 S.Ct. 2637 (1979);[4] and (b) that they be brief, *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979).[5] As stated in *Sharpe v. United States*, 660 F. 2d 967, 970 (4th Cir. 1981), "the brevity requirement for investigatory stops predicated upon less than probable cause [is significant since] it is the transitory nature of the stop that justifies elimination of probable cause requirement."[6] This brevity requirement applies even when law

4. In *Brown v. Texas*, two police officers approached Brown as he was coming out of an alley in a "high drug problem area" and requested identification. When Brown refused to identify himself and angrily asserted that the officers had no right to stop him, he was frisked. The *Brown* Court said: "When the officers detained [Brown] for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the [reasonableness] requirements of the Fourth Amendment." 443 U.S. at 50, 61 L.Ed. 2d at 361, 99 S.Ct. at 2640.

5. Without probable cause, but with a reasonable suspicion of illegal conduct, the police seized Dunaway and transported him to the police station for questioning. The Court noted first that Dunaway would have been restrained if he had tried to leave, and second, that Dunaway was not questioned briefly. The Court held that the detention "was in important respects indistinguishable from a traditional arrest," 442 U.S. at 212, 60 L.Ed. 2d at 834-35, 99 S.Ct. at 2256, and found it an unconstitutional seizure since made on less than probable cause.

6. On the question of brevity, *compare Brignoni-Ponce* (border patrol investigatory stops justified on the grounds that the intrusions usually consume no more than one minute, and involve only a brief question or two) *and United States v. Vasquez-Santiago*, 602 F. 2d 1069 (2nd Cir. 1979), *cert. denied* 447 U.S. 911, 64 L.Ed. 2d 861, 100 S.Ct. 2998 (1980) (detention involving only a couple of minutes of

enforcement officers have a reasonable suspicion of criminality, and "any further detention or search must be based on consent or probable cause." *United States v. Brignoni-Ponce*, 422 U.S. at 882, 45 L.Ed. 2d at 617, 95 S.Ct. at 2580.

The Supreme Court's statement in *Reid v. Georgia* aptly summarizes our analysis:

> The Fourth and Fourteenth Amendments' prohibition of searches and seizures that are not supported by some objective justification governs all seizures of the person, "including seizures that involve only a brief detention short of traditional arrest. [Citations omitted.] While the court has recognized that in some circumstances a person may be detained briefly without probable cause to arrest him, any curtailment of a person's liberty by the police must be supported at least by a reasonable and articulable suspicion that the person seized is engaged in criminal activity. [Citations omitted.]

448 U.S. at 440, 65 L.Ed. 2d at 893-94, 100 S.Ct. at 2753. "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result that this court has consistently refused to sanction." *Terry v. Ohio*, 392 U.S. at 22, 20 L.Ed. 2d at 906, 88 S.Ct. at 1880.

III

With these general principles in mind, we turn to the facts of this case to determine if, during the initial encounter (when Grimmett was initially approached), Grimmett was "seized" within the meaning of the Fourth Amendment, or merely questioned.[7] The trial court found the following facts. Harkey approached Grimmett in a public area outside of the terminal, identified himself,

questioning in an airport on the basis of a reasonable and articulable suspicion of narcotics violation was not an unconstitutional intrusion) *with United States v. Chamberlin*, 644 F. 2d 1262 (9th Cir. 1980) (twenty-minute detention of individual in back of car without probable cause but upon a reasonable and articulable suspicion of criminality is unlawful).

7. Evidently, relying on *Reid v. Georgia*, "[t]he State concedes that at this point the officers lacked sufficient reasonable suspicion to conduct a 'Terry-type' seizure." (State's Brief, p. 8.) The State argues that no seizure took place during the initial encounter.

stated the purpose of his approach, and asked if Grimmett would talk with him. Grimmett first agreed to talk to Harkey, then subsequently agreed to accompany Harkey into the terminal. At no time did Harkey display a weapon or use physical force or contact or threaten Grimmett. Indeed, Grimmett himself testified: "*Everything* that Mr. Davis and Officer Harkey stated was rather smooth. They conducted themselves rather nicely, I have to say that." Moreover, Harkey testified that if Grimmett had refused to talk to him, he would have had to let Grimmett go.

These facts, and the trial court's additional findings that Grimmett was not seized when the law enforcement officers initially approached him, are based on competent evidence and are conclusive on appeal. *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Cooke*, 54 N.C. App. 33, 282 S.E. 2d 800 (1981). Moreover, we are guided by the following language from *Terry v. Ohio*:

> Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.

392 U.S. at 19, n. 16, 20 L.Ed. 2d at 905, n. 16, 88 S.Ct. at 1879, n. 16. On the facts of this case, we find that no seizure occurred during the initial encounter.

IV

It is necessary to determine if, at any time after the initial encounter, Grimmett was "seized" within the meaning of the Fourth Amendment since such a violation might taint the subsequent searches. As if quoting the dissenting opinion in *United States v. Mendenhall*, 446 U.S. at 574, 64 L.Ed. 2d at 522, 100 S.Ct. at 1887, Grimmett contends that

> [w]hatever doubt there may be concerning whether [his] Fourth Amendment interests were implicated during the initial stages of [his] confrontation with the [officer], [he] undoubtedly was "seized" within the meaning of the Fourth Amendment, when the agents escorted [him] from the public

> area of the terminal to the . . . office for questioning and a strip search of [his] person.

On that point, the State argues "that further, more critical facts were uncovered following the officers' approach and conversation with [Grimmett]." For example, Grimmett's extreme nervousness and inability to identify himself are factors which, the State contends, provided the officers with sufficient articulable facts upon which to base a reasonable suspicion that Grimmett was engaged in criminal activity.

On the basis of *Reid v. Georgia*, we do not believe Harkey had a reasonable and articulable suspicion even considering the "further, more critical facts" urged upon us by the State. In *Reid v. Georgia*, "the petitioner appeared to the agent to fit the so-called 'drug courier profile' " and appeared nervous during the initial encounter. 448 U.S. at 440, 65 L.Ed. 2d at 894, 100 S.Ct. at 2753. The Court held that the agents could not have reasonably suspected the defendant of criminal activity based on the observed circumstances.

Although *Reid* is controlling on this narrow issue, it does not answer the further question: whether the further detention—the trip to the basement—was justifiable. *United States v. Mendenhall* now becomes helpful.

V

In *United States v. Mendenhall*, "[t]he district court specifically found that the respondent accompanied the agents to the office 'voluntarily in a spirit of apparent cooperation.' " 446 U.S. at 557, 64 L.Ed. 2d at 511, 100 S.Ct. at 1879, *quoting Sibron v. New York*, 392 U.S. 40, 63, 20 L.Ed. 2d 917, 935, 88 S.Ct. 1889, 1903 (1968). That finding was sustained by the record and binding on appeal. The same can be said about the case *sub judice*. The trial court found upon competent evidence that Harkey made a series of requests, to each of which the defendant assented. They consisted of his initial consent to talk to Harkey, his agreement to go inside the terminal, his assent to produce identification which was in Huss' luggage, and his consent to move with Harkey to the basement area of the terminal.

The evidence of consent to accompany Officer Harkey in this case was even stronger than the evidence of consent to accom-

pany the agents in *United States v. Mendenhall*.[8] The trial court in this case specifically found upon competent evidence that Grimmett consented to accompany Harkey to the basement.

VI

In addition to its finding that Grimmett consented to accompany Harkey to the basement, the trial court found upon competent evidence that Grimmett consented to the search of the suitcase that contained his identification. The following facts found by the trial court are supported by competent evidence:

> That Officer Harkey then asked defendant for tickets and identification; that defendant replied that further identification was in the suitcase which was in the possession of Huss; . . . [that] *the defendant opened the suitcase, at which time defendant was asked by Officer Harkey if he were carrying contraband; that the defendant replied, "No, go ahead and search the suitcase if you wish*"; that Officers Harkey and Davis began looking through the suitcase, discovered a .357 magnum pistol and Officer Davis discovered a tinfoil packet; that the defendant was then asked what it contained; that the defendant replied, "Crystal Meth," a street name for a controlled substance; that based on their experience the officers were of the opinion that the packet contained a controlled substance; that at this point, . . . defendant was placed under arrest for possession of a controlled substance; that following the arrest the officers immediately searched . . . Grimmett and found . . . strapped to his leg, a plastic bag with an off-white powdery substance having the appearance of cocaine, which was subsequently analyzed and determined to be cocaine.

Although Grimmett testified that he never consented to a search, the trial court specifically found and concluded that the search of the suitcase was with Grimmett's permission. Upon *voir dire* to determine the voluntariness of Grimmett's consent to a

8. The federal district court's suggestion that Ms. Mendenhall accompanied the agents to the office "voluntarily in a spirit of apparent cooperation" was based on fewer facts than we have in the case *sub judice*, and, therefore, the *Mendenhall* Court was required to do a much more thorough analysis than we are required to do to determine if the consent was in fact voluntary or the product of duress or coersion.

search of his property, the weight to be given the evidence is peculiarly a determination for the trial court, and his findings are conclusive when supported by competent evidence. *State v. Little*, 270 N.C. 234, 154 S.E. 2d 61 (1967). *See also Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973).

Once Grimmett told Harkey that the substance in the suitcase was "Crystal Meth," Harkey had probable cause to, and did, arrest Grimmett. The subsequent search of Grimmett's person which uncovered the cocaine that is the subject of his lawsuit, was incident to a lawful arrest. *See Sibron v. New York.*

VII

Grimmett finally contends that all of Harkey's questioning was conducted in a custodial atmosphere and while he was significantly deprived of his freedom without the benefit of *Miranda* warnings. *See Miranda v. Arizona.* Because we find that Grimmett not only consented to accompany Harkey to the basement but also consented to the search of the suitcase, we summarily reject Grimmett's argument that his statements, including his statement that "this is Crystal Meth" were tainted or were the fruits of unlawful police conduct.

For the reasons stated above, the Order of the trial court is

Affirmed.

Chief Judge MORRIS and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. CLIFFORD ROTENBERRY, AKA JOHNNY LEE DUNN

No. 814SC485

(Filed 17 November 1981)

1. Criminal Law § 21.1— continuance of probable cause hearing—extraordinary cause—due process

The trial court did not err in finding that extraordinary cause existed to allow the State's motion to continue defendant's probable cause hearing, made on the day the hearing was originally scheduled, because it was then after 4:00 p.m. and there was insufficient time to conduct probable cause hearings on the

eight cases against defendant. G.S. 15A-606(f). Nor was defendant's constitutional right to due process violated when the probable cause hearing was continued until two days later, since a probable cause hearing is not constitutionally required.

2. Criminal Law § 77.1— letter to girlfriend—competency as admission of defendant

In a prosecution for felonious assault and discharging a firearm into an occupied building, a letter from defendant to his girlfriend, who was an assault victim, confessing his love for her, asking her to testify for him, and stating that he would tell her everything to say and that "it's all my fault" was competent as an admission by defendant.

3. Criminal Law §§ 88.2, 169.6— exclusion of cross-examination—refusal to have answer placed in record

In a prosecution for felonious assault and discharging a firearm into an occupied building, the trial court did not err in sustaining its own objection to defense counsel's cross-examination of a witness concerning the type of container in which the witness bought a soft drink since such evidence was irrelevant. Nor did the trial court err in refusing to permit defense counsel to place the witness's answer in the record since both the question and the answer were immaterial.

4. Indictment and Warrant § 12— correction of case number on indictment—no amendment

A correction of the case number on a bill of indictment did not constitute an amendment of the indictment prohibited by G.S. 15A-923(e).

5. Assault and Battery § 15.2— instructions on intent to kill—any error cured by verdict

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, any error in the submission to the jury of the element of intent to kill was rendered harmless by the jury's verdict finding defendant guilty of the lesser offense of assault with a deadly weapon.

6. Assault and Battery § 14.4— felonious assault—serious injury—sufficiency of evidence

The State's evidence of "serious injury" was sufficient to support submission to the jury of an issue of defendant's guilt of assault with a deadly weapon with intent to kill inflicting serious injury where the victim testified that he was struck in the neck, arm, hand and head with 42 shotgun pellets fired through the window of a grill; after he was injured, he crawled under a sink in the grill with blood running from him onto the floor; he was then taken to the hospital by ambulance; and the doctor was unable to remove all of the pellets.

7. Criminal Law § 138.7— defendant's escape—consideration at sentencing hearing

Defendant's escape pending his trial was relevant information for the court to consider at defendant's sentencing hearing.

8. Criminal Law § 140.3— consecutive sentences—no cruel and unusual punishment

Imposition of consecutive sentences upon defendant for each of five counts of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury and one count of discharging a firearm into an occupied building did not constitute cruel and unusual punishment where none of the sentences exceeded the maximum provided by statute for the offense for which it was imposed.

APPEAL by defendant from *Lane, Judge.* Judgments entered 17 October 1980 in Superior Court, DUPLIN County. Heard in the Court of Appeals 21 October 1981.

Defendant was indicted on six counts of assault with a deadly weapon with intent to kill inflicting serious injury and one count of discharging a firearm into an occupied building. A jury found him guilty of five counts of assault with a deadly weapon, one count of assault with a deadly weapon inflicting serious injury and discharging a firearm into an occupied building. Defendant has appealed from the prison sentences imposed.

The State's evidence tends to show that in the early morning hours of 1 August 1980 defendant was playing pool at Dot's Grill in Wallace, North Carolina. Erica McMahon, defendant's girl friend, observed defendant and Debbie Webb at the Grill and informed Ms. Webb that she should stay away from defendant. Ms. McMahon testified that she and defendant were living together. As the two women were arguing, defendant came up and threatened to kill Ms. McMahon. Later in the morning defendant and Ms. Webb left the Grill. Ms. McMahon began looking for them and discovered them unclothed in Ms. Webb's truck parked near the Grill. She ordered Ms. Webb out of the truck and threatened to "stomp" her. Defendant left the truck, walked to his van nearby and obtained a gun. Two men who were at the Grill wrestled the gun from defendant and removed the bullets. They then returned the gun to him. Defendant struck Ms. McMahon with the gun and ran back to the truck. He then ran toward the Grill and started shooting through the window. Two witnesses, who were standing outside the Grill at the time of the shooting, testified that defendant was definitely the person who fired into the Grill. Five other persons testified that they were shot while inside the Grill.

The Chief of Police for the Town of Wallace testified that he received a telephone call about the alleged shooting at 5:18 a.m. on 1 August 1980. He drove to the Grill and searched the surrounding woods. At 6:30 a.m. he found defendant and Ms. Webb under the floor of one of the carnival rides located beside the Grill. Defendant informed him that he knew nothing about a gun being fired.

The defendant presented no evidence.

Attorney General Edmisten by Assistant Attorney General Dennis P. Myers, for the State.

Charles M. Ingram for defendant appellant.

MARTIN (Robert M.), Judge.

Defendant has brought forward on appeal all forty-one of his assignments of error and has incorporated them into nine arguments.

[1] Defendant first assigns error to the trial court's allowance of the State's motion to continue his probable cause hearing. The hearing was initially scheduled for 12 August 1980. At approximately 3:10 p.m. on said date, the State moved for a continuance on the basis that none of the State's witnesses was present. The trial court allowed the motion after finding that an extraordinary cause had been shown which justifed the continuance. The court noted that 140 cases were on the 12 August 1980 calendar; that it was after 4:00 p.m. and that there was insufficient time to hold probable cause hearings on the eight cases against defendant. The hearing was thereafter held two days later. Defendant contends in his brief that neither the reason given by the State nor the findings in the trial court's order granting the continuance constitutes an extraordinary cause as defined in G.S. 15A-606. He further contends that the State's motion was untimely. G.S. 15A-606(f) provides:

> Upon a showing of good cause, a scheduled probable-cause hearing may be continued by the district court upon timely motion of the defendant or the State. Except for extraordinary cause, a motion is not timely unless made at least 48 hours prior to the time set for the probable-cause hearing.

It is the trial court's duty to determine good cause and extraordinary cause. *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977). We find no error in the trial court's determination in the case at bar. Even if the continuance was erroneously granted, defendant failed to show any prejudicial effect from the two day delay.

We also find no merit to defendant's Assignments of Error Nos. 2, 3 and 7, which are based upon the trial court's denials of defendant's motions to dismiss. At the 14 August 1980 probable cause hearing, at the beginning of trial and at the close of all the evidence, defendant moved to dismiss the charges against him on the basis that his constitutional right to due process was violated when the probable cause hearing was continued. In *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320 (1972), the Court held that neither the United States Constitution nor the North Carolina Constitution requires a preliminary hearing before a defendant may be prosecuted. This holding has been reaffirmed in *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978), and the recent case of *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). We further note that a probable cause hearing is unnecessary after the grand jury has returned indictments. *State v. Foster, supra.*

[2] Assignments of Error Nos. 4 and 5 concern the admissibility of evidence involving a letter written to Ms. McMahon by defendant. Ms. McMahon testified that she had received three letters from defendant in the two months preceding his trial. The trial court allowed Ms. McMahon to read one of these letters to the jury. In the letter defendant confessed his love for her. Ms. McMahon then read the following to the jury:

> Im (sic) facing 134 years. Baby, that is alot of time. If you care at all you will testify for me in Court. You want (sic) get into any trouble. I'm—I'll tell you everything to say, but then again you probably don't care. If you do you best get down here and see me. . . . Why, you don't know how much I'm hurt over all this shit and it's all my fault.

Defendant argues that the contents of this letter were immaterial to the charges against him and only prejudiced the minds of the jurors. We feel that defendant's letter to his girlfriend qualifies as an admission by defendant and is, therefore, competent evidence. *State v. Edwards*, 286 N.C. 140, 209 S.E. 2d 789 (1974).

Notwithstanding our opinion, defendant has failed to show any prejudicial effect from the reading of this letter to the jury.

[3] Defendant next argues that the trial court erred in sustaining *sua sponte* its own objection to cross-examination of a witness by defense counsel and in refusing to allow defense counsel to note an exception in the record. During the cross-examination of one of the eyewitnesses to the shooting, defense counsel asked him if he bought a soft drink at the Grill in a cup, bottle or can. The court then called defense counsel and the district attorney to the bench and instructed defense counsel not to pursue this line of questioning. Defense counsel then explained to the court that his question was an attempt to determine whether the witness had been consuming alcohol at the Grill and had bought the soft drink in order to mix with an alcoholic beverage. After considering this explanation the court still refused to allow the question and to allow defense counsel to place the answer in the record. Defendant argues that the court's action "unfairly restricted the cross-examination by defendant of a State's witness, and thereby hampered impermissibly the effective representation of the accused." He further argues that the court expressed an opinion in violation of G.S. 15A-1222 and -1232 by refusing to allow the question. Our Supreme Court has consistently held that the legitimate bounds of cross-examination remain largely within the trial court's discretion. *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972); *State v. Chance*, 279 N.C. 643, 185 S.E. 2d 227 (1971); *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970). The Court has further emphasized that the trial court should disallow any line of cross-examination which constitutes immaterial, irrelevant and incompetent matter. *State v. McPherson, supra.* In the case at bar, we find no relevance to the question concerning the type of container in which the witness bought his soft drink. The defendant's contention, that a certain type of container would infer that the witness bought the drink in order to mix with an alcoholic beverage, is sheer speculation.

The court's refusal to allow defense counsel to place the witness' answer in the record was also proper. In a similar situation our Supreme Court, quoting *State v. McPherson, supra*, found no error:

> "Ordinarily, this Court does not approve the refusal of the trial court to permit counsel to insert in the record the

> answer to a question to which objection has been sustained." *State v. McPherson, supra* at 487, 172 S.E. 2d at 53. But in certain instances where both the question and the answer are immaterial, the trial judge's refusal to have an answer placed in the record will not be held error. *State v. McPherson, supra.*

State v. Stanfield, 292 N.C. 357, 362, 233 S.E. 2d 574, 578 (1977). We finally note that defendant has failed to show that the verdict was improperly influenced by the trial court's action. This assignment of error is overruled.

[4] Defendant has assigned error to the denial of his motion to dismiss case #80CRS4869 on the ground that no bill of indictment in this case was ever returned by the grand jury. Our examination of the record on appeal discloses that a warrant for arrest #4869 was issued charging defendant with assaulting William Ellis Rivenbark, Jr., with a deadly weapon with intent to kill and resulting in serious injury. The warrant for arrest in case #4870 charged defendant with discharging a firearm into an occupied building, Dot's Grill. Thereafter seven bills of indictment were returned against defendant. Two of these bills were numbered 80CRS4870. One bill indicted defendant for the crime of feloniously discharging a firearm into an occupied building and the other charged him with the assault upon Rivenbark. When this error was called to the attention of the trial judge, he allowed the State to amend the indictment charging the assault upon Rivenbark by changing the number to #80CRS4869. Defendant argues that G.S. 15A-923(e) prohibits any amendment to a bill of indictment. In *State v. Carrington,* 35 N.C. App. 53, 58, 240 S.E. 2d 475, 478, *disc. review denied and appeal dismissed,* 294 N.C. 737, 244 S.E. 2d 155 (1978), we interpreted the term "amendment" to mean "any change in the indictment which would substantially alter the charge set forth in the indictment." Defendant adopts the position that by amending an indictment so that it charges an accused in a case which no indictment was rendered by the grand jury results in a substantial change. We reject this position. Defendant was charged in an arrest warrant and a bill of indictment for the felonious assault upon Rivenbark. The mere typographical error in the bill of indictment involving the case number does not alter the charge in any way. At no time was defendant misled as to the nature of the charges against him.

[5] At the close of the evidence, defendant moved to dismiss the charges on the grounds that there was insufficient evidence of serious injury and any intent to kill. Defendant has assigned error to the denials of these motions. We initially note that although the trial court submitted to the jury six charges of assault with a deadly weapon with intent to kill inflicting serious injury, the defendant was found guilty of assault with a deadly weapon in five of these cases and assault with a deadly weapon inflicting serious injury in the remaining case. No intent to kill was found. In *State v. Wynn*, 25 N.C. App. 625, 214 S.E. 2d 274, *cert. denied*, 288 N.C. 252, 217 S.E. 2d 677 (1975), defendant was charged with second degree murder and the jury found him guilty of voluntary manslaughter. We found no error in the refusal of the trial court to dismiss the charge of second degree murder and concluded "that his conviction of a lesser charge rendered harmless the submission of the greater charge to the jury, at least absent some showing that the verdict of guilty of the lesser offense was affected thereby. (Citations omitted.)" *Id.* at 627, 214 S.E. 2d 276. Since defendant has failed to show that the verdicts of guilty as to assault with a deadly weapon were affected by the charge on the greater offense, this assignment of error as it refers to the charge on the element of intent to kill is overruled.

[6] We also find no error in the inclusion of the element of serious injury in the charge. Only in case #80CRS4869 was defendant found guilty of assault with a deadly weapon *inflicting serious injury.* "Serious injury" as employed in G.S. 14-32(b) means physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious, but evidence of hospitalization is not required. The question of whether a serious injury has occurred is determined by the facts of each case and is a jury question. *See State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964); *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). In the case at bar, Rivenbark testified that he was struck in the neck, arm, hand and head with 42 shotgun pellets. He further testified that after he was injured, he crawled under a sink in the Grill "with blood running from him onto the floor." He was then taken to the hospital by ambulance. He emphasized that the doctor was unable to remove all of the pellets. In light of this evidence, we find no error in the court's submission of the charge of assault upon William Rivenbark with a deadly weapon with the intent to kill inflicting serious injury.

Assignments of Error Nos. 11-28 involve alleged errors in the trial court's instructions to the jury. We have examined the charge and admit that the instructions were at times confusing. When the charge though is viewed as a whole, we find no reversible error.

> If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. *State v. Hall*, 267 N.C. 90, 147 S.E. 2d 548 (1966). Furthermore, insubstantial technical errors which could not have affected the result will not be held prejudicial. *State v. Norris*, 242 N.C. 47, 86 S.E. 2d 916 (1955). The judge's words may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. Gatling*, 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Jones*, 67 N.C. 285 (1872).

State v. McWilliams, 277 N.C. 680, 685, 178 S.E. 2d 476, 479 (1970).

[7] Defendant's final argument involves alleged errors in the sentencing phase of the trial. Defendant first assigns error to the admission of evidence concerning his escape on the day of his probable cause hearing. He argues that this irrelevant evidence only prejudiced the court against him. Formal rules of evidence do not apply in a sentencing hearing. G.S. 15A-1334(b). The court may inquire into such matters as age, character, education, environment, habits, mentality, propensities, and record of a defendant. The court may also inquire into alleged acts of misconduct in prison. *State v. Thompson*, 267 N.C. 653, 148 S.E. 2d 613 (1966). Defendant's escape pending his trial was clearly relevant information for the court to consider at the sentencing hearing. Defendant's assignments of error concerning the court's consideration of letters written by him from his jail cell are not reviewable, because the evidence at the hearing does not indicate the contents of these letters.

[8] Defendant's remaining assignments of error go to the judgments and commitments. He argues therein that the sentences imposed violate the constitutional prohibition against cruel and unusual punishment. On each of his five convictions of assault with a deadly weapon, defendant received a sentence of two years minimum, two years maximum. He was sentenced to nine years

minimum, ten years maximum on his conviction of discharging a firearm into an occupied building. As to his conviction of assault with a deadly weapon inflicting serious injury, defendant received ten years minimun, ten years maximum. All of these sentences were to run consecutively. Since none of these sentences exceeds the maximum provided by statute and since the court did not abuse its discretion in ordering the sentences to run consecutively, these assignments of error are overruled. *State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976).

After careful examination of the record, we conclude that defendant received a fair trial free from prejudicial error. The verdicts and judgments are therefore upheld.

No error.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA EX REL. RUFUS L. EDMISTEN, ATTORNEY GENERAL, PLAINTIFF v. CHALLENGE, INC., EDWARD G. RECTOR, DOUGLAS L. BEEKMAN, CAROL A. RECTOR, ALLEN K. OAKS AND RICHARD MAILMAN, DEFENDANTS

No. 8110SC195

(Filed 17 November 1981)

1. Unfair Competition § 1— illegal pyramid scheme—preliminary injunction proper

The trial court did not err in concluding defendant, Challenge, Inc., was operating an illegal pyramid scheme in violation of G.S. 14-291.2, and in granting a preliminary injunction where the evidence tended to show that Challenge, Inc., marketed a program of four motivational seminars at a total price of $5000; that the multi-level sales program was designed both to sell the seminars and to recruit new salesmen; that prospective salesmen were invited to meetings at which they were told about the company and about the potential profits to be made from selling the seminars; that a Sales Trainee could become an Independent Sales Agent by selling $5000 worth of seminars, being approved by another agent, paying for and attending a workshop, and recruiting two additional Sales Trainees; that all Sales Agents recruited in North Carolina met the requirements for becoming a Sales Agent by selling the seminar to themselves; and that all participants in North Carolina who advanced in the program did so by purchasing the seminars for themselves in order to meet the $5000 requirement to become an Independent Sales Agent.

2. Unfair Competition § 1— preliminary injunction properly issued—no need to show irreparable harm

Under G.S. 14-291.2 and G.S. 75-14 it is not necessary for the State to show actual injury has resulted in order for a court to provide for injunctive relief from the continuation of illegal pyramid and chain schemes. Rather, the State must merely show that the act or practice complained of adversely affects the public interest.

APPEAL by defendants from *Canaday, Judge.* Preliminary injunction issued 23 September 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 23 September 1981.

The State's complaint alleged that defendants were operating a pyramid distribution program in violation of G.S. 14-291.2 and G.S. 75-1.1, relating to unfair methods of competition. The State requested a temporary restraining order, a preliminary injunction, and a permanent injunction, plus civil penalties. Defendants denied that Challenge, Inc., was operating an illegal pyramid.

At the hearing on the preliminary injunction the State's evidence, consisting of four affidavits, tended to show that Challenge, Inc., marketed a program of four motivational seminars, at a total price of $5,000.00. The multi-level sales program was designed both to sell the seminars and to recruit new salesmen. Prospective salesmen were invited to meetings at which they were told about the company and about the potential profits to be made from selling the seminars. The first level of salesmen was the Sales Trainee, who received a twenty percent commission on his sales. The only requirement for this level was to be sponsored by an Independent Sales Agent. An Independent Sales Agent could earn the highest profits: thirty percent of sales made by Sales Trainees recruited by the particular Sales Agent, plus twenty percent for any direct sales of seminars by the Sales Agent himself. A Sales Trainee could become an Independent Sales Agent by selling $5,000.00 worth of seminars, being approved by another agent, paying for and attending a workshop, and recruiting two additional Sales Trainees. All Sales Agents recruited in North Carolina met the requirements for becoming a Sales Agent by selling the seminars to themselves, since they could purchase the $5,000.00 package at a twenty percent discount for $4,000.00. The meetings at which the program was explained were always held in a distant city, with everyone traveling to them by bus. The bus rides and meetings included an

emotional "pep rally"-type recruiting approach. A Sales Agent or Trainee always stayed with the prospect, telling him about the merits of joining the program. Prospects were encouraged to raise money for the seminars by borrowing if necessary. One woman stated in her affidavit that she had lost her house as a result of borrowing to pay for the seminars.

Defendants' evidence tended to show that no one was required to buy the seminars in order to become an Independent Sales Agent. People in other states had become Independent Sales Agents without buying the seminars themselves. The people who bought the seminars did so because they were interested in the subject matter and because it was a convenient way to reach their sales quota. Over twenty people filed affidavits showing their support for Challenge, Inc., and their satisfaction with the seminars. Challenge, Inc., did not use high pressure sales tactics. There was a three-day cooling off period during which prospects could get a total refund and an additional seven-day period for a partial refund. To the date of the hearing, the company had granted full refunds to anyone who requested them within ten days. The marketing program was designed to be similar to plans involving insurance companies and their agents. Sales Agents made commissions only when those they had recruited made sales, not when the recruits entered the program.

The court found that Glenn Turner was involved in Challenge, Inc., that Challenge's presentation to prospects was highly emotional, that there was no reasonable possibility a Sales Trainee would buy seminars from anyone else, and that individuals were paying for the opportunity to earn a commission when new participants were introduced into the plan. The trial court concluded that Challenge was operating an illegal pyramid scheme and granted a preliminary injunction. Defendants appealed.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Howard Kramer and William L. Cassell for defendant appellants.

CLARK, Judge.

The sole question before this Court is whether the trial court erred in granting the preliminary injunction, the defendants having elected to appeal before the ultimate questions raised by the pleadings are decided at the trial on the merits. Ordinarily, a preliminary injunction will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect the plaintiff's right until the controversy between him and defendant can be determined. *Pruitt v. Williams*, 288 N.C. 368, 218 S.E. 2d 348 (1975); *Laboratories, Inc. v. Turner*, 30 N.C. App. 686, 228 S.E. 2d 478 (1976). *See* G.S. 1-485, and G.S. 1A-1, Rule 65.

On appeal we are not bound by the findings or ruling of the court below in injunction cases, but may review the evidence on appeal. However, there is a presumption that the judgment entered below is correct, and the burden is upon appellant to assign and show error. *Pruitt v. Williams, supra; Realty Corp. v. Kalman*, 272 N.C. 201, 159 S.E. 2d 193 (1967); *Huskins v. Hospital*, 238 N.C. 357, 78 S.E. 2d 116 (1953); 7 Strong's N.C. Index 3d *Injunctions* § 12.1 (1977).

The plaintiff in his complaint alleges that defendants are engaging in a pyramid distribution scheme in violation of G.S. 14-291.2 which provides as follows:

> "*Pyramid and chain schemes prohibited.*—(a) Any person who shall establish, promote, operate or participate in any pyramid distribution plan, program, device or scheme whereby a participant pays a valuable consideration for the opportunity or chance to receive a fee or compensation upon the introduction of other participants into the program, whether or not such opportunity or chance is received in conjunction with the purchase of merchandise, shall be deemed to have participated in a lottery and shall be punished as provided for in G.S. 14-290.
>
> (b) 'Pyramid distribution plan' means any program utilizing a pyramid or chain process by which a participant gives a

valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program;

'Compensation' does not mean payment based on sales of goods or services to persons who are not participants in the scheme, and who are not purchasing in order to participate in the scheme; and

'Promotes' shall mean inducing one or more other persons to become a participant.

(c) Any judge of the superior court shall have jurisdiction, upon petition by the Attorney General of North Carolina or solicitor of the superior court, to enjoin, as an unfair or deceptive trade practice, the continuation of the scheme described in subsection (a); in such proceeding the court may access a civil penalty against any defendant found to have engaged in the willful promotion of such a scheme with knowledge that such conduct violated this section, in an amount not to exceed two thousand dollars ($2,000) which shall be for the benefit of the general fund of the State of North Carolina as reimbursement for expenses incurred in the institution and prosecution of the action; and the court may appoint a receiver to secure and distribute assets obtained by any defendant through participation in any such scheme.

(d) Any contract hereafter created for which a part of the consideration consisted of the opportunity or chance to participate in a program described in subsection (a) is hereby declared to be contrary to public policy and therefore void and unenforceable."

The defendants argue (1) that the plaintiff's evidence does not support the findings of fact made by the trial court, (2) that the findings of fact fail to show that the Challenge program is a pyramid scheme in violation of G.S. 14-291.2, and (3) that the plaintiff failed to show and the trial court failed to find that irreparable injury has occurred.

THE FINDINGS OF FACT

The defendants excepted to findings of fact that Glenn W. Turner was a central and controlling figure in the Challenge pro-

gram; that the Challenge presentations were highly emotional with promises of large profits; that the seminars were purchased at a discount by the trainees themselves; and that participants paid a fee to receive a commission upon the recruitment of new prospects.

The evidence tends to show that Glenn W. Turner had some connection with the Challenge Program. Turner's residence and the home office of Challenge, Inc., were located in Orlando, Florida. Challenge's Chairman of the Board admitted that Turner was an unpaid consultant. Turner's wife was on the Challenge payroll. On 7 June 1980 Turner spoke for about an hour at a seminar in Hickory, North Carolina and urged participation in the program. Turner's name was used in the seminars as an inducement to participation in the program. We do not find this evidence sufficient to support the finding that Turner was the central and controlling figure in Challenge, Inc. However, such finding is not necessary or material to the issuance of the temporary injunction by the trial court. The evidence was sufficient to show Turner's participation in the Challenge program and to support the order enjoining him and other defendants from acts and conduct in violation of the pyramid statute, G.S. 14-291.2. Turner has received widespread publicity for his promulgation and operation of other pyramid schemes, including the "Dare to Be Great" (motivational and self-development) and "Koscot Interplanetary" (cosmetics) programs which have been found by the courts to be illegal and in violation of fair trade practices. In reviewing the evidence and determining the issues, we rely entirely on the record on appeal and not on Turner's notorious record as a basis for inferring guilt by association.

The other findings of fact challenged by the defendants which are material to the issuance of the injunction we find to be fully supported by State's evidence presented in the four affidavits and by the testimony of the director of Challenge operations in North Carolina. We see no need to reiterate this evidence previously summarized which has few contradictions as to the plan of operation.

THE CHALLENGE PROGRAM

[1] The defendants argue that Challenge is not an illegal pyramid scheme that violates G.S. 14-291.2 because participants

are not "required" to sell courses to themselves to advance in the organization, and an Independent Sales Agent does not pay valuable consideration for the chance to receive compensation upon the introduction of other participants. This argument is not convincing since the statute is violated if an individual "pays" consideration, regardless of whether he is required to pay it. The Challenge *modus operandi* is such that it would be grossly impractical not to pay the consideration for the opportunity to participate. The evidence is uncontroverted that all participants in North Carolina who advanced in the program did so by purchasing the seminars for themselves in order to meet the $5,000.00 requirement to become an Independent Sales Agent.

Although there are differences, this program closely resembles the pyramid sales operations of Glenn Turner's Dare to Be Great, Inc., (motivational and self-development program), and Koscot Interplanetary, Inc. (cosmetics). In a series of lawsuits, many states enjoined the operation of these two programs as illegal pyramid schemes and deceptive trade practices. *See*, for example, *State ex rel. Morgan v. Dare to Be Great, Inc.*, 15 N.C. App. 275, 189 S.E. 2d 802 (1972); *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W. 2d 624 (Iowa 1971); *Dare to Be Great, Inc. v. Commonwealth ex rel. Hancock*, 511 S.W. 2d 224 (Ky. Ct. App. 1974); *Kugler v. Koscot Interplanetary, Inc.*, 120 N.J. Super. 216, 293 A. 2d 682 (1972). Turner's operations were enjoined for their "headhunting" tactics, which allowed a salesman to make more money by recruiting new prospects than by selling a product. Injunctions were also issued to prevent potential danger to consumers, in that a prospect who paid $5,000.00 for a motivational course believed he was paying not only for the product but also for the chance to earn future income. Therefore, prospects paid more for the product than it alone was worth. *See*, 33 Ohio St. L.J. 676 (1972). The similarities between Challenge and Dare to Be Great cannot be ignored. Dare to Be Great was a series of four self-motivation courses or "adventures" that sold for $5,000.00 and had several levels of salesmen, including one called an "Independent Sales Agent." Both programs recruited new individuals by using manufactured excitement and promises of wealth.

Defendants further argue that the Challenge program is similar to that used by established business concerns, such as

Amway and insurance companies, because the Independent Sales Agents of Challenge do not receive compensation upon the introduction of other participants, but only upon actual sales made by a Sales Trainee. This argument was not fully answered by *State ex rel. Morgan v. Dare to be Great, supra*, the only appellate decision in this State dealing with a violation of G.S. 14-291.2. Therefore, although federal court decisions are not controlling in construing the North Carolina statute, it is appropriate to look for guidance at federal decisions interpreting provisions in the Federal Trade Commission Act which closely parallel G.S. 75-1.1. The Federal Trade Commission found that Koscot, Ger-Ro-Mar and Holiday Magic were illegal pyramid schemes that involved marketing plans which required a person seeking to become a distributor to pay a large sum of money, either as an entry fee ("headhunting" fee) or for the purchase of a large amount of nonreturnable inventory ("inventory loading"). In exchange, the new distributor would have the right to recruit others who would themselves have to pay a large sum of money to join the organization. *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106 (1975), *aff'd, sub nom.*, 580 F. 2d 701 (D.C. Cir. 1978); *In re Ger-Ro-Mar*, 84 F.T.C. 95 (1974), *aff'd in part, rev'd in part sub nom.*, 518 F. 2d 33 (2d Cir. 1975); *In re Holiday Magic, Inc.*, 84 F.T.C. 748 (1974). The F.T.C. has found that the Amway plan discussed in *In re Amway Corporation*, Trade Reg. Rep. (CCH) ¶ 21,574 (1979) relied on by defendants does not contain the essential features of an illegal pyramid scheme. In Amway a sponsoring distributor receives nothing from the mere act of sponsoring. It is only when the newly recruited distributor sells to consumers that the Sponsor begins to earn money from his recruit's efforts. Amway prevents inventory loading and encourages the sale of Amway products to consumers with two rules: the "70 percent rule" provides that a distributor must sell at least 70% of the products he bought during a given month and the "10 customer" rule provides that a distributor must make sales to ten different customers each month. Therefore, these safeguards and others not here discussed prevent the Amway plan from being an illegal pyramid scheme. *In re Amway Corporation, supra.*

Defendants' reliance on *Amway* is misplaced because the marketing plan of Challenge does not closely resemble that of Amway and lacks the safeguards inherent in that program. In the

Challenge program, each time a prospect met the requirements to become an Independent Sales Agent by paying $5,000.00 for the seminar package, his sponsoring Sales Agent received a commission on that sale which amounted to a fee for recruiting a new participant. The net effect of this feature of Challenge's program in North Carolina was to give participants, upon the payment of a valuable consideration, the opportunity to receive a fee for the introduction of new participants into the program in violation of G.S. 14-291.2.

Defendants further contend that issuance of the injunction was inequitable because prior to the hearing on 15 September 1980, Challenge, Inc., took action to change their operating procedures and eliminate objectionable features in a meeting of the Board of Directors on 13 August 1980. It appears from the minutes of this meeting that the Board made "recommendations" for modification of its marketing plan, including the elimination of the requirement to sell courses for $5,000.00 within sixty days and the addition of the requirement that a Sales Trainee make at least one of his sales to an outside purchaser. The Board agreed to "present these possible amendments to the marketing program to the officials of North Carolina" and, if they were accepted, the officials could implement them within a reasonable length of time. Since the proposed or recommended changes were not effected prior to the injunction hearing, it is obvious that they were not considered by the trial court, and it would be inappropriate for this Court to rule on what effect, if any, the proposed amendments would have on the legality of the Challenge program. The defendants have elected to appeal from the injunction order before a trial on the merits, and we must limit our decision to the issues raised in the appeal from that order.

IRREPARABLE INJURY

[2] Turning now to defendants' claim that the preliminary injunction was improvidently issued by the trial court because the State failed to show irreparable harm. G.S. 14-291.2 prohibits pyramid and chain schemes such as alleged in the case *sub judice*. Section (c) of this statute provides for injunctive relief from the continuation of such schemes. In addition, G.S. 75-14 provides that the Attorney General has the power to obtain mandatory orders to carry out the provisions of Chapter 75. In *Mayton v. Hiatt's*

Used Cars, 45 N.C. App. 206, 262 S.E. 2d 860, *disc. review denied*, 300 N.C. 198, 269 S.E. 2d 624 (1980), this Court stated that public enforcement through the Attorney General was similar to Section 5 of the Federal Trade Commission Act, whose purpose is to vindicate public interest rather than to redress individual grievances. It is not necessary to show actual injury has resulted, but merely that the act or practice complained of adversely affects the public interest. The court continued, "[s]imilarly, there is no suggestion in our own statutory scheme that the Attorney General would be required to prove such actual injury." *Id.* at 211, 262 S.E. 2d at 863. Many other jurisdictions have held that where an injunction is authorized by a statute designed to provide a government agent with the means to enforce public policy, the usual grounds for relief need not be established as long as the statutory conditions exist. *Henderson v. Burd*, 133 F. 2d 515 (2d Cir. 1943); *Conover v. Hall*, 111 Cal. 3d 842, 523 P. 2d 682, 114 Cal. Rptr. 642 (1974); *Ackerman v. Tri-City Geriatric & Health Care*, 55 Ohio St. 2d 51, 378 N.E. 2d 145 (1978); *Bowles v. Barde Steel Co.*, 177 Or. 421, 164 P. 2d 692, 162 A.L.R. 328 (1945); 42 Am. Jur. 2d *Injunctions* § 38 (1969).

The order granting the preliminary injunction is

Affirmed.

Chief Judge MORRIS and Judge WELLS concur.

STATE OF NORTH CAROLINA v. RAYMOND PARKER

No. 8129SC384

(Filed 17 November 1981)

1. Larceny § 7.10— possession of recently stolen property—evidence insufficient to support conviction

Evidence of defendant's possession of eight-track tapes approximately 19 days after they were allegedly stolen and his possession of a rifle some 30 days after it was allegedly stolen was insufficient to support defendant's conviction of larceny under the doctrine of possession of recently stolen property.

2. Searches and Seizures § 19— issuance of search warrants—alleged errors irrelevant

Any error in the issuance of two search warrants was irrelevant where defendant's conviction was based upon evidence seized during a warrantless search to which consent was given and not upon evidence seized pursuant to the warrants.

3. Searches and Seizures § 13— search and seizure by consent

A pan containing marijuana plants was lawfully seized from defendant's bedroom during a warrantless search where the search was conducted with the consent of both defendant and his father.

APPEAL by defendant from *Owens, Judge.* Judgments entered 26 September 1980 in Superior Court, HENDERSON County. Heard in the Court of Appeals 12 October 1981.

Defendant was indicted for feloniously manufacturing marijuana (#80CRS1469) and for two counts of breaking or entering and larceny (#80CRS2721 and #80CRS2722). Although the bill of indictment in case #80CRS2721 was not filed as a part of the record on appeal, we have had a copy of this bill certified to the Court and that case will also be considered on its merits, even though the appeal is subject to dismissal for failure to include the indictment in the record. Defendant was found guilty of the drug charge, but he was acquitted on the breaking or entering charges and found guilty of nonfelonious larceny of a rifle and four eight-track tapes.

The evidence for the state tends to show that on 5 February 1980, Crystal Lanning discovered that four of her eight-track tapes were missing. On 24 February 1980, Crystal mentioned to her brother Randy that her tapes were missing. After talking with him, she went to defendant's house, located beside the Lanning house, and peered into his bedroom window. She observed three of her tapes in the room. Later she went to defendant's home when he was not present and obtained the tapes from defendant's father.

Mrs. Lanning, Crystal's and Randy's mother, testified that around the end of January or first of February 1980, she discovered that the latch on the basement door had been damaged. Thereafter it was discovered that her daughter's tapes, a piggy bank containing silver, a man's ring, and a February issue of Playboy magazine were missing. On 4 March 1980, she called the Henderson County Sheriff's Department and talked with Officer Morley. Pursuant to this conversation, Morley went to de-

fendant's house to talk with him about the alleged breaking or entering and larcenies and to search defendant's bedroom.

At trial a *voir dire* hearing was conducted after defendant objected to Morley's testimony about the items he discovered in defendant's house. On *voir dire* Morley testified that he searched defendant's bedroom with the consent of both defendant and his father. When he entered the room he spotted an aluminum pan containing small plants which he believed to be marijuana. He seized the container and immediately returned to his office in order to draw up an application for a search warrant to search defendant's home. In the application, Morley indicated that he had probable cause to believe that marijuana was located at defendant's residence, because he had just observed what appeared to be marijuana plants in defendant's bedroom. As soon as the magistrate issued a search warrant, Morley returned to defendant's house. At that time he seized a bottle commonly used for smoking marijuana. He noticed a .22 caliber rifle in defendant's closet but did not seize it. On 6 March 1980, Randy Lanning discovered that his .22 caliber rifle with missing. Officer Morley was again called and informed about the missing rifle as well as other missing articles. Morley thereafter applied for a search warrant noting therein that he had probable cause to believe that a piggy bank, a gold ring, a February issue of Playboy magazine, and a .22 caliber rifle were located in defendant's home. A search warrant was issued and executed on the evening of 6 March 1980. Pursuant to this search, Morley seized a .22 caliber Marlin rifle, a February 1980 issue of Playboy magazine, two rolled joints and a Round Gold River box containing seeds. The rifle, box, and magazine were discovered in defendant's closet. Randy Lanning identified the rifle, but Mrs. Lanning was unable to identify the Playboy magazine.

At the close of the *voir dire* examination of Officer Morley, defendant moved to quash both search warrants on the basis that no probable cause was shown for their issuance. Defendant also moved to suppress any evidence obtained under the search warrants. After considering the *voir dire* evidence and making findings of fact, the trial court denied both motions. Officer Morley then repeated his *voir dire* testimony before the jury. Another deputy sheriff testified that as he was fingerprinting defendant around 6 March 1980, defendant stated, "I guess next time I'll

have to wear gloves, won't I?" He emphasized that the statement was not in response to any question posed to defendant.

Defendant's evidence tends to show that his mother was hospitalized in Cherokee, North Carolina, from 28 January until 5 February 1980, and that he stayed in Cherokee to be with his mother until the two returned home at 8:00 p.m. on 5 February. Mitchell Owen, defendant's 13-year-old friend, testified that in February 1980 he found the four tapes on the side of the road near the Lanning house. Defendant rode up on his motorcycle as Owen was examining the tapes. Owen gave defendant the tapes because he thought they had been thrown away. Defendant took the stand and testified that he found the rifle lying against a tree near his house. He denied taking anything from the Lanning house. He further denied ownership of the marijuana found in his room.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Blanchard, Veazey and Thompson, by Thomas D. Thompson, and Holt, Haire and Bridgers, by Ben Oshel Bridgers, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss the charges of breaking or entering and larceny. This motion was made at the close of the state's evidence. We initially point out that even though this motion was not renewed at the close of all the evidence, G.S. 15A-1446(d)(5) requires that the sufficiency of the evidence be considered on appeal. We further note that no prejudicial error could have been committed by the court's denial of the defendant's motion to dismiss the breaking or entering charges, because defendant was acquitted of these charges. Our sole task under this assignment of error is then to determine whether the trial court erred in failing to grant the motion to dismiss the larceny charges. The only evidence presented which connects defendant to the alleged crimes of larceny was his possession of the rifle and eight-track tapes. It is, therefore, evident that the state relied upon the doctrine of possession of recently stolen property to prove defendant's guilt. The application of this doctrine, when applied to

a larceny case, raises the presumption of guilt against the possessor of recently stolen property and permits the case to go to the jury. *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). The doctrine applies when the following conditions are met:

> (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). Both conditions (1) and (2) were met. Crystal Lanning testified that she never gave defendant permission to enter the Lanning house and take her tapes. Randy Lanning gave similar testimony regarding his rifle. Each witness also positively identified his or her property. We conclude, however, that condition (3) was not met. In *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969), this Court discussed the circumstances which must be considered in deciding whether this third condition of the doctrine is satisfied:

> Whether the time elapsed between the theft and the moment when the defendant is found in possession of the stolen goods is too great for the doctrine to apply depends upon the facts and circumstances of each case. Among the relevant circumstances to be considered is the nature of the particular property involved. Obviously if the stolen article is of a type normally and frequently traded in lawful channels, then only a relatively brief interval of time between the theft and finding a defendant in possession may be sufficient to cause the inference of guilt to fade away entirely. On the other hand, if the stolen article is of a type not normally or frequently traded, then the inference of guilt would survive a longer time interval. In either case the circumstances must be such as to manifest a substantial probability that the stolen goods could only have come into the defendant's possession by his own act, to exclude the intervening agency of others between the theft and the defendant's possession, and to give reasonable assurance that possession could not have been obtained unless the defendant was the thief. *State v. Weinstein*, 224

N.C. 645, 31 S.E. 2d 920; *State v. Holbrook*, 223 N.C. 622, 27 S.E. 2d 725. The question is ordinarily a question of fact for the jury. *State v. White*, 196 N.C. 1, 144 S.E. 299.

Id. at 76-77, 169 S.E. 2d at 479.

In the case at bar the tapes were discovered missing on 5 February 1980. About 19 days later Crystal Lanning saw her tapes in defendant's bedroom. The rifle was discovered missing on 6 March 1980 and found in defendant's closet on the same date. The bills of indictment indicated that the two larcenies were pursuant to a breaking or entering which occurred on or about 5 February 1980. The only evidence supporting this date is the testimony of Becky Lanning that she discovered damage to her latch on her basement door "around the last of January or the first of February." The state in its brief admits that a rifle and tapes are items which are normally and frequently traded in lawful channels. They argue, though, that the items had identifying marks which made them unique; thus presenting an additional factor which strengthens the presumption of guilt. Crystal testified that her name was written on the tapes. Randy testified that his rifle contained a new silver spring. In support of this argument, defendant calls this Court's attention to the facts in *Blackmon, supra.* Defendant therein was charged with stealing a wrench. "It was a handmade tool, the like of which the mechanic who made it had never seen before or since and which over a period of years he had used only once." 6 N.C. App. at 77, 169 S.E. 2d at 479. This wrench was found in defendant's possession 27 days after the alleged breaking and entering and larceny. We held that the doctrine of possession of recently stolen property was properly applied and found no error. Our holding, though, was based upon the uniqueness of the stolen wrench as well as the fingerprint evidence against defendant. This evidence tended to establish defendant's presence at the exact time and place the wrench was stolen. In the case *sub judice*, the state relies solely upon defendant's possession of the recently stolen property. His possession of the tapes approximately 19 days after the alleged breaking or entering and his possession of the rifle 30 days after the alleged crime are not sufficient to overcome his motion to dismiss the charges of larceny. "The possession, in point of time, should be so close to the theft as to render it unlikely that the possessor could have acquired the property honestly. (Citations

omitted.)" *State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369, 370 (1968). Defendant's possession of the tapes clearly does not satisfy this definition. In addition to the elapse of 19 days between the alleged breaking and entry and defendant's possession of the tapes, there is exculpatory evidence which explains his possession. He testified that a friend, Mitchell Owen, gave him the tapes. Owen corroborated this testimony by stating that he found the tapes on the ground near the Lanning house and gave them to defendant. Owen further indicated that he did not notice Crystal Lanning's name on the tapes. Crystal admitted that her name had either faded or had been erased when she obtained the tapes from defendant's father. As to the rifle, defendant merely testified that he found it leaning against a tree near his house. The 30-day interval between the alleged theft and the possession, though, does not justify an inference of guilt. Accordingly, the judgments and commitments as to the larceny convictions are reversed.

Defendant's second argument, that the court erred in denying his motion to set aside the verdicts of guilty of nonfelonious larceny, has been answered by our determination of defendant's first argument.

[2] In his third argument, defendant has alleged error in the failure of the trial court to quash the two search warrants involving defendant's residence. The first search warrant was applied for and issued after defendant and his father gave Officer Morley permission to search defendant's bedroom and after Officer Morley discovered therein a pan containing marijuana plants. Defendant's conviction of manufacturing marijuana was, therefore, based upon evidence seized during a warrantless search to which consent was given and not upon evidence seized pursuant to the first search warrant. Any alleged error as to this search warrant is irrelevant. The second search warrant was issued after Randy Lanning discovered that his rifle was missing. Because of our reversal of the judgment and commitment involving larceny of this rifle, we need not consider any alleged errors in the second search warrant.

[3] In defendant's final argument, he has cited numerous assignments of error and exceptions to allegedly inadmissible testimony. We only need to examine those assignments of error

pertaining to the charge of manufacturing marijuana. Assignment of error #13 refers to the alleged error of the trial court in admitting testimony of the pan and its contents. In assignment of error #14, defendant has excepted to the seizure of the pan and its contents. Both of these assignments of error are without merit. The state's uncontradicted evidence shows that the pan containing plants, later determined to be marijuana, was found in defendant's bedroom after both he and his father invited Officer Morley to search defendant's bedroom. A warrantless search of a defendant's home is constitutional if defendant voluntarily gives officers permission to search. *See State v. Carlton*, 28 N.C. App. 573, 221 S.E. 2d 924, *appeal dismissed*, 289 N.C. 616, 223 S.E. 2d 767, *disc. review denied*, 290 N.C. 309, 225 S.E. 2d 830 (1976).

For the failure of the state to prove beyond a reasonable doubt each fact necessary to give rise to the inference or presumption raised by the doctrine of possession of recently stolen property, the judgments in cases #80CRS2721 and #80CRS2722 must be vacated. We find no error in case #80CRS1469.

Reversed and remanded as to cases #80CRS2721 and #80CRS2722.

No error as to case #80CRS1469.

Judges ARNOLD and BECTON concur.

THE STATE OF NORTH CAROLINA v. RALPH HINES

No. 8110SC439

(Filed 17 November 1981)

1. False Pretense § 3— obtaining money by false pretenses—sufficiency of the evidence

The evidence was sufficient to support the permissible inference that defendant intended to cheat or defraud when he obtained checks from the prosecuting witnesses where the evidence tended to show that upon learning the prosecuting witnesses were considering making an investment, he suggested a proposed venture; that a prosecuting witness wrote defendant a check for $800

to cover legal fees and expenses of the incorporation of the venture; that she left the payee blank because defendant was uncertain how it should be completed; that when the cancelled check was returned, defendant's name had been filled in as payee; that the prosecuting witness had not given defendant permission to deposit the check in his personal account; that another check for $473, intended as the first month's rent on a building for the venture was given to defendant; that the money was not received as rent and a definite lease agreement had not been arrived at; and that defendant had never met with an attorney about incorporating the business.

2. Criminal Law § 112.2— reasonable doubt—instruction proper

A charge on "reasonable doubt" that "the rule of reasonable doubt does not require that you be satisfied of the defendant's guilt beyond all doubt before you would return a verdict of guilty against him" was proper when read in context with the entire charge.

3. False Pretense § 3.2— obtaining property by false pretenses—instructions proper

There was no merit to defendant's contention that the court erred in failing to instruct that to constitute false pretense, the misrepresentation of a subsisting fact must not only be intended to deceive, but it must also be relied upon and in fact deceive where the court repeatedly informed the jury that to find defendant guilty it must find that the prosecuting witnesses were in fact deceived and gave defendant their money in reliance upon his false representations.

4. False Pretense § 3.2— obtaining property by false pretenses—instruction

The court did not err in failing to instruct that "evidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud," G.S. 14-100(b), where the court explained the law arising on the evidence as provided by G.S. 15A-1232 and the defendant did not request special instructions.

5. Criminal Law § 101.4— permitting the jury to take exhibits to jury room—no error

Where the foreman asked that the jurors be allowed "to examine the written stuff that was submitted," in a prosecution for obtaining property by false pretenses, it was not error for the court to allow the request pursuant to G.S. 15A-1233(b) where there was no objection by defendant.

6. Criminal Law § 101.4— request of jury to hear testimony of witness—denial proper

No abuse of discretion was shown in the denial of a jury foreman's request that the jury be allowed to hear again the testimony of one of the witnesses in defendant's trial on obtaining property by false pretenses where the court cited problems with extracting portions of evidence rather than reviewing it in its entirety, and the court asked the members of the jury instead "to rely upon their collective recollection of the evidence."

State v. Hines

APPEAL by defendant from *Canaday, Judge.* Judgment entered 5 December 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 15 October 1981.

Defendant appeals from judgments of imprisonment entered upon verdicts of guilty of two counts of obtaining property by false pretense.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Gulley, Barrow & Boxley, by H. Spencer Barrow, for defendant appellant.

WHICHARD, Judge.

STATE'S EVIDENCE

The State's evidence tended to show the following: Dr. and Mrs. Frankford M. Johnson, the prosecuting witnesses, met defendant when he began dating their daughter. Defendant learned the Johnsons were considering making an investment, and he suggested a clothing store catering to large and tall men.

Defendant and the Johnsons discussed the proposed venture for several months. They agreed the business should be incorporated, and defendant was to arrange the incorporation with an attorney friend. Mrs. Johnson, at defendant's request, wrote defendant a check for $800.00 to cover legal fees and expenses of incorporation. She left the payee blank, because defendant was uncertain how it should be completed. When the cancelled check was returned, defendant's name had been filled in as payee. Mrs. Johnson had not given defendant permission to deposit the check in his personal account.

Defendant took the Johnsons to a mall to view possible sites for the store. He subsequently asked Mrs. Johnson for a check for $473.00 as a deposit on the first month's rent to hold the store site. She gave the check to defendant with the understanding that he would deposit it in a corporate account. She did not give him permission to deposit it in his personal account. Defendant had not in fact arrived at a definite lease agreement with the mall, and the mall was not at any time holding the space the Johnsons had viewed. The mall manager never had any discussions with

defendant concerning his getting $473.00, or any amount of money, to hold any space at the mall. The manager never requested nor received any money from defendant.

Subsequently the Johnsons' son learned from the attorney defendant indicated he had contacted that no corporation had been established. The entire Johnson family then met with the attorney and learned that defendant had never been to see him about incorporating the business. They also learned that defendant had misrepresented many other matters. Immediately upon leaving the attorney's office, the Johnsons went to the police.

DEFENDANT'S EVIDENCE

Defendant testified in his own behalf that his intent in securing the $800.00 check was to have $400.00 for expenses of incorporation and $400.00 to issue 400 shares of stock with a par value of $1.00 each. He indicated he told Mrs. Johnson to leave the payee blank on the check because he was uncertain how the attorney would want the check completed. He further testified that he had recalled the rent per month at the mall to be $946.00; that he told Mrs. Johnson he had one-half that amount; that she agreed to put up the other one-half; that he deposited her check for $473.00 in his account in order to write the mall a check for the entire amount; and that he did not think he ever asked Mrs. Johnson's permission to deposit her check in his account. On cross-examination defendant testified that he had been convicted of obtaining property by false pretense on two previous occasions.

SUFFICIENCY OF EVIDENCE

[1] Defendant contends the judgment should be vacated and the charges dismissed, pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5),[1] on the ground that the evidence was insufficient as a matter of law to sustain the convictions. His argument is that "it is clear, in fact admitted, that misrepresentations were made," but that "it was not established that the defendant made false representations that were calculated to deceive and which were intended to deceive."

It is an essential element of obtaining property by false pretense that the act be done "knowingly and designedly . . .

1. No motions were made at trial to test the sufficiency of the evidence.

with intent to cheat or defraud." G.S. 14-100. *See State v. Phillips*, 228 N.C. 446, 45 S.E. 2d 535 (1947). "Intent [, however,] is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974). "[I]n determining the presence or absence of the element of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged . . . ." *State v. Norman*, 14 N.C. App. 394, 399, 188 S.E. 2d 667, 670 (1972).

We find the evidence recited above sufficient to support the permissible inference that defendant intended to cheat or defraud when he obtained the checks in question. Thus, "[i]t was for the jury to determine, under all the circumstances, defendant's ulterior criminal intent." *Bell*, 285 N.C. at 750, 208 S.E. 2d at 508. This assignment of error is overruled.

INSTRUCTIONS TO JURY

Defendant assigns error relating to instructions to the jury as follows:

I.

[2] Defendant contends the court erred in the following portion of its explanation of "reasonable doubt":

> [T]he rule of reasonable doubt does not require that you be satisfied of the defendant's guilt beyond all doubt before you would return a verdict of guilty against him. It is hardly likely that any jury in the trial of any criminal case could ever be satisfied of a defendant's guilt beyond all doubt.

He argues this portion was likely to create an impression with the jury that it was their responsibility to convict him if they believed the evidence indicated a possibility of guilt.

Before rendering the portion complained of, the court had instructed as follows:

> Now a reasonable doubt is the doubt based upon reason and common sense arising out of the evidence in the case, or the lack of evidence. It is not a doubt arising from sympathy or from prejudice. It is not a vain, imaginery or capricious

> doubt; and when it is said that the jury must be satisfied of a defendant's guilt beyond a reasonable doubt, it means that the jury must be entirely convinced or fully satisfied of his guilt; and if the jury, after considering all the evidence in the case, is not convinced of the defendant's guilt to a moral certainty, then the jury may be said to have a reasonable doubt as to his guilt.

A charge must be construed contextually, *State v. Bailey*, 280 N.C. 264, 185 S.E. 2d 683, *cert. denied*, 409 U.S. 948, 34 L.Ed. 2d 218, 93 S.Ct. 293 (1972); and so construed, the jury could not have been misled by the charge here to believe as defendant contends. In *State v. Brackett*, the Supreme Court found no error in the following instruction:

> The defendant is presumed to be innocent, and this presumption goes with him throughout the entire trial and until the jury is satisfied beyond reasonable doubt of his guilt; *not satisfied beyond any doubt, or all doubt, or a vain or fanciful doubt*, but rather what that term implies, a reasonable doubt, one based upon common sense and reason, generated by insufficiency of proof.

218 N.C. 369, 372, 11 S.E. 2d 146, 148 (1940) (emphasis supplied). The substance of that instruction and the instruction here do not differ. This assignment of error is overruled.

II.

Defendant also contends the above complained of portion amounted to an expression of opinion by the trial court, in violation of G.S. 15A-1232, that defendant was guilty. The contention is without merit. The court merely informed the jury that it must find defendant guilty beyond a reasonable doubt, but not beyond all doubt. The instruction is in essential accord with language approved in *Brackett*, 218 N.C. 369, 11 S.E. 2d 146. This assignment of error is overruled.

III.

[3] Defendant contends the court erred in failing to instruct that to constitute false pretense, the misrepresentation of a subsisting fact must not only be intended to deceive, but it must also be relied upon and in fact deceive. The contention is without merit.

The court on four occasions referred to false representations made by defendant to the Johnsons, then stated:

(1) and the State must further so satisfy you that the defendant *thereby, that is by the use of such representations, false representations, obtained a sum of money from [the Johnsons];*

(2) and if the State has further so satisfied you that the defendant *by making such statements obtained the sum of $800 from [the Johnsons]* . . . it would be your duty . . . to return a verdict of guilty;

(3) the State must satisfy you . . . that the defendant made the representation . . . and that this statement was false and that the defendant knew that such statement was false and that he made such statement with the intent to cheat or defraud . . . *and that he did obtain money as the result of making such false representation;*

(4) if the State has so satisfied you that the defendant made such representation with the intent to cheat or defraud . . . and . . . has further so satisfied you the defendant *thereby, that is by reason of such representation, obtained the sum of $473 from [the Johnsons],* it would be your duty . . . to return a verdict of guilty of this offense.

By these portions of the charge the court repeatedly informed the jury that to find defendant guilty it must find that the Johnsons were in fact deceived and gave defendant their money in reliance on his false representations. "If the false pretense caused the victim to give up his property, it logically follows that the property was given up because the victim was in fact deceived by the false pretense." *State v. Cronin,* 299 N.C. 229, 238, 262 S.E. 2d 277, 283 (1980).

The following instruction on obtaining property by false pretense has been held to be "substantially in compliance with the law":

> If the jury believe, beyond a reasonable doubt, that the defendant . . . fraudulently, designedly, knowingly and falsely represented to [the victim] . . . that he had not assigned his claim . . . , and that he was the owner of the order, when in

truth and in fact he was not, and that by reason thereof he obtained the order from [the victim], he must be guilty. If the jury are not so satisfied, they must acquit.

State v. Hargrave, 103 N.C. 328, 334, 9 S.E. 406, 408 (1889). The instructions here were in substantial accord with those approved in *Hargrave*. This assignment of error is overruled.

IV.

Defendant contends the court erred in failing to instruct that the jury had to find that the misrepresentation was material and was a proximate and immediate inducement to the transaction. The contention is without merit. The portions of the instructions quoted in III above clearly indicated to the jury that it must find a causal connection between the false representations made and the delivery of the checks to defendant. This assignment of error is overruled.

V.

[4] Defendant contends the court erred in failing to instruct that "[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud." G.S. 14-100(b).

"In instructing the jury, the judge must declare and explain the law arising on the evidence." G.S. 15A-1232. He must instruct the jury "on all substantial features of the case arising on the evidence." *State v. Dooley*, 285 N.C. 158, 163, 203 S.E. 2d 815, 818 (1974). The court here instructed on all essential elements of obtaining property by false pretense. It thus instructed "on all substantial features of the case arising on the evidence." *Id.*

The jury could not have been misled by the instructions given to find defendant guilty solely on the ground that he did not fulfill his contractual obligations. If defendant desired special instructions on G.S. 14-100(b), he should have requested them. G.S. 15A-1231; *State v. Boyd*, 278 N.C. 682, 180 S.E. 2d 794 (1971). This assignment of error is overruled.

JURY ROOM VIEW OF EXHIBITS

[5] After the jury commenced deliberations, and before a verdict was reached, the foreman asked that the jurors be allowed "to ex-

amine the written stuff that was submitted." The court allowed the request pursuant to G.S. 15A-1233(b), which in pertinent part provides: "Upon request by the jury and with the consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence."

Defendant contends the court erred in allowing this view of the exhibits, citing *State v. Bell*, 48 N.C. App. 356, 269 S.E. 2d 201, *disc. rev. denied*, 301 N.C. 528, 273 S.E. 2d 455 (1980). This court, in *Bell*, found that the trial court erred in allowing exhibits to be taken to the jury room *over the objection of defendant*, but held the error harmless. The record here reveals no objection by defendant to allowance of the foreman's request. Hence, the jury view was within the court's discretion; and no abuse of discretion has been shown. This assignment of error is overruled.

DISALLOWANCE OF READING FROM TRANSCRIPT

[6] At the time he requested a jury room view of the exhibits, the jury foreman also requested that the jury be allowed to hear again the testimony of the attorney defendant indicated he had contacted regarding incorporation of the business venture. The court cited problems with extracting portions of evidence rather than reviewing it in its entirety, and refused the request on the basis that "it might result in error." It asked the members of the jury instead "to rely upon [their] collective recollection of the evidence." Defendant assigns error to this refusal.

The grant or denial of this request was in the court's discretion. G.S. 15A-1233(a). No abuse of discretion has been shown in the denial. *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980), relied on by defendant, is distinguishable. The trial court in *Lang* had advised the jury that the transcript was not available to it. The Supreme Court stated this indicated that the court had not exercised its discretion to decide whether under the facts of the case the transcript should be made available. Here, by contrast, the court's statement clearly indicates that it was denying the request in the exercise of its discretion. This assignment of error is overruled.

RESULT

No error.

Judges VAUGHN and HILL concur.

ELIZABETH KAY McLEAN v. DR. PAUL SALE

No. 8130SC271

(Filed 17 November 1981)

1. **Insane Persons § 1— involuntary commitment—physician's certificate—duty to perform examination**

Under G.S. 122-58.4, defendant physician had a positive duty to examine plaintiff before he signed a Qualified Physician Examination and Evaluation certificate for the involuntary commitment of plaintiff to a mental health care facility, and a cause of action arose against defendant if plaintiff was involuntarily committed as a result of defendant's actions regardless of what may have prompted defendant to fail to make the examination of plaintiff. Therefore, in an action to recover damages for plaintiff's wrongful commitment pursuant to a certificate allegedly signed by defendant without an examination of plaintiff, the trial court erred in instructing the jury that plaintiff must prove that the failure of defendant to examine plaintiff was wrongful in that it was willful, intentional and without reasonable or just cause.

2. **Insane Persons § 1— involuntary commitment—examination by qualified physician**

The examination by a qualified physician required by G.S. 122-58.4 in involuntary commitment proceedings requires that the person to be examined be physically in the presence of the qualified physician so that the physician may actually utilize his five senses, or such of them as he deems necessary, in carrying out the mandate of the statute. However, the physician may use additional information in determining the condition of the person being examined, such as the history of the person as told to the physician or previously recorded, medical records of the person, or prior judicial records of commitment proceedings.

3. **Damages § 11.2; Insane Persons § 1— involuntary commitment—physician's wrongful signing of Examination and Evaluation certificate—punitive damages**

Plaintiff was not entitled to punitive damages for defendant physician's wrongful signing of an Examination and Evaluation certificate for the commitment of plaintiff to a mental hospital without examining plaintiff as required by statute where there was no evidence that defendant acted maliciously or willfully or with wantonness or reckless disregard for the consequences.

McLean v. Sale

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 15 October 1980 in Superior Court, SWAIN County. Heard in the Court of Appeals 20 October 1981.

In this action plaintiff seeks compensatory and punitive damages from defendant. She alleges defendant wrongfully caused her to be involuntarily admitted and confined in Broughton Hospital by signing and executing a Qualified Physician Examination and Evaluation certificate without first examining plaintiff as required by N.C.G.S. 122-58.4.

Plaintiff produced evidence tending to show that on 3 December 1976 she was attending school at Swain County High School. She drove a school bus, with eighty-eight children as passengers, to school on that day. Although she had known and been treated by the defendant doctor before this date, on 3 December 1976 she did not see him, nor was she in his presence or in sight or view of him. Dr. Sale did not speak to her on that date. Dr. Sale did not examine her on 3 December 1976. Nevertheless, based on defendant's written authorization, plaintiff was placed in a police car about 1:00 p.m. and taken to Broughton Hospital in Morganton, North Carolina, where she was kept in a locked ward until the next Tuesday at 10:00 a.m. She was released from confinement at that time. Plaintiff further testified concerning the effect of the hospitalization upon her health. She immediately lost her job as a school bus driver. In February 1978 it was necessary for her to receive psychiatric treatment from Dr. Bill Griffin. She also suffered from public embarrassment and moved to Macon County.

Plaintiff offered into evidence the following documents: Petition for Involuntary Commitment, The Custody Order for Involuntary Commitment, and the Qualified Physician Examination and Evaluation certificate. E. J. McLean, plaintiff's father, testified that after the hospitalization he confronted defendant. Defendant admitted that he signed the papers. Mr. McLean asked, "Did you examine her?" Defendant replied, "No, I did not. I didn't see her. I took them at their word."

Defendant produced evidence tending to show that he was a medical doctor, practicing general medicine in Bryson City, North Carolina. He is not a psychiatrist. He had been licensed to practice in North Carolina for seven years. He had known plaintiff for about five years and had treated her for headaches and "for an

evaluation of some changes in her monthly periods." Later he saw her for an infected cyst in her low back. The defendant also knew Tom Williams, who worked as a school psychologist with the Swain County school system. Apparently Williams met with defendant in his office on 3 December 1976, where he told defendant that he thought plaintiff was depressed and a danger to herself. Dr. Sale testified that based on what Williams told him and his knowledge of "the person as a patient," it was his opinion that "there was a significant danger to this person's life at the time" and that "she needed to have attention which would protect her." Dr. Sale testified, "I did not meet personally on that date with Kay McLean." He had not seen her since the latter part of 1975, when he treated her for the cyst. Defendant further admitted that he signed the Qualified Physician Examination and Evaluation certificate. He also admitted that he signed the certificate without ever seeing plaintiff, and that "[s]uch action as I took I relied upon what Williams told me and part of what Williams told me was something somebody else told him."

The court directed a verdict against plaintiff on the issue of punitive damages, and the jury answered the following issue: "1. Did the defendant, Dr. Paul Sale, wrongfully cause the plaintiff, Elizabeth Kay McLean, to be admitted and confined to Broughton Hospital on December 3, 1976? ANSWER: *No.*"

Plaintiff moved to set the verdict aside, which was denied, and appealed from the judgment denying plaintiff any recovery.

Roberts, Cogburn and Williams, by Max O. Cogburn, for plaintiff appellant.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff submits that the trial court erred in its instructions to the jury. We agree. The court instructed the jury[1] that:

> An examination may take many forms. And various methods may be employed to examine a person. Such

1. Plaintiff did not except to all of the quoted portions of the charge, but it is necessary that other parts be included in considering the assignments of error.

methods may include an investigation into the background of a person, references to available information about such person; and inquiry of others familiar with such person and with the acts, occurrences and events which resulted in the issuance of an order for the examination.

Such examination also may include consultation with others who may have counseled with such person. And a research into medical histories available about such person. The law requires at least a personal examination, however cursory or brief, shall be conducted by the examining qualified physician prior to a finding by such physician that such person was mentally ill or an inebriate and imminently dangerous to himself or others.

If a physician charged with the duty of examining a person presented to him fails to, at least, personally examine such person, he has not then complied with the provisions of the law.

However, in order to recover for the breach of failure to perform this duty, the Plaintiff is required to prove from the evidence and by its greater weight that such failure was wrongful in the sense that it was intentional and willful, without reasonable or just cause. In determining whether such failure of the physician to personally examine an individual presented for examination was intentional and willful, you may consider all the facts and circumstances you find to have existed at the time in question, of which the Defendant had knowledge; the means by which he learned such information; the reasonableness of his conduct and the circumstances; the nature and extent of any investigation he may have conducted; the motive, if any, he may have had in executing a commitment document; and any other relevant fact arising upon the evidence.

If you find that the Defendant intentionally failed to personally examine the Plaintiff, and that such was willful and without reasonable or just cause, then the Defendant would have breached the duty he owed the Plaintiff; otherwise, not.

So then, Members of the Jury, as to this first issue, I instruct you that if you find from the evidence and by its

greater weight, the burden being upon the Plaintiff to so satisfy you, that on December 3, 1976, the Defendant, Dr. Paul Sale, executed a commitment document which resulted in the Plaintiff being confined and admitted to Broughton Hospital. And that when he did so, he intentionally; that is, willfully and without reasonable or just cause, failed to personally examine the Plaintiff prior to executing such document. Then it would be your duty to answer this first issue yes in favor of the Plaintiff.

[1] Under N.C.G.S. 122-58.4, the defendant had a positive duty to examine plaintiff before he signed the Qualified Physician Examination and Evaluation certificate. *McLean v. Sale*, 38 N.C. App. 520, 248 S.E. 2d 372 (1978), *disc. rev. denied*, 296 N.C. 585 (1979). Defendant's failure to perform the examination is a violation of the statute, and if plaintiff was involuntarily committed as a result of defendant's actions, a cause of action arises against defendant. This is true regardless of what may have prompted defendant to fail to make the examination of plaintiff. The trial court instructed the jury that plaintiff must prove that the failure of defendant to examine plaintiff as required by the statute was wrongful, in that it was willful, intentional and without reasonable or just cause. This was error. The reasons defendant failed to make the required examination were competent on the question of punitive damages, but not on the issue of whether defendant violated his statutory duty to plaintiff.

The court's instructions on what constitutes an examination within the meaning of the statute were conflicting, confusing and erroneous. The words *examine* and *examination* are not defined in the statute. *Examination* means: "The act or process of inspection of the body and its systems to determine the presence or absence of disease." Taber's Cyclopedic Medical Dictionary 509 (14th ed. 1981). *Examination* means observation or inspection. J. Rodale, The Synonym Finder 373 (1967). *Examine* means to "inspect visually or by the use of other senses . . . to inspect or test for evidence of disease or abnormality." Webster's Third New International Dictionary 790 (1971).

[2] We hold that *examine* as used in the statute requires that the person to be examined be physically in the presence of the qualified physician, so that the physician may actually utilize his

five senses, or such of them as he deems necessary, in carrying out the mandate of the statute. Of course the physician may use additional information in determining the condition of the person being examined. Such information could include, but is not limited to, the history of the person as told to the physician or previously recorded, medical records of the person, or prior judicial records of commitment proceedings.

Our holding is supported by the statute itself, as well as common sense and good medical practice. The statute requires that a law enforcement officer "shall take the respondent to a community mental health center for an examination by a qualified physician . . . ." N.C. Gen. Stat. § 122-58.4(a). "The qualified physician shall examine the respondent as soon as possible, and in any event within 24 hours, after the respondent is presented for examination." N.C. Gen. Stat. § 122-58.4(c). The law enforcement officer must take and present the person to be examined to the physician for this purpose. This certainly requires that the person must be physically present before the physician for the purpose of the examination. To hold otherwise would increase the possibility that persons who are not mentally ill or inebriates and dangerous to themselves or others would be involuntarily committed. N.C. Gen. Stat. § 122-58.1. The policy of this state, as manifested by the statute, is to prevent such occurrences. *McLean v. Sale, supra.* Defendant's argument that the evidence in this case would support a finding that he examined plaintiff within the meaning of the statute is rejected. All the evidence shows that he did not examine plaintiff as required by the statute.

On the record before us, plaintiff was entitled to a directed verdict on the first issue. The evidence does not disclose any genuine issue of material fact. Plaintiff's right to recover does not depend upon the credibility of her witnesses. Her case is established by the documents in evidence and the admissions of defendant. The doctrine of *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971), is, therefore, not applicable. A directed verdict may be granted for the party having the burden of proof if his right to judgment is established by the non-movant's evidence. *Bank v. Burnette,* 297 N.C. 524, 256 S.E. 2d 388 (1979); *Alligood v. Railroad,* 21 N.C. App. 419, 204 S.E. 2d 706 (1974); *Price v. Conley,* 21 N.C. App. 326, 204 S.E. 2d 178 (1974); N.C. Civ. Prac. & Proc.

§ 50-6 (2d ed. 1981). Defendant admits that he did not have plaintiff in his presence for the purpose of an examination. He "took them at their word." Defendant admits that plaintiff was committed to Broughton Hospital following his signing of the certificate. Once the defendant signed the certificate, the officer was required to take plaintiff to the hospital. N.C. Gen. Stat. § 122-58.4(c); *McLean v. Sale, supra.* By signing the certificate without examining plaintiff as required by the statute, defendant wrongfully caused her to be admitted and confined in Broughton Hospital.

[3] Plaintiff further contends that the court erred in dismissing the claim for punitive damages. We reject this contention. There is no evidence that defendant acted maliciously or willfully or with wantonness or reckless disregard for the consequences. *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393 (1956). Plaintiff does not allege defendant acted with malice. Plaintiff asks us to extend the basis for an issue of punitive damages, relying upon *DiGiovanni v. Pessel,* 104 N.J. Super. 550, 250 A. 2d 756 (1969). The New Jersey court allowed an issue of punitive damages solely on the basis that defendant failed to make a required statutory examination. This decision by the Superior Court, Appellate Division, was reversed by the Supreme Court of New Jersey. *Di Giovanni v. Pessel,* 55 N.J. 188, 260 A. 2d 510 (1970). We are mindful of our Court's statement in *Hinson v. Dawson, supra:* "[W]e are not disposed to expand the doctrine [of punitive damages] beyond the limits established by authoritative decisions of this Court." 244 N.C. at 27, 92 S.E. 2d at 396.

Plaintiff also assigns as error the admission of certain testimony, principally what Williams said to defendant and what Linda Dills told Williams. In the light of our opinion today, these matters are not likely to reoccur at a new trial, and we, therefore, refrain from discussing them.

New trial.

Judges HEDRICK and CLARK concur.

CECIL JEANETTE WALTERS v. MELVIN ROYCE WALTERS

No. 8126DC255

(Filed 17 November 1981)

Divorce and Alimony §§ 16.10, 19.5— award of "alimony" part of complete property settlement—error to find payments ended upon remarriage

The trial court erred in concluding plaintiff's award pursuant to a consent judgment constituted "alimony," invoking the provisions of G.S. 50-16.9(b) requiring termination of her "alimony" upon remarriage, rather than a part of a complete property settlement where (1) the preamble to the consent judgment stated that the parties "had settled and compromised the differences between them," (2) the parties expressly agreed that the payments would continue "regardless of whether or not the parties are divorced or the plaintiff should remarry," (3) the parties agreed that the plaintiff would be permitted to use defendant's motor vehicle "until the first periodic payment" was made thereby combining elements of both the payment and property division provisions, (4) the only indicia of alimony in the provisions of the consent judgment was the word itself appearing therein, and (5) the parties stipulated that the payments would be treated as "alimony" for tax purposes indicating a convenient characterization and a device used by them for tax advantages only.

APPEAL by plaintiff from *Black, Judge.* Order entered 18 December 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1981.

Thomas, Harrington & Biedler, by Larry E. Harrington; and Thomas D. Windsor, for plaintiff-appellant.

James, McElroy & Diehl, by William K. Diehl, Jr., for defendant-appellee.

HILL, Judge.

Plaintiff and defendant entered into a consent judgment on 4 October 1978 which represented "that they had settled and compromised the differences between them . . .." With the parties' consent, the court "ORDERED, ADJUDGED AND DECREED" the following:

> 1. The defendant, Melvin Royce Walters, is hereby ordered and directed to pay to the plaintiff, Cecil Jeanette Walters, said payments to constitute alimony, the sum of One Thousand ($1,000.00) Dollars per month, beginning October, 1978, and continuing for sixty-two (62) months thereafter, for

a total of sixty-three (63) payments, said payments to be made quarterly in advance, commencing October 1st, 1978, and the quarterly payments thereafter to be payable on January 1st, April 1st and July 1st, and October 1st of each successive year until all of the payments shall have been made, provided, however, the defendant, Melvin Royce Walters, shall be allowed six (6) weeks following the due date of any payment in which to make the same without being in default of the provisions of this Order.

2. The defendant, Melvin Royce Walters, will simultaneously with the entry of this Judgment execute a fee simple warranty deed for all of his right, title and interest in and to that real estate located in Burnsville Township, that was conveyed to the parties to this action by deed dated January the 23rd, 1968, and recorded in Deed Book 160, page 636, Registry of Anson County. This conveyance, however, shall be subject to any outstanding liens and ad valorem taxes existing at the time of the conveyance.

3. It is further ORDERED that the provisions of this Judgment shall be enforceable by contempt proceedings.

4. It is further ORDERED that the plaintiff, Cecil Jeanette Walters, be permitted to use and enjoy that certain motor vehicle heretofore provided her by her husband until the first periodic payment as herein provided is made.

5. It is understood that the payments as herein provided shall be made by the defendant to the plaintiff regardless of whether or not the parties are divorced or the plaintiff should remarry during said period of time.

It was stipulated that at this time the parties agreed that defendant would deduct as "alimony" on his tax return the payments he made pursuant to the consent judgment. However, no deductions were taken until 1979. Plaintiff reported the payments received as "alimony" income in 1978.

Defendant made payments in accordance with the provisions of the consent judgment for three months, then he unilaterally reduced the payments to $500. On 20 August 1979 the parties agreed to a court order requiring payments by defendant to plaintiff of $500 per month for 101 months, modifying a portion of the

consent judgment. The remainder of the consent judgment continued in full force and effect. Plaintiff remarried on 19 April 1980.

Defendant refused to pay plaintiff under the provisions of the consent judgment upon plaintiff's remarriage, and she prayed the court jail defendant, in exercise of its civil contempt powers, for his willful refusal to comply with those provisions. Thereafter, defendant moved to terminate the payments provided by the consent judgment on the grounds that such payments were "alimony" in character, that plaintiff's remarriage was a substantial change of circumstances justifying termination of payments, and that because of her remarriage, plaintiff is now fully supported by her present spouse.

The court found facts and concluded that plaintiff's award was "alimony," that plaintiff's remarriage invoked the provisions of G.S. 50-16.9(b) requiring termination of her "alimony" upon remarriage—"language contained in [the consent judgment] to the contrary notwithstanding," that the payment provisions "are not so intertwined with a property settlement of the parties as to prevent them from being modified," that "[t]his alimony award" could be modified upon a proper showing and enforced by the contempt powers of the court, and that "plaintiff's wife has not offered sufficient proof by a preponderance of the evidence that the court award of alimony payments somehow merged with a part of some property settlement between the parties."

The court ordered that plaintiff's contempt motion be denied and dismissed with prejudice, and that defendant's motion to "terminate alimony payments . . . by reason of plaintiff's remarriage" be allowed. Plaintiff appeals from this order.

There are two requirements for a court to have power to modify a consent judgment: First, that the consent judgment be an order of the court; and, second, that the order be one to pay alimony. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). *See* G.S. 50-16.9(a). Since the quoted language of the consent judgment in the case *sub judice* clearly indicates that it is an order of the court, our inquiry is directed to the alimony requirement.

Even though denominated as such, support payment provisions may not be alimony, and thus modifiable, if those provisions

and other provisions for a property division between the parties constitute "a *complete* settlement of all property and marital rights between the parties . . .." *Bunn v. Bunn*, 262 N.C. 67, 70, 136 S.E. 2d 240, 243 (1964) (emphasis original). Furthermore, where those provisions "constitute a reciprocal consideration so that the entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties." *Id.*, *quoted in White v. White*, *supra* at 666-67, 252 S.E. 2d at 701. Thus, the question is whether the payment provisions of the consent judgment are modifiable alimony provisions independent of and separate from the property division provisions of the consent judgment.

Our construction of the provisions of the consent judgment in the case *sub judice* is governed by the principles expressed in *Allison v. Allison*, 51 N.C. App. 622, 627, 277 S.E. 2d 551, 554-55 (1981), wherein Judge Whichard, speaking for this Court, wrote:

> Our Supreme Court has stated in *White v. White*, 296 N.C. 661, 667-668, 252 S.E. 2d 698, 702 (1979):
>
> > The answer depends on the construction of the consent judgment as a contract between the parties. "The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purpose of the contract, the subject matter and the situation of the parties at the time the contract is executed." (Citation omitted.)
>
> If the consent judgment "is clear and unambiguous and leaves no room for construction," its construction is a matter of law and must be "as written, in the light of the undisputed evidence as to the custom, usage, and meaning of its terms." (Citation omitted.) Where ambiguities appear, however, the intentions of the parties must be determined from evidence of the facts and circumstances surrounding entry of the consent judgment, just as the intentions of the parties to an ambiguous written contract must be determined from the surrounding circumstances.

As in *Allison*, the consent judgment here is not "clear and unambiguous," leaving no room for construction. Therefore, the

court below had to consider the provisions of the consent judgment and the surrounding circumstances to determine the parties' intentions. We must do likewise "to determine whether '[t]he facts in this mixed question of law and fact are supported by the evidence' and whether '[t]he findings support the conclusion[s] of law.' " *Allison v. Allison, supra* at 628, 277 S.E. 2d at 555, *quoting Highway Comm. v. Rankin*, 2 N.C. App. 452, 455, 163 S.E. 2d 302, 304 (1968). We are not bound by the court's "finding" that the payment and property division provisions are separable. *See White v. White, supra.*

Several factors indicate that the parties intended the consent judgment to be a complete property settlement, and its provisions reciprocal consideration for them, rather than separable alimony and property division provisions as the court below concluded. First, the preamble to the consent judgment states that the parties "had settled and compromised the differences between them as shall hereinafter appear." This language is subject to the interpretation that the agreement was considered a complete settlement by the parties. *Cf Britt v. Britt*, 36 N.C. App. 705, 245 S.E. 2d 381 (1978).

Second, the parties expressly agreed that the payments would continue "regardless of whether or not the parties are divorced or the plaintiff should remarry during said period of time." This provision indicates an intention by the parties to create something other than alimony since it expressly addresses, and circumvents, the condition of remarriage which must terminate alimony under G.S. 50-16.9(b).

Third, the parties agreed that plaintiff would be permitted to use defendant's motor vehicle "until the first periodic payment as herein provided is made." The nature of this provision, in combining elements of both the payment and property division provisions, indicates a dependence upon the settlement as a whole, integrated agreement to govern the parties' differences.

Fourth, the only indicia of alimony in the provisions of the consent judgment is the word itself appearing therein. "That the payments were denominated 'alimony' . . . is far from conclusive on the issue." *White v. White, supra* at 668, 252 S.E. 2d at 702. Further, although there is evidence to support it, there is no language in the consent judgment finding plaintiff to be a "de-

pendent" spouse and defendant to be a "supporting" spouse. Such designations are indicative of the payment and receipt of alimony. *See* G.S. 50-16.1 and G.S. 50-16.2. "While a finding of dependency is not required where judgments ordering payment of alimony are entered by consent, . . . the absence of such a finding was nevertheless a factor which the court could have considered in interpreting the inherently ambiguous consent order." *Allison v. Allison, supra* at 629, 277 S.E. 2d at 556. The absence of this language supports an interpretation that the payment provisions are not alimony. *Cf id.*

Fifth, the parties stipulated that the payments would be treated as "alimony" for tax purposes. Defendant's evidence discloses that both parties referred to the payments as "alimony." In fact, defendant testified that he "did not have any other agreements with [his] wife." This evidence alone is insufficient to support a conclusion that the payment provisions are modifiable as alimony under G.S. 50-16.9(b). When weighed against the foregoing factors, the court could have concluded that the parties' label of "alimony" was merely a convenient characterization and a device used by them for tax advantages only.

We are not unmindful of this Court's decision in *Rowe v. Rowe*, 52 N.C. App. 646, 280 S.E. 2d 182 (1981). In that case, unlike the case *sub judice*, the parties expressly agreed that the "permanent alimony" payments provided for would "terminate only upon the death of either of the parties *or the remarriage of the Defendant [wife]*, whichever event shall first occur . . .." *Id.* at 649, 280 S.E. 2d at 184 (emphasis added).

This Court in *Rowe* rejected defendant Mary W. Rowe's argument that the parties' agreement was a complete property settlement by applying the following rules first announced by the Supreme Court in *White v. White, supra*:

> Alimony provisions are *presumed separable* from provisions for property settlement, and therefore modifiable, even when both appear in the same document. (Citations omitted.) In the face of this presumption, a party opposing modification must establish by a preponderance of the evidence that the provision for alimony contained in the [consent judgment] . . . was intended by the parties to be only a part of their overall property settlement.

Rowe v. Rowe, supra at 658, 280 S.E. 2d at 189 (emphasis added).

Even though the agreements in *Rowe* and in the case *sub judice* are distinguishable, and their results thereby opposite, the plaintiff here has presented enough evidence to overcome the presumption of separability announced in *White* and applied in *Rowe*. Under the analysis herein applied or under the *White* presumption, the provisions of the consent judgment and surrounding circumstances support the identical result.

Therefore, upon considering all of the factors named above which could or should have influenced the court below, we hold that those factors only support a conclusion that the parties intended those provisions to be inseparable and constitute a complete property settlement not terminable upon plaintiff's remarriage. *See Bunn v. Bunn, supra; Allison v. Allison, supra.*

The order appealed from is

Vacated and the case remanded for findings and conclusions consistent with this opinion.

Judges VAUGHN and WHICHARD concur.

HORACE MANN INSURANCE COMPANY, J. E. MARTIN, AND PAUL G. HEATON v. CONTINENTAL CASUALTY COMPANY

No. 8118SC240

(Filed 17 November 1981)

1. Insurance § 149— professional liability insurance—two policies—excess insurance clause—other insurance clause—primary insurer

Where plaintiff insurer's professional liability policy insuring a school superintendent and a school principal contained a standard "excess insurance" clause, defendant insurer's indemnity policy insuring the superintendent and principal contained the standard "other insurance" or "escape" clause, and each policy would have separately covered the amount paid in settlement and defense of a dismissed teacher's federal court action against the insureds were it not for the existence of the other policy, the policy issued by defendant which contained the "other insurance" or "escape" clause provided the primary coverage and the policy issued by plaintiff which contained the "excess insurance" clause provided excess coverage only.

2. Insurance § 149— liability insurance—denial of coverage by primary insurer—defense by excess carrier—subrogation against primary carrier

When the primary insurance carrier denies coverage and refuses to provide a defense to the insured, the excess insurance carrier may provide a defense and effect settlement and thereafter subrogate against the primary carrier to recover its expenses, at least when the injured party has not sued for an amount in excess of the primary coverage.

APPEAL by defendant from *Kivett, Judge.* Order entered 25 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 October 1981.

This is an appeal from summary judgment in an action between two insurance companies to determine which is responsible for paying a claim. Both the corporate plaintiff, Horace Mann Insurance Company (Horace Mann) and the defendant, Continental Casualty Company (CNA) had issued policies which covered the claim in controversy. On the basis of affidavits and certain admissions by CNA in its Answer and in response to the plaintiffs' Request For Admissions, summary judgment was entered in favor of the plaintiffs, in the amount of $52,479.68. The issue on appeal is whether summary judgment was properly granted for the plaintiffs.

Smith, Moore, Smith, Schell & Hunter, by Martin N. Erwin, for plaintiff appellees.

Perry C. Henson, for defendant appellant.

BECTON, Judge.

I

The facts are undisputed. In December 1977, the individual plaintiffs, J. E. Martin and Paul G. Heaton, as superintendent and principal, respectively, in the Stanly County School System, were sued in federal court by Michael Smith, a teacher, who alleged that his teaching contract had not been renewed because of his exercise of First Amendment rights.[1] At the time the federal

1. Michael Smith also alleged that his rights to due process of law under the Fourteenth Amendment were violated. Specifically, he alleged that his contract was not renewed because he objected to daily prayers, silent prayers and devotionals conducted by the principal, Heaton. He prayed for $750,000.00 as compensatory damages and $250,000.00 as punitive damages.

court suit was instituted by Smith, CNA had in force and effect its policy number BEL 318 1371, under which the Stanly County Board of Education and the individual plaintiffs, Martin and Heaton, were assureds. Horace Mann had in force and effect its policy number M-3008, insuring Heaton, and its policies Nos. M-3013 and M-4002, insuring Martin.

Unquestionably, each policy in controversy would have separately covered Smith's claim against Martin and Heaton were it not for the existence of the policy(ies) of the other insurer. The Horace Mann policies required it to defend any civil suit against Martin and Heaton arising out of their activities in a professional capacity, even if the suit were groundless, false or fraudulent. CNA's policy is one of indemnity. It does not contain the standard insuring agreement to furnish the assureds with a defense to an action as do liability policies. CNA's policy, however, does require it to reimburse the assureds for loss covered by the policy for which the assureds should become legally obligated to pay, and the definition of loss includes cost of defense of legal actions.

Horace Mann contends that its policies contain "excess insurance" clauses and only provide coverage in excess of the primary coverage provided by CNA. CNA contends that its policy contains an "other insurance" clause[2] and provides no coverage to Martin and Heaton since they had valid policies with Horace Mann. Because CNA denied coverage, Horace Mann undertook the defense of the federal case, and a settlement was eventually negotiated.[3]

The plaintiffs filed this action in state court asserting that CNA wrongfully denied coverage to Martin and Heaton and that the plaintiffs were entitled to recover from CNA $52,479.68—the amount paid in settlement and defense of the federal court action.

2. CNA's "other insurance" clause is also known as an "escape" clause or "no liability" clause.

3. Under the terms of the settlement agreement, $23,850.00 was paid to Smith by or on behalf of Martin and Heaton. In addition, attorneys' fees for Martin and Heaton in the amount of $26,858.78 were paid, and Horace Mann Insurance Company incurred defense costs in an additional amount of $1,770.90. The payment of the settlement amount was structured in the form of a loan from Horace Mann to Martin and Heaton with Martin and Heaton issuing their personal checks to Smith and to Smith's attorneys.

CNA argues on appeal (1) that since there was no genuine issue as to any material fact, it, as opposed to Horace Mann, was entitled to summary judgment as a matter of law; (2) that if CNA's other insurance clause is not controlling, the clause at least cancels Horace Mann's excess clause and the loss should be prorated between the two companies; and (3) if Horace Mann is not liable on its policy, then it defended the action as a "mere volunteer" and is not entitled to maintain this action against CNA.

II

[1] We must first decide which of the two policies is primary and which is excess. The relevant provisions in the CNA policy are contained in paragraph IV(b)(1) and follow:

> IV. Exclusions
>
> . . .
>
> (b) The insurer shall not be liable to make any payment for loss in connection with any claim against the Assureds
>
> (1) which is insured by another valid policy or policies
>
> . . . .

The relevant provisions in Horace Mann policies M-3008 and M-3013 are identical and are set forth in paragraph 6 in the following language:

> If at time of loss there is other insurance available to the assured covering such loss or which would have covered such loss except for the existence of this insurance, then the Company shall not be liable for any amount other than the excess over any other valid and collectable insurance applicable to the loss hereunder.

Horace Mann's Policy No. M-4002 contains the same provision but states it in slightly different language:

> In consideration of the nominal premium charged for this policy the Company shall not be liable for any amount other than the excess over any other valid and collectable insurance applicable to the loss hereunder.

In insurance parlance, the above quoted provision in the CNA policy is a standard escape or no-liability clause, while the provisions in the Horace Mann policies quoted above are excess insurance clauses. "A basic escape clause provides that there shall be no coverage where there is other valid and collectible insurance." 8A Appleman, Insurance Law and Practice § 4910 (1981). Thus, escape clauses do not except certain occurrences from coverage; rather, they provide conditional coverage. Stated differently, "if there is no applicable primary or excess coverage, then protection does exist under the policy containing the escape clause." *Id.* at § 4906. An excess clause, on the other hand, "generally provides that if other valid and collectible insurance covers the occurrence in question, the 'excess' policy will provide coverage only for liability above the maximum coverage of the primary policy or policies." *Id.* at § 4909.

The majority rule is that when a standard escape clause (no liability clause) competes with an excess insurance clause, the carrier using the escape clause is held to be the primary insurer, and the carrier that uses the excess insurance clause is held to be the excess insurer only. *Zurich General Accident Liability Ins. Co. v. Clamor*, 124 F. 2d 717 (7th Cir. 1941); *New Amsterdam Casualty Co. v. Certain Underwriters at Lloyds of London*, 34 Ill. 2d 424, 216 N.E. 2d 665 (1966). Our Supreme Court in *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967) [hereinafter *Allstate v. Shelby*] cited with approval the majority rule set forth in *Zurich* and followed in *New Amsterdam*. The rationale for the rule is that "the policy constituting excess insurance only [does] not provide other collectible coverage so far as the no-liability clause of the other policy [is] concerned." 16 Couch on Insurance 2d, § 62.76 (1966). *See also Allstate v. Shelby*; Annot. 46 A.L.R. 2d 1163 (1956).

The majority rule is not without its exception, however, and when a super escape clause competes with an excess insurance clause, the super escape clause is usually given effect. That is, when the escape clause expressly provides "that the insurance does not apply to any loss covered by other specified types of insurance, including the excess insurance type, it has been held that the insurer whose policy so provides is absolved from liability." 16 Couch on Insurance 2d, § 62.75. Our Supreme Court is one of

the courts that have so held, although it did not label the no liability clause a super escape clause. *Allstate v. Shelby.*

In *Allstate v. Shelby,* a prospective purchaser's automobile liability policy, which provided that the policy would be excess as to a non-owned automobile, competed with a garage liability policy, issued to a dealer who was permitting the prospective purchaser to test drive the dealer's car. The dealer's policy provided that a person operating with the insured's consent was covered only if no other valid and collectable insurance, "either primary or excess," was available. Our Supreme Court held that Allstate (the prospective purchaser's insurer) was liable because it issued excess coverage insurance and the garage policy "expressly [made] the existence of such 'excess' policy an event which" prevented the garage policy from operating at all with reference to the purchaser. 269 N.C. at 351, 152 S.E. 2d at 443.

The following general principles are set forth in *Allstate v. Shelby*:

1. Parties may contract as they please, and their contract will be enforced by the court as written;

2. Escape clauses and excess insurance clauses are not like provisions that are indistinguishable from each other so as to require the loss to be prorated between the carriers;

3. When the parties contract that coverage will be precluded by the existence of other insurance, the existence of a policy with an excess insurance clause is not such an event as will set into motion the exclusionary provision in the first policy;

4. However, when the other insurance escape clause is a super escape clause and expressly provides that coverage is precluded by the existence of excess coverage, the existence of a policy with an excess insurance clause *is* an event that sets in motion the provisions in the first policy.

As stated above, our Supreme Court is not alone in upholding super escape clauses. That an insurer can, in anticipation of the possibility that an insured may have excess coverage with another insurer, expressly contract against liability when the other insurance is either primary *or excess* has been upheld in other jurisdictions. *See, for example, Continental Cas. Co. v.*

Weekes, 74 So. 2d 367 (Fla. 1954); *Cook v. Strolle*, 39 Wisc. 2d 715, 159 N.W. 2d 686 (1968); and *Davis v. DeFrank*, 33 A.D. 2d 236, 306 N.Y.S. 2d 827, *aff'd* 27 N.Y. 2d 924, 318 N.Y.S. 2d 142, 266 N.E. 2d 822 (1970). *See also* Annot. 46 A.L.R. 2d 1163 (1956). Having cited with approval the majority rule announced in *Zurich*, our Supreme Court in *Allstate v. Shelby* applied the exception to this rule solely because the Shelby Mutual policy (garage liability policy) expressly stated that the existence of an excess policy was an event which precluded coverage by Shelby Mutual because it contained the phrase, "either primary or excess."

In the case before us, CNA's policy contains a standard escape clause (not a super escape clause) while the Horace Mann policies contain standard excess insurance clauses. Based on the reasoning of our Supreme Court in *Allstate v. Shelby*, we hold that CNA's policy provides primary coverage.

III

[2] CNA also argues that (1) the duty of Horace Mann to afford the individual plaintiffs with a defense was not conditioned on its coverage being primary or excess; (2) that the individual plaintiffs incurred no cost in this action; and (3) that Horace Mann is not entitled to recover the defense cost from CNA because, if Horace Mann is not liable on its policies, then Horace Mann defended the action as a mere volunteer. On the basis of our Supreme Court's action in *Insurance Co. v. Insurance Co.*, 277 N.C. 216, 176 S.E. 2d 751 (1970) [hereinafter *Jamestown*], we summarily reject these arguments.

In the *Jamestown* case, the Court ruled that when the primary insurance carrier denies coverage and refuses to provide a defense to the insured, the excess insurance carrier may provide a defense and effect settlement and thereafter subrogate against the primary carrier to recover its expenses, at least when, as in this case, the injured party has not sued for an amount in excess of the primary coverage. The Court said that in such a situation, the excess carrier is not "such a pure volunteer as to be deprived of the right of subrogation," 277 N.C. at 222, 176 S.E. 2d at 756, because the excess carrier might be liable if the coverage question were resolved against it. The Court also observed that the primary carrier "should not be allowed to shift the burden of defense to its insured . . . or to [the excess carrier]

simply by denying coverage to [its assured]. To allow [the primary carrier] to do so would allow it to escape its obligations under its policy." 277 N.C. at 221, 176 S.E. 2d at 755.

CNA's policy did not require it to provide the individual plaintiffs with a defense, but rather obligated the individual plaintiffs to retain their own attorney and obligated CNA to reimburse the individual plaintiffs at a later date. The insuring provisions of CNA's policy (Paragraph 1(a)) provide that if a claim is made against the assureds for a "Wrongful Act," "the Insurer will pay on behalf of . . . the Assureds, . . . all loss which the said Assureds or any of them shall become legally obligated to pay." The term "loss" is defined in the policy to mean

> any amount which the Assureds are legally obligated to pay . . . for a claim or claims made against the Assureds for a Wrongful Act and shall include but not be limited to damages, judgments, *settlements and costs, cost of investigation and defense of legal actions*, . . . claims or proceedings and appeals therefrom. . . . [Emphasis added.]

CNA as the primary carrier cannot escape its liability under its policy.

On the authorities cited above, we

Affirm.

Chief Judge MORRIS and Judge ARNOLD concur.

ROY E. McKEE, EMPLOYEE v. CRESCENT SPINNING COMPANY, EMPLOYER, AND THE TRAVELERS INSURANCE COMPANY, CARRIER

No. 8110IC159

(Filed 17 November 1981)

1. Master and Servant § 68— workers' compensation—occupational disease—contributing factors

In a workers' compensation case where the evidence showed that plaintiff's chronic bronchitis and byssinosis were related to plaintiff's exposure to cotton dust, it was of no consequence that the Commission failed to find that the plaintiff's chronic bronchitis was a contributing factor to his disability.

2. Master and Servant § 68— occupational disease—claim not barred by notice provisions

The Workers' Compensation Act contemplates that two events must occur before a worker's compensation claim ripens and the notice provisions of G.S. 97-22 and G.S. 97-58 are triggered: (1) injury from an occupational disease; and (2) disability. Therefore, plaintiff met the first precondition of his claim where the evidence showed that plaintiff worked with defendant until 22 December 1971, that prior to that time he had been informed by doctors that he had a "breathing problem" and "brown lung," but that plaintiff was unaware that his breathing difficulty was connected with his exposure to cotton dust until August of 1978 and where he gave notice to his employer of a claim on 22 May 1978, and he met the second precondition when he could work and earn wages no longer in December 1971.

APPEAL by defendants from the Opinion and Award of the North Carolina Industrial Commission entered 2 September 1980. Heard in the Court of Appeals 17 September 1981.

Plaintiff filed a claim for workers' compensation benefits with the Industrial Commission on 22 May 1978. At the hearing before Deputy Commissioner Lawrence B. Shuping, Jr., plaintiff's testimony tended to show that he had dropped out of school in the ninth grade and worked in cotton mills for 37 years thereafter. Plaintiff smoked cigarettes for nine years but quit at age 27 when told the mill "didn't allow you to smoke." For the past six or seven years he was employed by defendant Crescent Spinning Company. Plaintiff developed health problems and was advised by physicians in 1966 that he had a "breathing problem," and in 1970 that he had "brown lung." However, neither physician explained the cause of the disease. Plaintiff continued working until 22 December 1971. One week before his layoff, a physician advised plaintiff that he had a "breathing problem." Sometime in 1978 another physician told plaintiff he had "chronic obstructive lung disease," but at that time plaintiff was unaware that his breathing difficulty was connected with his exposure to cotton dust.

Dr. T. Reginald Harris testified that he examined plaintiff in August 1978 and diagnosed plaintiff's condition as severe obstructive lung disease causing a substantial reduction in lung capacity. He further testified that plaintiff's activities had been reduced to "feeding, clothing himself, riding in an automobile and walking short distances in the house and outside at a slow rate." Dr. Harris concluded that plaintiff "probably does have byssinosis;"

however, he also testified that "McKee has a chronic obstructive lung disease, byssinosis, probable, but there is present chronic bronchitis." Dr. Harris stated that plaintiff's pulmonary disease was caused by his exposure to cotton dust, but he could not say the occupational exposure was the only factor involved. He further testified that the byssinosis and the chronic bronchitis contributed to plaintiff's permanent disability.

On 18 December 1979 Deputy Commissioner Shuping entered his Opinion and Award, concluding that plaintiff contracted byssinosis as a result of his exposure to cotton dust in his employment, that byssinosis is an occupational disease, that plaintiff's claim was timely filed, and that plaintiff was entitled to compensation. On 2 September 1980 the Full Commission entered its Opinion and Award, adopting entirely the conclusions of the deputy commissioner. Defendants appealed.

Frederick R. Stann for Roy E. McKee, plaintiff-appellee.

Boyle, Alexander, Hord & Smith, by B. Irvin Boyle, for Crescent Spinning Company and The Travelers Insurance Company, defendant-appellants.

HILL, Judge.

[1] Our review of an award by the Industrial Commission is limited to two questions: (1) whether the Commission's findings are supported by competent record evidence; and (2) whether those findings justify the Commission's conclusions of law. *Inscoe v. DeRose Industries,* 292 N.C. 210, 232 S.E. 2d 449 (1977); *Walston v. Burlington Industries,* 49 N.C. App. 301, 271 S.E. 2d 516 (1980). In their first two assignments of error defendants argue that the Commission erred in its finding that plaintiff's byssinosis was the cause of his pulmonary disease because of evidence that chronic bronchitis was present when the byssinosis first was diagnosed. Defendants assign as error the Commission's failure to conclude that plaintiff's byssinosis was secondary to his chronic bronchitis, contending chronic bronchitis was the disabling factor and is not attributable to plaintiff's employment. We do not agree.

There is no evidence to support defendants' contention that plaintiff's byssinosis was secondary to his chronic bronchitis.

Defendants apparently draw their conclusion from Dr. Harris's testimony that "Mr. McKee has a chronic obstructive lung disease, byssinosis, probable, but there is *present* chronic bronchitis. I was positive of the bronchitis and in my opinion there was a probability of byssinosis." (Emphasis added.) There is, however, plenary evidence that plaintiff's "chronic obstructive lung disease"—both chronic bronchitis and byssinosis—was related to his employment; Dr. Harris's medical report, stipulated into evidence by the parties, so states. Since the evidence shows that both types of "chronic obstructive lung disease" were related to plaintiff's exposure to cotton dust, it is of no consequence that the Commission failed to find that the plaintiff's chronic bronchitis was a contributing factor to his disability. We therefore overrule these assignments of error.

[2] In their remaining assignments of error, defendants argue that plaintiff's claim for benefits was barred by the notice provisions of G.S. 97-22 and 97-58. Defendants contend that notice of plaintiff's injury to his employer required by G.S. 97-22 was filed well beyond "the date that the employee [was] advised by competent medical authority that he [had an occupational disease]." G.S. 97-58(b). We do not agree and overrule these assignments of error.

The Workers' Compensation Act [the Act] contemplates that two events must occur before a workers' compensation claim ripens and the notice provisions are triggered: (1) injury from an occupational disease; and (2) disability. In *Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 144, 149 (1980), our Supreme Court determined that, "with reference to occupational diseases the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the *nature and work-related cause of the disease.*" (Emphasis added.) Thus, notification of injury in the manner quoted above is a necessary element of the claim. A finding of the date of disability also is necessary to determine which version of the Act to apply in determining benefits. *See Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). We first must determine, then, at what point plaintiff was informed of the "nature and work-related cause" of his condition.

Defendants contend that plaintiff was properly informed of his injury in 1966 when Dr. McDowell told plaintiff he had a

"breathing problem and if it didn't soon get better to get out of the mill." Defendants contend that plaintiff was further informed in 1970 when Dr. McTesson made his "brown lung" diagnosis. Merely stating one has a "breathing problem and if it didn't soon get better to get out of the mill" or a simple diagnosis of "brown lung" neither advised plaintiff of the nature nor work-related cause of his condition.

In *Singleton v. D. T. Vance Mica Co.*, 235 N.C. 315, 321, 69 S.E. 2d 707, 711 (1952), a workers' compensation claimant received a copy of a letter from his doctor stating that examination revealed " 'evidence of dust disease' " with a recommendation that the claimant " 'be transferred to some other location . . . where the dust hazard would be negligible.' " This advice was found not sufficient to give notice of silicosis, an occupational disease. *Id.* Similarly, "[i]t is not enough that the workman be told a medical name for his disease, which may be meaningless to him, without a statement of its causal relationship to an extra-hazardous occupation." *Williams v. Dept. of Labor & Industries*, 45 Wash. 2d 574, 576, 277 P. 2d 338, 339 (1954). Thus, where there is no evidence in the record that "any doctor at any time prior to the filing of the claim specifically told [the claimant], simply and directly, that his condition arose out of his employment or anything clearly to that effect," there is no proper notice of injury to the employee. *Templeton v. Pope & Talbot, Inc.*, 7 Ore. App. 119, 120-21, 490 P. 2d 205, 206 (1971). We find these cases in accord with the rule cited in *Taylor v. J. P. Stevens & Co.*, *supra*, and their results determinative of the case *sub judice.*

Plaintiff first was informed of a "breathing problem" in 1966. This diagnosis was accompanied only by an admonition to "get out of the mill"; a recommendation similar, if not less specific, than that given in *Singleton v. D. T. Vance Mica Co.*, *supra.* Plaintiff testified that in 1970 "a Dr. McTesson told me I had brown lung but he did not tell me what brown lung was. I didn't know it amounted to anything except I had it. I didn't know what caused it and the doctor never told me what caused it." We note that "brown lung" is not a "medical name" but slang terminology for byssinosis. In 1970, when this diagnosis was made, the term clearly was meaningless to plaintiff. "[O]ur legislature never intended that a claimant for workers' compensation benefits would have to make a correct medical diagnosis of his own condition prior to

notification by other medical authority of his disease in order to timely make his claim." *Taylor v. J. P. Stevens & Co., supra* at 102, 265 S.E. 2d at 149. Likewise, plaintiff cannot be expected to inquire further and discover the relationship of his condition to his employment. *Nelson v. Industrial Comm'n,* 120 Ariz. 278, 585 P. 2d 887 (1978). Plaintiff therefore was not properly informed in 1966 and in 1970 of the "nature and work-related cause" of his condition as required under G.S. 97-58(b).

As to the existence of the first precondition of plaintiff's claim, there is no bar since he gave notice thereof to his employer on 22 May 1978, almost three months before the record shows he was first informed by competent medical authority of the existence of his disease. G.S. 97-22; 97-58(b).

We now turn to a determination of the second event—disability—to decide whether the Commission erred in concluding plaintiff's claim was timely filed. G.S. 97-55 defines "disability" for occupational diseases as "the state of being incapacitated as the term is used in defining 'disablement' in G.S. 97-54." G.S. 97-54 states that for occupational disease other than asbestosis and silicosis, "disablement" is equivalent to "disability" under G.S. 97-2(9). Under the latter statute, "disability" is defined 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." G.S. 97-2(9). (Emphasis added.)

In the case *sub judice,* plaintiff was not disabled until he could work and earn wages no longer. *See Fetner v. Rocky Mount Marble & Granite Works,* 251 N.C. 296, 111 S.E. 2d 324 (1959). It was stipulated, and the Commission found as fact, that plaintiff began working for defendant-employer on 7 March 1966 and quit working 22 December 1971. We find the Commission was correct in its conclusion of law that plaintiff was disabled from the time he stopped working. Therefore, the claim was timely filed since its two elements were met in 1978 when plaintiff was properly notified by Dr. Harris of his disease.

The Commission concluded, however, that plaintiff was "disabled" as of 7 March 1971 with the exception of a week of temporary employment thereafter. Plaintiff's compensation was computed as of 7 March 1971 according to G.S. 97-29 as it existed *before* the 1971 amendment thereto, effective 1 July 1971. We

believe the record supports the Commission's finding of fact that disability occurred on the latter date, 22 December 1971, rather than on 7 March 1971. The Commission then should have applied G.S. 97-29, *as amended*, and computed plaintiff's compensation as of 22 December 1971, the day he quit working. *See* 1971 N.C. Sess. Laws, c. 281, § 1; *see also Wood v. J. P. Stevens & Co., supra.*

Since the Commission's conclusion that plaintiff's disability occurred on 7 March 1971 is not supported by the facts as found, we remand this case to the Commission for a conclusion of law consistent with the facts and a re-computation of plaintiff's award as of 22 December 1971, with the exception of the week thereafter when plaintiff was temporarily employed. For these reasons, we

Affirm in part and remand the case to the Industrial Commission for entry of a Conclusion of Law consistent with this opinion. Plaintiff's motion for attorney's fees is denied.

Judges HEDRICK and WHICHARD concur.

IN THE MATTER OF THE CUSTODY OF JOHN CHARLES PEAL, JR. AND STACY BRIAN PEAL

No. 8113SC194

(Filed 17 November 1981)

Divorce and Alimony § 25.10— modification of child custody—changed circumstances not shown

The trial court's conclusion that there had been a substantial change in circumstances so as to justify a change of custody of a nine-year-old child from its mother to its father was not supported by the court's findings concerning the child's desire to live with his brother, who was in the father's custody, the mother's leaving the child alone after school some 30 to 45 minutes, intemperate acts toward the child by the mother and maternal grandmother, or social activities involving the mother, her boyfriend and the child.

Judge CLARK dissenting.

In re Peal

APPEAL by respondent from *Wood, Judge.* Order entered in COLUMBUS County District Court on 12 September 1980. Heard in the Court of Appeals 23 September 1981.

This is a custody matter between divorced parents, in which the father moved for change of custody of Stacy Peal. The mother answered, also moving for a change in custody of John C. Peal, Jr. The trial court awarded custody of both boys to their father. Their mother has appealed from that order.

Britt & Britt, by E. M. Britt, for respondent-appellant.

Williamson, Walton & Williamson, by Benton H. Walton, III, for petitioner-appellee.

WELLS, Judge.

This appeal involves the question of whether the trial court's findings of fact support his conclusion of law that there has been a material change of circumstances as to Stacy Peal, justifying a change in custody. We hold that the trial court's findings do not support its conclusion of law and reverse.

The factual background leading to the present appeal is substantially as follows. John C. Peal and Nell R. Peal, parents of John, Jr. and Stacy, entered into a separation agreement dated 20 December 1976, in which they agreed that Nell Peal would have primary custody of both children. Problems arose between the parents. A custody order was entered by Judge Wood on 29 July 1977. In that order, Judge Wood found both parents to be fit and proper persons to have custody of the children, but found a substantial change in circumstances sufficient to award primary custody of John, Jr. to his father, petitioner in this appeal. Judge Wood awarded primary custody of Stacy to his mother, respondent in this appeal. The parties were divorced on 20 January 1978. The divorce judgment contains no reference to custody of the children.

In his petition, out of which this appeal grows, John Peal alleged that there had been a substantial change of circumstances as to Stacy, but alleged no factual basis except that Stacy had reached the age of eight. Respondent Nell Peal answered, denying a substantial change as to Stacy, asserting a substantial change

as to John, Jr., and prayed for John, Jr.'s custody during the school year.

Following an extensive hearing at which twenty-one witnesses (including both parents and both children) were heard, Judge Wood entered his order in which he made extensive findings of fact. Those pertinent to our disposition of this appeal are as follows:

> 3. That at the prior hearing of this action, the minor child, Stacy Brian Peal, did not testify nor express any desire to the Court concerning his preference for custody and residence.
>
> 4. That this Motion in the Cause in this matter filed by John Charles Peal was filed by the said John Charles Peal at the express request of the child Stacy Brian Peal who told his father that he wanted to live with him on a permanent basis and he wanted to live with his brother and he desired that his father file this Motion.
>
> 5. That in July of 1977 the said Stacy Brian Peal was five years of age and at the time of this hearing he is nine years of age. That the said Stacy Brian Peal does not have a preference as to with whom he desires to live but he has a strong desire to live with his brother, John Charles Peal, Jr. That the said child John Charles Peal, Jr. has a strong desire to live with his father, John Charles Peal and with his brother, Stacy Brian Peal.
>
> . . .
>
> 7. That the two minor children have a close relationship but the only significant time that the children now spend together is on weekend visitation.
>
> 8. That the said Stacy Brian Peal, at the time of the prior Order was not in school and since the date Order (sic) in 1977 has attended the first and second grades at the Cerro Gordo Elementary School and has attended the third grade and is now attending the fourth grade at the Chadbourn Elementary School. That John Charles Peal, Jr. also attends the Chadbourn School. That the said Stacy Brian Peal is usually left alone after school for approximately thirty to forty-five minutes from the time he gets out of school until his mother gets home from her teaching job at the Cerro Gordo School.

9. That the said Nell R. Peal has left the child, Stacy Brian Peal, with her mother when she is out of town and the mother has on at least one occasion disciplined the child by slapping him in the face.

10. That the said Nell R. Peal advised Stacy Brian Peal that the FBI from Fayetteville would come with fire in their eyes to get him unless he told the Court he wanted to live with her.

11. That on one occasion the said Nell R. Peal and her boyfriend, Jimmy Strickland, and the minor child, Stacy Brian Peal, went to Ocean Isle Beach flounder gigging and spent the night, with the said Stacy Brian Peal sleeping in the van of Jimmy Strickland.

12. That the said Nell R. Peal has also taken the minor child, Stacy Brian Peal, to the home of her boyfriend, Jimmy Strickland, which is not more than ten miles from her home and has spent the night to watch the stars with the said Jimmy Strickland and his mother.

These findings of fact are supported by competent evidence, and are therefore conclusive on appeal. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974). The question we must resolve, therefore, is whether these findings support the trial court's judgment. Our appellate courts have consistently held that the person seeking a change in a child custody order bears a heavy burden of showing such a substantial change of circumstances *as will affect the welfare of the child.* The principle was well stated by our Supreme Court in *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968):

> A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Accord Tucker v. Tucker, 288 N.C. 81, 216 S.E. 2d 1 (1975). *See also Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429 (1980), *disc. rev. denied*, 301 N.C. 87, --- S.E. 2d --- (1980). *Pritchard v. Pritchard*, 45 N.C. App. 189, 262 S.E. 2d 836 (1980).

Findings of fact set out in paragraphs 3, 4, 5, and 7 relate to Stacy's preference as to where he lives. These findings indicate that Stacy has no preference, but has expressed his desire to live with his father and brother. We note here that the evidence shows that Stacy also expressed his desire to live with his mother. While our appellate courts have held that preferences of children should be given consideration by the trial court in custody proceedings, *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132 (1969) (and cases discussed and cited therein), such a preference is only one factor for the court's consideration. While being of considerable weight, such an expressed preference is not sufficient alone to justify a change of custody. Certainly the findings in this case do not suggest that Stacy's welfare is being adversely affected by his inability to live with either parent or with his brother. Unfortunate though it may be that these two brothers living so close to each other cannot live together in the same household, we cannot agree that these findings of fact support the trial court's judgment.

The findings contained in paragraph 8 reflect no circumstances which taken alone show such a change in Stacy's circumstances as would endanger or threaten his welfare. Chadbourn is a small city in North Carolina, where a healthy ten year old boy should be reasonably secure while left alone for thirty to forty-five minutes in his own home in the afternoon. These findings do not support the trial court's judgment.

The findings in paragraphs 9 and 10 reflect intemperate acts on the part of Stacy's mother and maternal grandmother, but do not give rise to a reasonable conclusion that his welfare was adversely affected by these acts. These findings do not support the trial court's judgment.

The findings in paragraphs 11 and 12 relate to social activities on the part of Stacy's mother which show no adverse impact on Stacy's welfare. They do not support the trial court's judgment.

For the reasons we have stated, the judgment of the trial court must be and is

Reversed.

Chief Judge MORRIS concurs.

Judge CLARK dissents.

CLARK, Judge, dissenting.

Judge Wood, Chief District Judge of the Thirteenth Judicial District, presided over this custody trial; and after hearing and seeing twenty-one witnesses over a period of two days, ordered that the custody of Stacy Peal, aged 9, be changed from the mother to the father, and that the father retain custody of Stacy's older brother, John Charles. Judge Wood had also presided over the original custody trial between the parents in July 1977.

This court must indulge a presumption in favor of the validity of Judge Wood's custody order. It is a well-established principle that the trial judge's findings of fact in custody orders are binding on the trial courts if supported by competent evidence. *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974); *King v. Allen*, 25 N.C. App. 90, 212 S.E. 2d 396, *cert. denied*, 287 N.C. 259, 214 S.E. 2d 431 (1975). Judge Wood made findings of fact. In my opinion the findings of fact clearly establish that the trial judge considered and found several substantial factors which had changed since the 1977 hearing, including the following:

1. *Preference of the child.* The court found that Stacy preferred to stay with his father. This is entitled to considerable weight, particularly so in this case because Stacy wanted to be with both his father and older brother. The court found that the father's motion for custody was based on Stacy's preference. The majority points out that at his second appearance as a witness Stacy testified that he preferred to stay with his mother. It should also be noted that in this appearance Stacy also testified that his mother told him the F.B.I. from Fayetteville would come and get him with fire in their eyes if he did not want to live with her. The trial court's finding of preference is supported by the evidence and is binding on this Court.

2. *Increase in age.* The original custody trial, when custody was awarded by Judge Wood to the mother, was in 1977 when Stacy was five years old. At that time Stacy was not attending school. At the time of this hearing he was in the fourth grade. The trial court obviously recognized that these were critical years in the young boy's life with significant changes in his biological and intellectual horizons. It is also significant that in this order Judge Wood found that at the 1977 trial it was his opinion that the father should have custody of both boys except for Stacy's tender age.

The majority opinion also recognizes findings of intemperate acts by the mother and grandmother and social activities by the mother with her boyfriend, but these findings are discounted in the majority opinion with the observation that they did not adversely affect Stacy. These and other findings of fact were determined to relate to the welfare of the child and were obviously considered by the trial judge in adjudging the child's best interest.

It is noted that the trial court denied the mother's motion to stay its custody order. The mother has not moved in this Court for a stay or supersedeas. I assume, therefore, that Stacy has been in the custody of his father since the order was entered on 7 October 1980. The majority opinion results in the immediate return of Stacy, after a year with his father and older brother, to his mother under custodial circumstances not now known to the Court.

In child custody cases when the trial judge has heard and seen the witnesses, the contesting parents, and the child, and has awarded custody which he finds is in the best interest of the child, it is particularly important that the appellate courts recognize the presumption of validity and avoid any semblance of judicial imperialism.

BEVERLY DENISE GREEN v. THOMAS MICHAEL GREEN

No. 8110DC93

(Filed 17 November 1981)

1. **Divorce and Alimony § 25.11— child custody—insufficient evidence to support judge's finding**

When the court finds that both parties are fit and proper persons to have custody and then adjudges that it is in the best interest of the child for the father to have custody, such holding will be upheld if it is supported by competent evidence. However, in this case the record leads to the conclusion that some of the findings of fact are not supported by competent evidence, and the remaining findings of fact are not sufficient to support the conclusion that it was in the child's best interest that her custody be awarded to her father. Further, the trial court failed to resolve important questions raised by the evidence which bore directly on the best interest of the child, while making certain material findings in favor of the defendant that were not supported by the evidence.

2. **Divorce and Alimony § 25.1— lack of conclusion finding father "a fit and proper person to have custody"—no error**

It was not error for the court to fail to conclude that defendant was "a fit and proper person to have custody" as the conclusion of law determinative of the custody issue is not that the person gaining custody is a fit and proper person to have custody, but which party will best promote the interest and welfare of the child.

APPEAL by plaintiff from *Sherrill, Judge.* Judgment entered 22 August 1980 in District Court, WAKE County. Heard in the Court of Appeals 2 September 1981.

In an action for absolute divorce, plaintiff-wife sought custody of the minor child born to the marriage, Kelly Phoenix Green, and child support. Plaintiff stated in her complaint that during the parties' separation the child lived with her and that the defendant had failed to provide adequate support for the child. Defendant in his answer requested a full hearing on the matter of custody and support.

The evidence tends to show that during the marriage, the plaintiff was primarily responsible for the care of the child and the household, but that defendant also took care of the child and shared most domestic responsibilities. Defendant stated that he completed two years of college work during the marriage, but withdrew from school upon the couple's separation. His testimony

indicates that he was working at the time of this action as an electrical technician at a salary of $13,000 per year. He stated that he lives in a two bedroom apartment in Greensboro. Plaintiff averred that she, the child, and a man reside in a two bedroom duplex apartment in Raleigh. The man with whom plaintiff lives is an automobile mechanic, provides support for plaintiff and her child, and has a good relationship with the child. The child by all indications, is bright, clean, happy, healthy, and, with the aid of babysitters, protected and supervised at all times. The evidence indicates that plaintiff is a good and loving mother.

Defendant indicated his intention to enroll the child in a pre-kindergarten day care center in Greensboro. He testified that his mother, a nurse, lives approximately 30 miles from defendant's Greensboro residence.

After a hearing, the court entered the judgment awarding custody of the daughter to defendant-husband with visitation rights to plaintiff. Both plaintiff and defendant were found to be fit to have custody of the child, but the court found that the best interest and welfare of the child required that she be placed with her father. Plaintiff has appealed to this Court.

Donald H. Solomon for plaintiff appellant.

Thomas M. Green, defendant appellee.

MORRIS, Chief Judge.

G.S. 50-13.2(a) provides that an order for custody of a minor child "shall award the custody of such child to such person, . . . as will, in the opinion of the judge, best promote the interest and welfare of the child." This provision codified the rule declared many times by the North Carolina Supreme Court that in custody cases the welfare of the child is the polar star by which the court's decision must be governed. *In re Cox*, 17 N.C. App. 687, 195 S.E. 2d 132, *cert. denied* 283 N.C. 585 (1973); *In re Custody of Pitts*, 2 N.C. App. 211, 162 S.E. 2d 524 (1968). The judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will best promote the interest and welfare of the child. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977); *Blackley v. Blackley*, 285 N.C. 358, 204 S.E. 2d 678 (1974).

While the welfare of the child is always to be treated as the paramount consideration, *Blackley v. Blackley,* supra; *Stanback v. Stanback,* 266 N.C. 72, 145 S.E. 2d 332 (1965); *Thomas v. Thomas,* 259 N.C. 461, 130 S.E. 2d 871 (1963), wide discretionary power is vested in the trial judge. *Blackley v. Blackley,* supra; *In re Moore,* 8 N.C. App. 251, 174 S.E. 2d 135 (1970); *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967); *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966). The normal rule in regard to the custody of children is that where there is competent evidence to support a judge's finding of fact, a judgment supported by such findings will not be disturbed on appeal. *Powell v. Powell,* 25 N.C. App. 695, 214 S.E. 2d 808 (1975); *Brooks v. Brooks,* 12 N.C. App. 626, 184 S.E. 2d 417 (1971); *Swicegood v. Swicegood,* supra; *see Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133 (1953). The facts found must be adequate for the appellate court to determine that the judgment is substantiated by competent evidence, however. *Montgomery v. Montgomery,* supra; *Savage v. Savage,* 15 N.C. App. 123, 189 S.E. 2d 545 (1972), *cert. denied,* 281 N.C. 759, 191 S.E. 2d 356 (1972); *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967).

[1] The crucial question presented by this appeal is whether the evidence adduced supports the findings of fact by the trial court and whether those findings form a valid base for the conclusion of law. "[W]hen the court fails to find facts so that this court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby,* supra, at 238-39, citing *Swicegood v. Swicegood,* supra. We find that neither the record nor the findings of fact is sufficient satisfactorily to show that the order in this case is supported by the evidence.

There is lack of proof in support of the judge's finding that "[b]oth parties have a basically adequate plan for the care of the minor child." There is abundant evidence to show that plaintiff had a specific and workable plan for the care and supervision of the child. Defendant, on the other hand, indicated only that he would enroll the child in a pre-kindergarten and that he knew of such a facility near his home. There is no evidence that he had made inquiry at that or any other day care center. Unlike plaintiff, defendant has not indicated the existence of any comprehen-

sive babysitting arrangement even though he works some weekends. Nor is there any evidence to support the judge's finding of fact that "[d]efendant's mother . . . is willing and capable of providing assistance in caring for the child." The only evidence with regard to defendant's mother was that she lives approximately 30 miles from defendant and is a nurse. Although implicit in the court's finding, there is no concrete indication that she assented to take a part in the care of the child or to what extent she was willing to contribute to the youngster's nurture. It follows, based on the evidence adduced, that there is no support for the judge's finding that "[d]efendant's plan for day care for the minor child while he is working is preferable to the plaintiff." Apropos is *Darden v. Darden*, 20 N.C. App. 433, 201 S.E. 2d 538 (1974), in which lack of evidence as the defendant's child care arrangements was a significant element in this court's remand of a decision that granted custody to the defendant.

The trial court found that "[b]ased on the findings of fact above, both the plaintiff and defendant are fit to have custody of Kelly," but found further that the defendant could best promote the interest and welfare of the child. When the court finds that both parties are fit and proper persons to have custody, as it did here, and then adjudges that it is in the best interest of the child for the father to have custody, such holding will be upheld. But it must be supported by competent evidence. *See Griffith v. Griffith*, 240 N.C. 271, 81 S.E. 2d 918 (1954); *Grafford v. Phelps*, 235 N.C. 218, 69 S.E. 2d 313 (1952); *McEachern v. McEachern*, 210 N.C. 98, 185 S.E. 684 (1936). Our examination and consideration of the record leads us to the conclusion that the findings of fact set out above are not supported by competent evidence, and that the remaining findings of fact are not sufficient to support the conclusion that it was in the child's best interest that her custody be awarded to her father.

The trial judge indicated in his findings that plaintiff's paramour had been living with the plaintiff and minor child since the parties' separation. Such adulterous conduct alone is insufficient to determine custody. The court must consider all the facts of the case and decide the issue in the best interests of the child. *Blackley v. Blackley*, supra; *Paschall v. Paschall*, 21 N.C. App. 120, 203 S.E. 2d 337 (1974). "[T]he findings bearing on the party's fitness to have care, custody and control of the child and the find-

ings as to the best interests of the child must resolve all questions raised by the evidence pertaining thereto." *In re Kowalzek*, 37 N.C. App. 364, 370, 246 S.E. 2d 45, 48 (1978), cert. denied, 295 N.C. 734, 248 S.E. 2d 863 (1978). We have said that the trial judge is not required to find all the facts shown by the evidence, but only enough *material* facts to support the judgment. *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971). In the case at bar, however, the judge's findings ignored relevant evidence regarding defendant's lack of visitation with the child, the plaintiff's devotion to the child, the amount of support provided by defendant, alleged physical assault by defendant upon plaintiff, and plaintiff's intention to marry the man with whom she lives. The trial court thus failed to resolve important questions raised by the evidence which bear directly on the best interests of the child, while making certain material findings in favor of the defendant that are not supported by the evidence.

[2] Plaintiff assigns as error a lack of conclusion of law that defendant was "a fit and proper person to have custody." We find no merit in this contention. "A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties." *Montgomery v. Montgomery*, supra at 157, 231 S.E. 2d 28-29. The matter at issue is custody. To support an award of custody, the judgment of the trial court should contain findings of fact which sustain the conclusion of law that custody of the child is awarded to the person who will "best promote the interest and welfare of the child." G.S. 50-13.2(a); *Blackley v. Blackley*, supra; *Williams v. Williams*, supra. The conclusion of law determinative of the custody issue is not, therefore, that the person gaining custody is a fit and proper person to have custody, but which party will best promote the interest and welfare of the child. Indeed, the trial court stated separately from the findings of facts, that "as a matter of law . . . it would be in the best interest of the minor child that Thomas Green have custody."

Evidence must bolster the trial court's findings, the findings must support the conclusions, and the conclusions must support the judgment. When the findings that are insufficiently supported are set aside, we perceive very little to buttress the judgment in this case. A new hearing is necessary in order that the court may make detailed findings with respect to the question of whether

the award of custody to the plaintiff or defendant will best promote the interest and welfare of the child.

Because of our conclusion that the facts found by the trial court are insufficient to sustain the award of custody in this case, we do not reach the question of whether the trial judge abused his discretion by failing to grant plaintiff's motion to amend the findings of fact pursuant to Rule 52(b) or for a new trial under Rule 59(a)(4) and (7) or Rule 60(b)(3). Nor do we discuss appellant's assignment of error with respect to alleged failure of the court and the defendant to comply with some of the jurisdictional requirements of G.S. 50A, the Uniform Child Custody Jurisdiction Act. We note that defendant has chosen to act for himself in this litigation without benefit of counsel.

Vacated and remanded.

Judges CLARK and WELLS concur.

STATE OF NORTH CAROLINA v. BILLIE GAUTHER PUCKETT

No. 8117SC511

(Filed 17 November 1981)

1. **Criminal Law § 166— the brief—statement of case—citation of authority**

Defendant's appeal is subject to dismissal for failure to comply with Appellate Rule 28(b)(2) and (3) where defendant's brief did not include a concise statement of the case and did not cite any authority or statute for the arguments therein.

2. **Criminal Law § 54— expert pathologist—drugs in deceased's body—exclusion of testimony**

The trial court properly excluded the testimony of an expert in the field of pathology relating to drugs found in the body of deceased where the witness was never qualified as an expert in the field of toxicology and he indicated that the toxicology examination was done by someone else not under his supervision.

3. **Criminal Law § 169.6— failure of record to show excluded testimony**

An exception to the exclusion of evidence cannot be sustained when the record fails to disclose what the witness would have testified had he been permitted to answer.

4. Homicide § 19.1— acts of violence by deceased—inadmissibility

The trial court in a homicide case properly excluded testimony concerning specific acts of violence of the deceased where there was no evidence that defendant had knowledge of such acts.

5. Criminal Law § 117.2— interested witness—failure to give requested instruction

Where a witness in a homicide case who testified that defendant talked about killing deceased and thought she could do it without going to prison also testified that she was aware that if defendant was convicted, the witness's child would receive all of deceased's estate, the trial court erred in failing to give defendant's requested instruction that the witness was interested in the outcome of the case and that her testimony should be scrutinized accordingly.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 8 August 1980 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 23 October 1981.

The defendant was indicted for the murder of her husband. A jury found her guilty of voluntary manslaughter and she was sentenced to three years imprisonment.

The defendant's evidence tended to show that when her husband came home on the afternoon of 28 November 1979, he was under the influence of drugs. He accused the defendant of running around on him. He pointed a gun in her face and cocked and uncocked the gun, telling the defendant that if she did not tell the truth, he would kill her. The deceased hit the defendant and threatened to smash in her skull. Her testimony continued as follows:

> I don't know how much time passed, but he kept pacing up and down and he told me that he was going to tie me to the bed. He said I was going to regret what happened. He never said exactly what. He just indicated that it would be something that I would not really like at all. There was another knock at the door. I said, "We are going to have to answer the door." He said, "I'll answer it, but if you come out of this bedroom, I'll kill you." Then he slipped on his jeans and I said, "I'm going to put my clothes on too." I jumped up and I put on my jeans and I put on my bra. He had put the gun back into the closet and my clothes were right there in front of the closet. I picked up the gun and walked out in the hall. I got up there and there was no one in there but Harold.

He saw me with the gun and he ran toward me and I tried to cock it. It's a revolver. I tried to cock it and it went off and I though it had hit him and I screamed, "Oh, my God, Have I shot you?" When he saw that I didn't mean to shoot him and it had scared me probably more than it scared him, he started toward me again. Then I cocked it and I said, "All I want is to get out of the house. If you'll just let me get out of the house, just go into the yard, let me leave." I was terrified. I was afraid to walk past him because I knew if I did he would take the gun away from me and shoot me. That's why I wanted to get him to go out into the yard. He said, "Hell no, you are going to have to shoot me in the back first." He turned and went into the bedroom that all the guns are in, and there must have been five or six big boxes of ammunition in there too, knives. The next thing I knew he had been shot. I don't recall pulling the trigger. I don't even recall hearing it go off. I do remember the first one. But I just knew he had been hit. He must have hollered or something. I ran out the door and I screamed for Wes. When he was going into the room, I thought he was going to get one of those guns that were in there, because there is no way out. He told me that I would not get out of that trailer. There is no way out from that room.

The defendant's evidence further tended to show that the defendant called an ambulance immediately after the shooting and that she tried to resuscitate the deceased. There was evidence tending to show that the deceased had a reputation as a violent and dangerous person and that he had subjected the defendant to physical abuse over an extended period of time.

Other facts pertinent to the resolution of this appeal are contained in the opinion of the Court.

Attorney General Edmisten by Assistant Attorney General Nonnie F. Midgette for the State.

D. Leon Moore for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant's appeal is subject to dismissal for failure to comply with the North Carolina Rules of Appellate Procedure. Rule

28(b)(2) and (3) provides in pertinent part that the appellants' briefs shall contain:

> (2) A concise statement of the case.
>
> (3) An argument. This shall contain the contentions of the appellant with respect to each question presented together with citations of the authorities, statutes, and those portions of the record on appeal upon which he relies.

By application of this Rule, defendant has abandoned her entire appeal, as counsel for defendant did not present a concise statement of the case and did not cite a single authority or statute for the arguments in her brief. Although the questions presented by this case have persuaded us in the interests of justice and in our discretion, as permitted by Rule 2, N.C. Rules App. Proc., to waive the procedural errors present, we again emphasize to the practicing bar that the Rules of Appellate Procedure are mandatory upon all parties before this Court. A thorough understanding of the Rules is essential for competent representation of clients in the Appellate Courts.

[2] The defendant assigns as error the failure of the trial court to allow Dr. Anthony Macri to testify about the result of the toxicologic analysis of the deceased's body. Dr. Macri testified as an expert in the field of pathology and he indicated that the toxicology examination was done by someone else not under his supervision. Dr. Macri was never qualified as an expert in the field of toxicology. "A finding by the trial judge that a witness is not qualified to testify as an expert as to a particular matter will ordinarily not be reversed on appeal, unless there is abuse of discretion or the ruling is based on an erroneous view of the law." *State v. Peterson*, 24 N.C. App. 404, 408, 210 S.E. 2d 883, 885-86 (1975); 1 Stansbury's N.C. Evidence § 133 (Brandis Rev. 1973). We find no abuse of the trial court's discretion in excluding the testimony of Dr. Macri relating to drugs in the body of the deceased.

[3] The defendant next assigns as error the failure of the trial court to allow the decedent's father to be questioned about the way in which the deceased treated the defendant. Th trial court sustained the State's objection to these questions. When an objection to a specific question is sustained, this normally means that

the answer the witness would have given should be made a part of the record. 1 Stansbury's N.C. Evidence § 26 (Brandis Rev. 1973). An exception to the exclusion of evidence cannot be sustained when the record fails to disclose what the witness would have testified had he been permitted to answer. *State v. Fletcher* and *State v. Arnold*, 279 N.C. 85, 181 S.E. 2d 405 (1971). Because the record fails to disclose what the witness's answers would have been, this assignment of error is without merit and is overruled.

The defendant's fourth assignment of error concerns the failure of the trial judge to permit questions of the investigating officer about statements made by the defendant at the scene. In her fifth assignment of error, defendant argues that the trial court should have allowed the decedent's first wife to be questioned about her previous relationship with the decedent. In both of these instances, the record does not disclose what the witnesses' answers would have been had they been allowed to testify. For the above stated reason, these assignments of error are without merit and are overruled.

[4] The defendant further contends that the trial court erred in failing to permit Terry Stephen Johnson to testify concerning specific acts of violence of the deceased. We disagree.

Where there is evidence of self-defense, the general character of the deceased as a violent and dangerous man is competent. Evidence of specific acts of violence, however, which have no connection with the homicide is not admissible. *State v. Morgan*, 245 N.C. 215, 95 S.E. 2d 507 (1956). In *State v. Davis*, 259 N.C. 138, 129 S.E. 2d 894 (1963), the defendant was not allowed to introduce evidence that the deceased had assaulted certain persons in order to establish the dangerous and violent character of the deceased. Evidence of specific acts of violence may be admitted only when the defendant knew of them and when the point in issue is the reasonableness of the defendant's apprehension. *Nance v. Fike*, 244 N.C. 368, 93 S.E. 2d 443 (1956).

Here there is no evidence in the record that the defendant knew of the incident which was excluded from evidence. Mr. Johnson testified about the dangerous and violent reputation of the deceased. His testimony regarding specific acts of violence was properly excluded.

[5] The defendant also assigns as error the failure of the trial judge to charge the jury that Carol Cox was an interested witness. The judge gave a general instruction on witness credibility but failed to give the requested instruction that "Carol Cox is an interested witness, interested in the outcome of this case and that her testimony should be scrutinized accordingly."

An instruction to scrutinize the testimony of a witness on the grounds of interest or bias relates to a subordinate feature of a criminal case, and the trial court is not required to charge as to such matters in the absence of a request for special instructions. *State v. Sealey*, 41 N.C. App. 175, 254 S.E. 2d 238 (1979). N.C. Gen. Stat. § 1-181 requires that a request for special instructions be in writing, signed by counsel submitting them and submitted to the trial court before the charge to the jury is begun. Although the defendant's motion misstated the record, she complied with the requirements of N.C. Gen. Stat. § 1-181.

The trial court is not required to give a requested instruction in the exact language of the request; however, when the request is correct in law and supported by the evidence in the case, the court must give the instructions in substance. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976). It is error for the court to change the sense or to so qualify the requested instruction as to weaken its force. *Lloyd v. Bowen*, 170 N.C. 216, 86 S.E. 797 (1915); *Brink v. Black*, 77 N.C. 59 (1877).

In this case Carol Cox testified that "I am aware that if Marie is convicted of anything, my child will not just share in the estate but receive all of it." Cox testified that the defendant had talked about killing her husband and that defendant thought she could do it without having to serve any time in prison. This testimony is damaging to the defendant.

While there is no error if the trial judge gives the requested instructions in substance, the general credibility instructions on the facts of this case are not substantially the same as the requested instructions. Carol Cox, through her minor son, had a substantial pecuniary interest in the outcome of this case and her testimony was harmful to the defendant.

As the Court stated in *State v. Griffin*, 280 N.C. 142, 144, 185 S.E. 2d 149, 151 (1971) concerning jury instructions, "[t]here is no

hard and fast form of expression, or consecrated formula, required, but the jury should be instructed that, as to the testimony of . . . parties interested in the case and defendants, that the jury should scrutinize their testimony in light of that fact; but if after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested." (Citation omitted.)

The failure to give the requested instructions constituted prejudicial error. The defendant was convicted of voluntary manslaughter, which is an unlawful killing, done without malice and without premeditation or deliberation. Voluntary manslaughter is defined as an intentional killing. *State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). Carol Cox's testimony tends to show that defendant deliberately killed the deceased. Thus the court's failure to give the requested jury instruction constituted not only error, but prejudicial error, entitling the defendant to a new trial.

We do not consider defendant's remaining assignments of error because they may not recur on retrial.

New trial.

Judges WEBB and WELLS concur.

LILLIAN S. HARRELL, EXECUTRIX OF THE ESTATE OF LOUIS F. HARRELL, DECEASED, EMPLOYEE, PLAINTIFF v. J. P. STEVENS & COMPANY, INC. EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC254

(Filed 17 November 1981)

1. Master and Servant § 68— noncompensable heart disease causing total incapacity—denial of claim proper

The Commission was justified in finding that the claimant failed to prove disability resulting from an occupational disease where there was evidence that plaintiff's noncompensable heart disease in itself and absent any occupational disease was sufficient to cause total incapacity for work.

2. Master and Servant § 94.4— rehearing by Commission—refusal to receive new evidence

According to G.S. 97-85, it is within the Commission's discretion whether to receive further evidence, and absent a showing of abuse of discretion, the appellate court will not review the Commission's decision.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 29 September 1980. Heard in the Court of Appeals 15 October 1981.

On 19 July 1976, plaintiff (now deceased) filed notice of an accident and claim with the Industrial Commission alleging that his exposure to cotton dust for thirty-seven years prior to 28 June 1976 had caused him to contract an occupational disease, byssinosis, which rendered him totally permanently disabled.

On 19 June 1978, a Deputy Commissioner denied plaintiff's claim. She entered an opinion and award concluding that plaintiff's total disability arose from a heart condition unrelated to his employment. The Full Commission affirmed the denial on 15 December 1978 by a 2-1 decision. Plaintiff then appealed to this Court pursuant to G.S. 97-86. *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 262 S.E. 2d 830 (1980).

After a review of the testimony presented at the Commission hearing, the Court listed the findings of fact made by the Deputy Commissioner. The Court concluded that the Commission had failed to make sufficient definitive findings to determine the critical issues raised. The opinion highlighted Finding of Fact No. 15 in which one doctor's testimony was said to have been discounted. The opinion emphasized that the Commission's function was to consider *all* of the evidence. *West v. Stevens*, 6 N.C. App. 152, 156, 169 S.E. 2d 517, 519 (1969).

On remand, the Deputy Commissioner again denied plaintiff's claim. Except for the portions we now set out in brackets, the findings are identical to those made in the earlier award as reported in *Harrell, supra*, at 202-204, at 833-35, and all of them need not be repeated here.

"Findings of Fact

. . .6. In September, 1972, decedent complained to Dr. Brown of a cough. Dr. Brown's impression was that decedent had an

acute respiratory infection. The condition responded to treatment and in December, 1972, the condition had cleared.

From that time until 1974, decedent would have flare-ups of acute bronchitis treated by Dr. Brown.

[From competent credible evidence, the undersigned finds that until 1974, decedent's respiratory difficulties were *acute* in nature and were not *chronic* as is characteristic of a patient who is developing byssinosis.]

9. On July 26, and again on August 12, 1976, plaintiff was examined by Dr. M. K. Topolosky, a pulmonary medicine specialist at Duke University Medical Center. Decedent's complaints were shortness of breath and chest pains and he gave Dr. Topolosky a history indicating that he had these problems both in and out of the work environment. Dr. Topolosky was of the opinion that decedent had moderate to severe chronic obstructive pulmonary disease, but that his major disabling factor was his heart.

[From competent credible evidence, the undersigned finds that as of August 12, 1976, decedent's disabling condition was as a result of heart condition.]

15. Decedent saw Dr. Kunstling of Raleigh on the order of the Industrial Commission on June 30, 1977. [Dr. Kunstling is one of the so-called "panel" of experts who are especially designated to seek referral of byssinosis claims. Dr. Kunstling's expertise is well-recognized in this field.

History in diagnosing a case of byssinosis is obviously important as indicated by Dr. Kunstling. The history the decedent gave to Dr. Kunstling on which he based his diagnosis of byssinosis is in conflict with complaints that decedent gave contemporaneously to Drs. Brown, Maddrey, Whalen, and Topolosky. Decedent saw Dr. Kunstling for the purpose of evaluating a claim he had made that he had contracted byssinosis in his employment with defendant employer. Decedent's evaluation by these other Doctors was done at the time of decedent's illnesses and presumably he was giving an accurate history of his problems. Because decedent's respiratory problems were acute rather than chronic in nature, because the smoking history he gave Dr. Kunstling

was found to be erroneous by the undersigned from competent credible evidence, because the seriousness of decedent's heart condition and its possible effect as well as the effect of obesity upon his breathing problems is [sic] found to be much more serious than decedent related to Dr. Kunstling, the undersigned attaches very little weight to Dr. Kunstling's diagnosis of byssinosis in this case. The Doctor based his diagnosis upon a certain history which he was given by the decedent. When the underpinnings of that history are eroded away by other evidence in the case, then the opinion that decedent had byssinosis is also eroded away.

[In weighing all of the evidence in the record as a whole and with the findings as before mentioned in this case, the undersigned ataches very little weight to Dr. Kunstling's diagnosis in this particular case.]

16. Decedent's total disability is a result of his heart condition. Decedent's heart condition is unrelated to decedent's exposure to cotton dust and lint in his employment.

17. Decedent has failed to carry his burden of proof that he is disabled as a result of an occupational disease arising out of and in the course of his employment with defendant employer.

Conclusion of Law

Decedent does not suffer from an occupational disease arising out of and in the course of his employment with defendant employer."

Plaintiff appealed to the Full Commission and moved for rescission of the opinion and award and an opportunity to present additional evidence. By its order filed 29 September 1980, the Commission affirmed the deputy's award and denied plaintiff's motions.

Hassell and Hudson, by Charles R. Hassell, Jr., for plaintiff appellant.

Maupin, Taylor and Ellis, by Richard M. Lewis and David V. Brooks, for defendant appellees.

VAUGHN, Judge.

Plaintiff's appeal challenges the sufficiency of evidence to support a denial of his claim to compensation. We hold there is sufficient evidence to support the Commission's order.

We note at the outset that provisions of North Carolina's Administrative Procedure Act do not govern awards of the Industrial Commission. G.S. 150A-1(a). The applicable scope of review is found in G.S. 97-86: "[A]n award of the Commission . . . shall be conclusive and binding as to all questions of fact; but either party to the dispute may . . . appeal from the decision of said Commission to the Court of Appeals for errors of law. . . ."

Our responsibility is twofold. We must first determine whether the Commission's findings are supported by any competent evidence. We must then determine whether the legal conclusions are justified by those findings. *Buck v. Proctor & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981).

On review, we are not triers of fact. The Industrial Commission has the exclusive duty and authority to find facts related to the disputed claim. Such findings are conclusive on appeal when supported by *any* competent evidence, even where there is plenary evidence which would permit a contrary finding. *Morrison v. Burlington Industries*, 301 N.C. 226, 271 S.E. 2d 364 (1980); *Buck v. Proctor & Gamble Co., supra.*

In the present cause, plaintiff excepts to Findings of Fact Nos. 3, 6, 9, 15, 16 and 17. In all material respects, however, we find that all of them can be grounded in the degree credence the Deputy Commissioner elected to give the evidence presented.

The ultimate findings of fact appear to be Nos. 9, 16 and 17 which address the critical issue of disability in 1976. Finding No. 9 is that decedent's disabling condition, as of 12 August 1976, was a result of his heart. We find competent medical evidence to support such a finding. Dr. Robert E. Whalen, Director of the Cardiovascular Disease Service at Duke Hospital, diagnosed plaintiff as having Class III Angina from February 1975 to July 1976. A Class III Angina patient is somewhat limited in activity by pain. Beginning in July 1976 and through November 1976, plaintiff had Class IV Angina. Class IV indicates that plaintiff was generally incapacitated by pain. In a letter dated 19 August 1976, Dr.

Topolosky, a pulmonary medicine specialist, stated that plaintiff's main problem was his cardiovascular disease: "His COPD [chronic obstructive pulmonary disease] is a contributing factor, but he would have to be declared a functional Class III cardiac patient." On a report sent to the Social Security Administration, Dr. Topolosky declared plaintiff disabled due to his cardiac status.

We also find sufficient medical evidence to support Finding No. 16 that plaintiff's total disability arose from a heart condition. In December of 1976, Dr. Maddrey turned over plaintiff's treatment to Dr. Brown. Dr. Brown testified that in January 1977, he diagnosed plaintiff's shortness of breath and chest pains as symptoms of his heart disease. He further stated, "Mr. Harrell has had a heart condition with angina since 1969. The first heart attack . . . would have been when he was at Durham a year ago. In my opinion, Mr. Harrell is disabled certainly because of a heart disease as a primary reason." Dr. Topolosky examined plaintiff on 4 November 1976. In his opinion, plaintiff's main problem was his cardiovascular disease. Dr. Whalen, after reviewing a 12 November 1976 evaluation report and other test results, concluded that plaintiff's heart condition rendered him 100% disabled.

Plaintiff concedes the existence of a disabling nonoccupational heart condition. He notes, however, that every doctor who testified also diagnosed the presence of chronic obstructive pulmonary disease. He argues that if he suffers from a compensable injury, he should not be completely deprived of compensation merely because there also exists an independent, concurrent, noncompensable cause of disability. *Daugherty v. Watts*, Ky., 419 S.W. 2d 137 (1967). A recent decision by the Supreme Court addresses plaintiff's argument:

> "When a pre-existing, nondisabling, non-job-related condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent. On the other hand, when a pre-existing, nondisabling, non-job-related disease or infirmity eventually causes an incapacity for work *without any aggravation or acceleration* of it by a compensable accident or by an occupational disease, the resulting incapacity so caused *is not compensable*. . . ." (Emphasis added.)

Morrison v. Burlington Industries, 304 N.C. 1, --- S.E. 2d --- (1981). In this cause, there is evidence that plaintiff's noncompensable heart disease *in itself* and absent any occupational disease, was sufficient to cause total incapacity for work. Where a noncompensable injury causes 100% disability without any aggravation or contribution by a compensable injury, the Commission is justified in finding that the claimant has failed to prove disability resulting from an occupational disease.

Plaintiff argues that the Commission failed to follow the mandate of the Court of Appeals in *Harrell* to "consider all the evidence, make definitive findings and proper conclusions therefrom, and enter the appropriate order." This cause was originally remanded because the Deputy Commissioner totally discounted testimony by Dr. Kunstling, a pulmonary medicine specialist, which was favorable to plaintiff. Finding of Fact No. 15, however, indicates that on remand the deputy did consider his testimony. In choosing to give Dr. Kunstling's diagnosis little weight, she exercised her prerogative to believe all or part or none of the evidence presented. As this Court stated, "[c]ontradictions in the evidence go to its weight, and the Commission may consider any such inconsistencies in weighing the testimony of Dr. Kunstling and, equally, in weighing the testimony of the other experts." *Harrell v. Stevens & Co.*, 45 N.C. App. at 206, 262 S.E. 2d at 835.

[2] Plaintiff contends the Commission erred in denying his motion to rescind the 3 June 1980 opinion and award and to take new evidence. According to G.S. 97-85, it is within the Commission's discretion whether to receive further evidence. The opinion and award of the Full Commission, filed on 29 September 1980, states: "It is the opinion of the undersigned that counsel for plaintiff has brought to the Industrial Commission neither argument nor evidence that justifies granting plaintiff the relief sought." In the absence of a showing of abuse of discretion, we will not review the Commission's decision. *Lynch v. Construction Co.*, 41 N.C. App. 127, 254 S.E. 2d 236 (1979).

We further conclude that on remand the Commission did make definitive findings on the critical issues. Mere recitals of medical opinion are not sufficiently specific to enable a reviewing court to judge the propriety of the Commission's order, and

therefore cannot properly form the basis for the conclusion of law as to compensation. *Moore v. Stevens & Co.*, 47 N.C. App. 744, 269 S.E. 2d 159 (1980); *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 235 S.E. 2d 856 (1977). As we have previously indicated, on remand, the Deputy Commissioner made essentially the same findings of fact as in the earlier opinion. Findings Nos. 3-14 are largely a narration of testimony given by medical experts. The additional findings, however, are more than mere recitals of opinions of the medical experts. The Deputy Commissioner made definite findings as to the nature of plaintiff's disabling disease.

In summary, the employee's entitlement to compensation is not grounded in disability. The employee must carry the burden of convincing the trier of the facts that his disability was caused by a compensable injury or disease. It is not disputed that the employee suffered physical impairment from an obstructive pulmonary disease. The Commission found, however, that his disability—his lack of ability to continue as a member of the work force—was caused by his heart disease. That finding finds support in the record. We cannot reverse just because there is evidence in the record that might have persuaded us, if we were triers of the facts, to reach a contrary result. The award is

Affirmed.

Judges HILL and WHICHARD concur.

CHARLES HENRY BOLICK v. AMERICAN BARMAG CORPORATION

No. 8025SC983

(Filed 17 November 1981)

Courts § 1; Limitation of Actions § 4.1; Sales § 22— products liability— purported statute of limitation—unconstitutionality

G.S. 1-50(6), which purports to bar personal injury, wrongful death and property damage claims arising out of an alleged product defect or failure brought more than six years after the date of initial purchase of the product for use or consumption, is not a statute of limitation and violates provisions of Art. I, § 18 of the N.C. Constitution guaranteeing access to the courts for

redress of injuries because product liability claims cannot not arise until the injury, death, or property damage occurs, or, if not readily apparent at the time of origin, until the injury is discovered or reasonably ought to have been discovered; the statute attempts to bar absolutely claims arising out of product defects or failures after a period measured from a date other than the date of accrual of those claims; and for those injured or damaged by products more than six years after initial purchase, the statute would bar the right to sue for redress of injury before that right arose.

Judge MARTIN (Robert M.) dissents.

APPEAL by plaintiff from *Lane, Judge.* Judgment entered 14 July 1980 in Superior Court, CATAWBA County. Heard in the Court of Appeals 10 April 1981.

Plaintiff appeals from a summary judgment dismissing his claims as barred by G.S. 1-50(6).

Tate, Young & Morphis, by Thomas C. Morphis, and Farthing & Cheshire, by Edwin G. Farthing, for plaintiff appellant.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins, III, for defendant appellee.

Harris, Bumgardner & Corry, by Tim L. Harris, for North Carolina Academy of Trial Lawyers, amicus curiae.

WHICHARD, Judge.

Plaintiff filed product liability claims against defendant on 10 October 1979 for injuries sustained on 3 June 1977 when he caught his hand in a machine manufactured and distributed by defendant. Plaintiff alleged defendant had negligently designed and manufactured the machine, which it sold to plaintiff's employer, and that this negligent design and manufacture proximately caused his injuries.

Defendant moved for summary judgment on the basis that G.S. 1-50(6), quoted *infra*, barred plaintiff's claims, because plaintiff brought them more than six years after 6 April 1971, the alleged date of sale of the machine by defendant to plaintiff's employer. The court granted defendant's motion and dismissed plaintiff's claims with prejudice.

We hold G.S. 1-50(6) unconstitutional on its face, and we therefore reverse. The courts have a duty "when it is clear a statute transgresses the authority vested in the legislature by the Constitution . . . to declare the act unconstitutional." *Wilson v. High Point*, 238 N.C. 14, 23, 76 S.E. 2d 546, 552 (1953); *Board of*

Managers v. Wilmington, 237 N.C. 179, 74 S.E. 2d 749 (1953); *Glenn v. Board of Education*, 210 N.C. 525, 187 S.E. 781 (1936). Article I, section 18 of the North Carolina Constitution, quoted *infra*, guarantees access to the courts for redress of injuries. The attempt by enactment of G.S. 1-50(6) to abrogate the right of access to the courts of persons who sustain injury, death, or property damage due to a defect or failure of a product, violates that provision for the reasons discussed below.

On 28 May 1979, after plaintiff suffered injury allegedly caused by defendant's negligence in the design or manufacture of the machine, but before he filed suit, the General Assembly enacted "An Act Relating to Civil Actions for Damages for Personal Injury, Death or Damage to Property Resulting From the Use of Products." 1979 N.C. Sess. Laws ch. 654 [hereinafter The Products Liability Act]. The Products Liability Act provided that it would not affect pending litigation and that it would become effective 1 October 1979. *Id.* §§ 7, 8. It also contained a severability clause. *Id.* § 5. Because plaintiff filed his claims on 10 October 1979, the act, by its terms, purportedly applies.

The Products Liability Act, in addition to creating chapter 99B of the General Statutes, which contains substantive provisions concerning products liability law, amended several sections of General Statutes, chapter 1. It amended G.S. 1-50 by adding the following:

> (6) No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

G.S. 1-50(6) purports to establish an absolute time after the purchase of a product beyond which no action can be maintained. The date from which the six year period is to be measured, the date of "initial purchase for use or consumption," has no relation to the claims purportedly barred, however. No claim can accrue, based upon or arising out of any alleged defect or failure in relation to a product, until the product causes actual injury. *See Raftery v. Construction Co.*, 291 N.C. 180, 230 S.E. 2d 405 (1976). A defect or failure in relation to a product could cause actual injury more than six years after the initial purchase. Thus, for those injured

or damaged by products more than six years after initial purchase, G.S. 1-50(6) would bar the right to sue for redress of injury before that right arose. The effect of G.S. 1-50(6) thus is to extinguish absolutely the right to assert personal injury, wrongful death, and property damage claims in all cases in which the statute would apply to bar the action.

Article I, section 18 of the North Carolina Constitution provides, "All courts shall be open; every person for an *injury done him* in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." (Emphasis supplied.) The North Carolina Supreme Court in *Osborn v. Leach*, 135 N.C. 628, 47 S.E. 811 (1904), discussed this "remedy by due course of law" provision in the 1868 Constitution from which current article I, section 18 derived, and adopted the following statement by the Kansas Supreme Court:

> It is not an easy task to deduce either from reason or the authorities a satisfactory definition of 'law of the land' or 'due course of law.' We feel safe, however, from either standpoint, in saying these terms do not mean any act that the Legislature may have passed, if such act does not give to one opportunity to be heard before being deprived of property, liberty or reputation, or having been deprived of either does not afford a like opportunity of showing the extent of his injury, and give an adequate remedy to recover therefor. Whatever these terms may mean more than this, they do mean due and orderly procedure of courts in the ascertainment of damages for injury, to the end that the injured one 'shall have remedy,' that is, proper and adequate remedy, thus to be ascertained. To refuse hearing and remedy for an injury after its infliction is a small remove from infliction of penalty before and without hearing.

Osborn, 135 N.C. at 636-637, 47 S.E. at 814 *quoting from Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904). The court then stated, "We have thus copied at some length the discussion of an almost identical statute [to North Carolina Constitution article I, section 18[1]] by the very able Supreme Court of our sister State, because

1. Kansas Bill of Rights section 18 provided, "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."

of the clearness and vigor with which it presents our own views upon the subject." *Osborn*, 135 N.C. at 637, 47 S.E. at 814.

Thus, article I, section 18 guarantees to those who suffer injury to their persons, property, or reputation, the right to seek redress therefor in the courts of this state. Any law which attempts to deny that right runs afoul of this guarantee. G.S. 1-50(6), because it would absolutely abolish rights to seek redress for injuries, on its face violates article I, section 18. This court has a duty, therefore, to declare it unconstitutional. *See Wilson v. High Point*, 238 N.C. 14, 76 S.E. 2d 546 (1953).

Other state appellate courts have striken, as violative of state constitutions, provisions which, like G.S. 1-50(6), extinguish rights to pursue claims for injuries in the courts. The Supreme Courts of Florida and Kentucky have declared unconstitutional, under provisions substantially similar to article I, section 18, statutes which barred claims for injury arising out of improvements to realty after the passage of a stated period from substantial completion of the improvement. *Overland Construction Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979); *Saylor v. Hall*, 497 S.W. 2d 218 (Ky. 1973). Several other jurisdictions, applying state constitutional provisions which guarantee access to the courts but differ in some respects from article I, section 18, have declared unconstitutional their statutes barring claims against builders and architects. *See Fujioka v. Kam*, 55 Hawaii 7, 514 P. 2d 568 (1973); *Skinner v. Anderson*, 38 Ill. 2d 455, 231, N.E. 2d 588 (1967); *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, Minn. ---, 260 N.W. 2d 548 (1977); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P. 2d 143 (Okla. 1977); *Broome v. Truluck*, 270 S.C. 227, 241 S.E. 2d 739 (1978); *Kallas Millwork Corp. v. Square D Co.*, 66 Wis. 2d 382, 225 N.W. 2d 454 (1975); *Phillips v. ABC Builders, Inc.*, 611 P. 2d 821 (Wyo. 1980).

Defendant contends G.S. 1-50(6) constitutes a statute of limitation, and therefore represents a valid exercise of legislative power. Both federal and state courts recognize the power of legislative bodies to enact statutes of limitation which prescribe "a reasonable time within which a party is permitted to bring suit for the recovery of his rights, and which, on failure to do so, establish a legal presumption against him that he has no legal rights in the premises," *Wilson v. Iseminger*, 185 U.S. 55, 62, 46

L.Ed. 804, 807, 22 S.Ct. 573, 575 (1902). To be a proper exercise of the legislative power, however, a statute which creates a time bar to a person's right to sue must in fact be a statute of limitation. G.S. 1-50(6), for reasons discussed below, is not a statute of limitation.

G.S. 1-15(a), applicable to all statutes of limitation in this state, provides, "Civil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued*, except where in special cases a different limitation is prescribed by statute." (Emphasis added.) As our courts have frequently noted,

> In no event can a statute of limitations begin to run until plaintiff is entitled to institute action. . . . Ordinarily, the period of the statute of limitations begins to run when *the plaintiff's right* to maintain an action *for the wrong alleged* accrues. The cause of action accrues *when the wrong is complete* . . . .

Raftery v. Construction Co., 291 N.C. 180, 183-184, 230 S.E. 2d 405, 407 (1976) (citations omitted; emphasis in original). The negligence of a defendant confers no right of action upon a plaintiff until the plaintiff suffers an injury proximately caused thereby. *Id.* at 186, 230 S.E. 2d at 408. As noted above, the claims of persons injured by alleged defects or failures in relation to products cannot accrue until the injury, death, or property damage occurs. Further, both prior to the Products Liability Act and in the Act itself, the legislature postponed the date the statute of limitation began to run, in situations rendering an injury not readily apparent to the claimant at the time of its origin, to the date the injury was discovered or reasonably ought to have been discovered. *See* G.S. 1-15(b) (Cum. Supp. 1977) (repealed 1979); G.S. 1-52(16). Thus, a statute of limitation cannot begin to run against a plaintiff with product liability claims until the injury occurs, or, if not readily apparent at the time of origin, until the injury is discovered or reasonably ought to have been discovered. Because G.S. 1-50(6) attempts to bar absolutely claims arising out of defects or failures in relation to products after a period measured from a date *other than* the date of accrual of those claims, it does not constitute a statute of limitation. Rather,

it would, as a matter of substantive law, abolish certain claims recognized prior to its enactment.[2]

The United States Supreme Court has stated,

> It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions.

Wilson v. Iseminger, 185 U.S. 55, 62, 46 L.Ed. 804, 807, 22 S.Ct. 573, 575 (1902). G.S. 1-50(6) purports to extinguish, for persons injured by products more than six years after initial purchase of the products, the constitutionally guaranteed opportunity to try their claims in the courts.

In their memoranda of additional authority and in oral argument, both parties urged application to this case of the rationale of *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980). Because G.S. 1-50(6) does not prescribe an accrual date and is not a statute of limitation, the *Flippin* decision has no application here. In *Flippin* the court applied the rule that although a legislature may shorten a limitation period, due process requires that in so doing it must provide a reasonable time for filing actions which have accrued but not been filed when the new statute takes effect. 301 N.C. at 113, 270 S.E. 2d at 486. The rule applies only to limitation statutes, however. No amount of time allowed to file claims which accrued but were unfiled prior to the effective date of the Products Liability Act could cure the constitutional infirmity of a statute which purports to bar certain claims before the injury or damage giving rise to those claims occurs.

We declare G.S. 1-50(6) void as violative of North Carolina Constitution article I, section 18; and we thus reverse the judgment of the trial court which dismissed plaintiff's action as barred by that section.

2. Because we hold G.S. 1-50(6) to be unconstitutional, we do not consider the question of retroactive application of a substantive law. *See Smith v. Mercer*, 276 N.C. 329, 172 S.E. 2d 489 (1970).

Reversed.

Judge VAUGHN concurs.

Judge MARTIN (Robert M.) dissents.

STATE OF NORTH CAROLINA v. WALTER EDWARD DAVIS, A/K/A MATTHEW EDWARD JOHNSON

No. 8126SC513

(Filed 17 November 1981)

1. **Criminal Law § 44— admission of testimony as to bloodhound's actions—properly admitted**

Testimony that a bloodhound was of pure blood, had been trained by the witness's supervisor, had worked with the witness in a training capacity a "dozen or so times," and had a very sensitive nose with the ability to discriminate between animal and human scents was sufficient to support a finding that the bloodhound had been properly trained. Further, testimony that the bloodhound followed a scent from the automobile in which a robber had been seen to the service station that he robbed before the bloodhound was taken off the track and then found the scent in the woods close to where the automobile had been found and followed it to the defendant was evidence supporting the finding that the bloodhound was put on the scent and pursued it in such a manner that it would support a reasonable inference of identification.

2. **Criminal Law § 114.2— error in recounting evidence—no expression of opinion**

It was not reversible error for the trial court to have stated that "he testified he was looking down from his chair on the defendant" while recounting the testimony of a witness when no witness had identified the defendant as the perpetrator of the robbery as throughout the charge the judge referred to "this individual" and only used the word "defendant" once when referring to the person who committed the robbery, and this *lapse linguae* was not brought to the judge's attention.

APPEAL by defendant from *Friday, Judge.* Judgment entered 22 August 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 23 October 1981.

The defendant was tried for armed robbery. The State's evidence tended to show that on 6 June 1980, just before midnight, a motorist saw an automobile parked on a service road near the Race Trac Service Station on Sugar Creek Road in

Charlotte. There were several people in the automobile and the driver was wearing a ski mask. The motorist called the police and while an officer was on his way to investigate the parked vehicle, he received a call that the Race Trac Service Station had been robbed. A bloodhound named "Homer" was brought to the scene. The defendant objected to any testimony as to the actions of Homer and a *voir dire* hearing out of the presence of the jury was held.

Troy Starnes testified at the *voir dire* hearing that he was the Deputy Sheriff of the Mecklenburg County Animal Shelter. He further testified that Homer was four years old, of pure blood, and had lived at the shelter for two years. He had been trained by Mr. Starnes' supervisor. Mr. Starnes had worked with Homer once in a training capacity and had been with him on other trackings a "dozen or so times." He had found Homer to have a very sensitive nose with the ability to discriminate between animal and human scents and between the scents of different human beings. Mr. Starnes also testified that Homer's success rate was about 50% and the success rate of other dogs at the shelter is 65% to 70%. He carried Homer to the automobile in which the man wearing a ski mask had been seen. Homer was placed in the vehicle and he left the vehicle and went to a police car in which another suspect was seated. Mr. Starnes then carried Homer back to the parked automobile. Homer then followed a scent to the Race Trac Service Station. There were several people and vehicles at the station and Mr. Starnes took Homer off the scent and carried him to the edge of the service station parking lot to search for the scent. Homer was unable to find the scent in this area and Mr. Starnes and Homer started back to the parked vehicle to see if they could "start over." They were then called by some officers in the woods by Sugar Creek Road. They went to the place in the woods near Sugar Creek Road and Homer picked up the scent and tracked for approximately ten minutes until they came to the defendant.

At the conclusion of the *voir dire* hearing, Judge Friday found as facts that Homer was a pureblood bloodhound who had an acute scent and power of discrimination, that he had been trained to pursue the human track, that he had been found to be reliable in pursuit, and that he was put on the scent and pursued it in such manner that it would permit a reasonable inference of

identification. Judge Friday allowed the testimony as to the actions of Homer to be introduced into evidence.

The State offered into evidence before the jury testimony substantially the same as offered on the *voir dire* hearing and further evidence which tended to show that Mr. Starnes and three other officers followed Homer through the woods until they came upon Homer standing over the defendant, who was lying on the ground. The defendant was armed with a pistol but offered no resistance to the officers. The defendant was brought back to the police car and his pockets were emptied. Money was taken from both pockets of the defendant and placed on the hood of the police car. The defendant nodded towards the change taken from his right pocket and said "That there, that's mine." The officers found close to the defendant a shirt and tennis shoes which the service station attendant testified were similar to the shirt and shoes worn by the man who robbed him. The person who robbed the service station wore a ski mask at the time of the robbery and the service station attendant could not identify the defendant as the robber.

The defendant did not offer any evidence. He was convicted of armed robbery and appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

WEBB, Judge.

The defendant's first assignment of error deals with the admission of the testimony as to Homer's actions. Several cases in this jurisdiction have dealt with the admission into evidence of the actions of bloodhounds. See *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965); *State v. McLeod*, 196 N.C. 542, 146 S.E. 409 (1929) and *State v. Hawley*, --- N.C. App. ---, --- S.E. 2d --- (1981). Each of these cases has stated the rule as follows:

> "It is fully recognized in this jurisdiction that the actions of bloodhounds may be received in evidence when it is prop-

> erly shown: (1) that they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) that they possess these qualities, and have been accustomed and trained to pursue the human track; (3) that they have been found by experience reliable in such pursuit; (4) and that in the particular case they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification."

The defendant argues the evidence was not sufficient to support the admission of evidence as to Homer's actions. He says the evidence was insufficient as to the second requirement that Homer had been properly trained to pursue the human track, and the fourth requirement that Homer was put on the trail of the guilty party under such circumstances as to afford substantial assurance or permit a reasonable inference of identification.

Mr. Starnes testified that Homer had been trained by Mr. Starnes' supervisor; that Mr. Starnes had worked with him once in a training capacity and on a "dozen or so" other trackings and had found him to have a very sensitive nose. We believe this is sufficient evidence for a finding that Homer had been properly trained. *See State v. Irick, supra* at 495. The defendant points out that Mr. Starnes testified that during practice sessions Homer was 65% reliable and in other sessions he was 50% reliable while the other dogs at the shelter were 65% to 70% reliable. This is evidence that Homer had not been properly trained. We believe the evidence that Homer was properly trained supports Judge Friday's finding to that effect. Since there is evidence to support this finding of fact, we cannot disturb it.

As to the defendant's argument that Homer was not put on the trail under such circumstances as to permit a reasonable inference of identification, the defendant relies on *State v. Lanier*, 50 N.C. App. 383, 273 S.E. 2d 746 (1981) and *State v. Marze*, 22 N.C. App. 628, 207 S.E. 2d 359 (1974). In *Lanier* this Court held that the testimony as to the actions of the bloodhound provided no evidence that the defendant was ever at the crime scene. We believe the instant case is distinguishable from *Lanier*. The testimony that Homer followed a scent from the automobile to

the service station before he was taken off the track and then found the scent in the woods by Sugar Creek Road and followed it to the defendant would place the defendant at the service station. We also believe this evidence supports the finding of fact by Judge Friday that Homer was put on the scent and pursued it in such manner that it would support a reasonable inference of identification. In *Marze* the bloodhound was put on a scent located three to four hundred feet from a house which had been the object of a breaking and entering. This Court held there was no evidence that the thief had ever been at the position at which the bloodhound was released. In the instant case there was evidence that the robber had been at the automobile where Homer first started tracking and at the service station. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends the court committed error in the charge. While recounting the testimony of the service station attendant, the court stated "He testified that he was looking down from his chair on the defendant." Neither the service station attendant nor any other witness had identified the defendant as the perpetrator of the robbery. The defendant relies on *State v. Oakley*, 210 N.C. 206, 186 S.E. 244 (1936) as precedent for reversible error. In *Oakley*, a capital case, the judge interrupted a witness and asked him "You tracked the defendant to whose house?" Although the judge instructed the jury that he had not intended to use the word "defendant" but should have said "He followed a set of tracks to whose house?" our Supreme Court held it was reversible error. All the evidence was circumstantial as it was in the instant case and the Supreme Court held this question by the judge to be an expression of opinion which required a new trial. We do not believe *Oakley* requires a new trial in this case. Throughout the charge Judge Friday referred to "this individual" and only used the word "defendant" once when referring to the person who committed the robbery. This *lapse linguae* was not brought to his attention. We believe from reading the charge as a whole, it is clear the judge did not intimate he thought the defendant committed the robbery and it was for the jury to determine that he did so from all the circumstances.

No error.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, TRAVELERS INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, STANDARD FIRE INSURANCE COMPANY, HOME INSURANCE COMPANY, HOME INDEMNITY INSURANCE COMPANY, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FIDELITY & GUARANTY INSURANCE UNDERWRITERS, TRAVELERS INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 8110INS236

(Filed 17 November 1981)

1. **Insurance § 1; Master and Servant § 80— workers' compensation rate filing—disapproval because proposed rates are inadequate**

A Deputy Commissioner of Insurance erred in ruling that he was precluded by G.S. 58-124.19(1) from approving a workers' compensation insurance rate filing because the rates proposed in the filing were "inadequate" in that they will not produce premiums adequate to cover all the costs of losses and expenses.

2. **Insurance § 1; Master and Servant § 80— insurance rate filing—meaning of "sufficient" and "inadequate"**

In enacting the provisions of G.S. 58-124.19(1), the legislative intent was that the term "inadequate" operates to protect the interest of insurance companies in achieving rate levels which are sufficient for them to earn a reasonable profit, while the term "excessive" operates to protect the interest of consumers in being offered rates which will not enable insurance companies to earn unreasonable profits. In this context, the limiting effect of the term "inadequate" as it is used in the statute is that the Commissioner of Insurance may not disapprove of such portions or parts of a filing as will result in rates which are inadequate to produce a fair and reasonable profit to the companies represented in the filing.

APPEAL by defendant Rate Bureau and constituent insurance companies from the Commissioner of Insurance. Order entered by

the Commissioner of Insurance 25 November 1980. Heard in the Court of Appeals 14 October 1981.

On 27 August 1980, defendant Rate Bureau made a filing on behalf of its member companies writing Workers' Compensation insurance in North Carolina seeking approval of revised Workers' Compensation insurance rates and rating values. The filing sought an overall increase of 12.4 percent in annual premium rates. The application was heard by Acting Chief Deputy Commissioner Wray, who subsequently entered his order denying the filing. From this order, defendants have appealed to this Court.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Griffin, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, by B. T. Henderson and George M. Teague, for defendant-appellant.

WELLS, Judge.

The standard of appellate review in this case is to be found in the provisions of the Administrative Procedures Act, particularly G.S. 150A-51[1] and the provisions of G.S. 58-9.6.[2] *See Com-*

1. G.S. 150A-51. Scope of review; power of court in disposing of case.—The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the agency findings, inferences, conclusions, or decisions are: (1) In violation of constitutional provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedure; or (4) Affected by other error of law; or (5) Unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted; or (6) Arbitrary or capricious. . . .

2. G.S. 58-9.6. Extent of review under § 58-9.4.—(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of the Court of Appeals, and any alleged irregularities in procedures before the Commissioner, not shown in the record, shall be considered under the rules of the Court of Appeals. (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any action of the Commissioner. The court may affirm or reverse the decision of the Commissioner, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commissioner's findings, inferences, conclusions or decisions are: (1) In violation of constitutional provisions,

missioner of Insurance v. Rate Bureau, 300 N.C. 381, 269 S.E. 2d 547 (1980), *rehearing denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980). *See also Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 281 S.E. 2d 24 (1981).

[1] The principal issue presented in this appeal is whether Deputy Commissioner Wray acted in excess of his statutory authority in denying the filing on the grounds that the requested rates were inadequate. We hold that the disputed order exceeds the statutory authority of the Commissioner of Insurance. We reverse and vacate the order.

The statutory scheme under which rates for Workers' Compensation insurance were to be set at the time of the filing at issue in this case is set out in the 1979 Cumulative Supplement to Vol. 2B of the General Statutes, under Article 12B of Chapter 58 of the General Statutes.[3] For a thorough discussion of the statutory scheme for establishing Workers' Compensation insurance rates, *See Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, 252 S.E. 2d 811 (1979), *disc. rev. denied* 297 N.C. 452, 256 S.E. 2d 810 (1979).

Deputy Commissioner Wray's order, in pertinent part, is as follows:

FINDINGS OF FACT

1. The Bureau made a filing for revised workers' compensation insurance rates on August 27, 1980.

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or (2) In excess of statutory authority or jurisdiction of the Commissioner, or (3) Made upon unlawful proceedings, or (4) Affected by other errors of law, or (5) Unsupported by material and substantial evidence in view of the entire record as submitted, or (6) Arbitrary or capricious. (c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commissioner. (d) The court shall also compel action of the Commissioner unlawfully withheld or unlawfully or unreasonably delayed. (e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commissioner under the provisions of this Chapter shall be prima facie correct.

3. The 1979 Supplement to Vol. 2B indicates that Article 12B was to expire on 1 September 1980. In sec. 8 of Chapter 824 of the Session Laws, the General Assembly removed the 1 September 1980 expiration date. Article 12B, therefore, remains in effect.

2. Said filing proposed an average increase of 12.4% in the overall level of workers' compensation rates and rating values presently in force in North Carolina.

3. The filing proposes to implement a 12.4% overall rate increase effective January 1, 1981 which represents approximately a $21,800,000 increase in premiums.

. . .

17. Actuarially, the rates proposed by the filing (Exhibit RB-5) will not produce a total amount of adequate premium to cover all the cost of losses and expenses . . .

18. Exhibit RB-17 was admitted into evidence and shows a projected underwriting loss as follows:

Premiums	$218,477,589	
Losses and Loss Adjustment Expense	182,703,575	
Expenses	55,446,138	
Profit and Contingencies	$(19,672,124)	(a negative figure)

. . .

25. By the uncontradicted evidence of the Bureau's own expert witness, the rate revision requested by Exhibit RB-5 will produce rates that are inadequate.

26. N.C. G.S. 58-124.19(1) requires that ". . . rates shall not be excessive, inadequate, or unfairly discriminatory."

CONCLUSION OF LAW

The rates proposed by the Filing are inadequate in contravention of N.C. G.S. 58-124.19(1), and G.S. 58-124.19(2) in that they will not produce a total amount of premium adequate to cover all the costs of losses and expenses, including due consideration of investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State.

NOW, THEREFORE, IT IS ORDERED that the filing dated August 27, 1980 by the North Carolina Rate Bureau for Revised Workers' Compensation Insurance Rates be and the same is hereby disapproved.

It is clear that Deputy Commissioner Wray ruled that he was precluded as a matter of law from approving the filing because the rates proposed in the filing were "inadequate". Defendants contend that this is an erroneous interpretation of the power, authority, and duty of the Commissioner. Plaintiff argues that he had no choice in the matter and was compelled by the statute to disapprove the filing. We find that plaintiff has misapprehended and misunderstood the legislative intent expressed in G.S. 58-124.19(1).

In the construction of a statute, the function of a reviewing court is to discover the intent of the Legislature and to give to the words of the statute the meaning which the Legislature had in mind. *Transportation Service, Inc. v. County of Robeson*, 283 N.C. 494, 196 S.E. 2d 770 (1973). Nontechnical statutory words are to be construed in accordance with their common and ordinary meaning. *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1979); *Transportation Services, Inc. v. County of Robeson*, supra. In declaring the true legislative intent, the Courts will adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature intended to achieve a reasonable result and that its enactment would be applied in a reasonable manner. *See Commissioner of Insurance v. Automobile Rate Office*, 294 N.C. 60, 241 S.E. 2d 324 (1977) and cases cited therein.

[2] Webster's Third New International Dictionary (unabridged) defines "adequate"[4] as: sufficient for a specific requirement, or lawfully and reasonably sufficient. "Sufficient" in turn is defined as: enough to meet the needs of a situation or a proposed end. "Inadequate" is listed as the antonym of "sufficient". "Excessive" is defined as: exceeding the usual, proper, or normal. Construing these words "inadequate" and "excessive" in their ordinary, nontechnical, commonly accepted meaning and use, we are satisfied that in enacting the provisions of the G.S. 58-124.19(1), the legislative intent was that the term "inadequate" operates to protect the interest of insurance companies in achieving rate levels which are sufficient for them to earn a reasonable profit, while the term "excessive" operates to protect the interest of consumers in being offered rates which will not enable insurance

4. Inadequate being the antonym of adequate.

companies to earn unreasonable profits. *See Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, supra. In this context, we are satisfied that the limiting effect of the term "inadequate" as it is used in the statute is that the Commissioner may not disapprove of such portions or parts of a filing as will result in rates which are inadequate to produce a fair and reasonable profit to the companies represented in the filing. *See Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, supra. The findings of fact in this case showing that the filed rates are inadequate to produce any profit, it follows *a fortiori* that the filed rates cannot be excessive.

An additional reason for rejecting the reasoning of the plaintiff in this case is the bizarre result reached by the order. Upon concluding that the filing must be rejected because the requested rates are "inadequate", plaintiff would leave in effect rates which are even more inadequate. We cannot believe that the legislature even contemplated such a result.

The pertinent findings of fact made by the Deputy Commissioner are not challenged in this appeal and therefore the question before this Court is whether those findings support the conclusion and order of the Deputy Commissioner. *Henson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975). We hold these findings of fact support only one valid conclusion of law: the filing must be approved.

We do not deem it necessary or appropriate to reach the other assignments of error brought forth in this appeal.

The order of 25 November 1980 disapproving the filing by the rate bureau is reversed and vacated; the rates and rating values proposed therein are deemed approved. *Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, supra.

Reversed and vacated.

Judges MARTIN (Robert) and WEBB concur.

CHARLES GRAGG, EMPLOYEE-PLAINTIFF v. W. M. HARRIS & SON, EMPLOYER, INSURANCE COMPANY OF NORTH AMERICA, CARRIER, DEFENDANTS

No. 8110IC233

(Filed 17 November 1981)

Master and Servant § 85— workers' compensation—time limitation of G.S. 97-47—a non-jurisdictional limit

The time limitation in G.S. 97-47 is a non-jurisdictional limit, unlike that of G.S. 97-58(c) and G.S. 97-24, and is a technical, legal defense. If the time limitation of G.S. 97-47 is to be available as a defense to claims based upon a change of condition, such defense must be asserted prior to hearing on the merits, and if not so asserted it must be deemed to have been waived. Therefore, where plaintiff requested a hearing before the Industrial Commission on 28 October 1977 and a hearing was conducted on 24 August 1978 but was continued at defendant's request, defendant's assertion of the time limitation as a defense on 8 January 1979 was not timely.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award of Full Commission filed 16 December 1980. Heard in the Court of Appeals 14 October 1981.

Plaintiff's claim for additional workers' compensation due to a change of condition was denied by Deputy Commissioner Delbridge. The Full Commission affirmed and adopted the Deputy Commissioner's findings of fact and conclusions of law, that plaintiff's claim was barred under G.S. 97-47. From this opinion and award, plaintiff appeals.

Williams, Willeford, Boger, Grady & Davis, by Samuel F. Davis, Jr., for plaintiff-appellant.

Brown, Brown & Brown, by Fred Stokes, for defendant-appellee.

WELLS, Judge.

The issue we decide in this appeal is whether the insurance carrier waived the time limitation defense of G.S. 97-47[1] by not

1. G.S. 97-47. Change of condition; modification of award.—Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously

raising it until after the first evidentiary hearing on plaintiff's claim.

In reviewing an award of the Industrial Commission, this Court's scope of review is limited to: (1) whether the Commissioner's findings are supported by any competent evidence, and (2) whether the Commissioner's findings justify its legal conclusions. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), *Inscoe v. Industries, Inc.*, 292 N.C. 210, 232 S.E. 2d 449 (1977).

Plaintiff's initial injury occurred on 16 September 1974, when he fell off of a roof while working as a carpenter. The injury produced pain in plaintiff's right ankle, right elbow, neck, and knees though no bones were broken. Defendant admitted liability, and plaintiff received temporary total disability compensation for his two-week loss of work immediately following the accident. Form 28B and the final draft were sent by the carrier to plaintiff on approximately 16 October 1974, and the draft was negotiated 28 October 1974. On approximately 8 September 1976, plaintiff notified his employer and the carrier that he was being hospitalized for a hip operation. The carrier's agent told the plaintiff that she would prepare the necessary papers for him to sign. Plaintiff signed and returned these papers before he was hospitalized on 14 September 1976. The hospital submitted Form 25H to the carrier on 12 October 1976. In December of 1976, the carrier informed plaintiff that coverage was being denied because his hip problems "did not result from an accident arising out of and in the course of your employment." In response, on 28 October 1977, plaintiff requested a hearing before the Industrial Commission, and a hearing was conducted by Deputy Commissioner Delbridge on 24 August 1978. Because one of defendant's medical witnesses was unable to be present at that hearing, Deputy Commissioner Delbridge continued the hearing at defendants' request. On 8 January 1979, plaintiffs were notified that defendants were asserting the time limitation as a defense. The second hearing was continued several times, and was finally held on 13 August 1979. At the hearing on 24 August 1978, the only issue raised by defend-

awarded, subject to the maximum or minimum provided in this Article. . . . No such review shall affect such award as regards any moneys paid but no such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article. . . .

ants was the causal link between plaintiff's initial compensable injury and his subseqent hip operation.

In his order dated 30 November 1979, Deputy Commissioner Delbridge found as a fact that plaintiff's hospital filed Form 25H with the carrier, rather than the Industrial Commission, on 12 October 1976. He concluded as a matter of law that filing Form 25H did not constitute a claim for a change of condition on behalf of plaintiff, and therefore plaintiff's claim was filed more than two years after the date of his last payment of compensation.

Deputy Commissioner Delbridge also made a finding of fact that defendants raised the bar of the statutory limitation on 8 January 1979, and concluded that this was a timely pleading of the defense.

G.S. 97-47, which concerns a change of condition and modification of award, contains the proviso that "[n]o such review shall be made after two years from the date of the last payment of compensation. . . ." This restriction has been construed to be a statute of limitations, rather than a jurisdictional bar. *Ammons v. Sneeden's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575 (1962), *Watkins v. Motor Lines*, 10 N.C. App. 486, 179 S.E. 2d 130 (1971), *rev'd. on other grounds*, 279 N.C. 132, 181 S.E. 2d 588 (1971). This distinguishes G.S. 97-47 from G.S. 97-58(c) and G.S. 97-24, other time limitations of the Workers' Compensation Act, G.S. 97-1 *et seq.*, compliance with each of which has been construed to be a condition precedent to jurisdiction of the Industrial Commission over the claim. *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 281 S.E. 2d 463 (1981), *Poythress v. Stevens and Co., Inc.*, 54 N.C. App. 376, (No. 8110IC222, filed 3 November 1981). *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E. 2d 354 (1963), *McCrater v. Engineering Corp.*, 248 N.C. 707, 104 S.E. 2d 858 (1958). Jurisdiction may be raised by any of the parties or the Commission *ex mero motu* at any time during the course of the proceeding. *Clark v. Ice Cream Co.*, supra, *McCrater v. Engineering Corp.*, supra. 12 Schneider *Workmens Compensation Text*, Limitations and Notice, § 2375.

Under general principles of civil procedure, however, the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived. 8 Strong's N.C. Index 3d, Limitation of Actions, § 16, 54 C.J.S. Limitations of Actions, § 354, *Over-*

ton v. Overton, 259 N.C. 31, 129 S.E. 2d 593 (1963), *see* G.S. 1A-1, Rule 12(b). We see no reason why this same rule should not apply to cases arising under G.S. 97-47.

In jurisdictions where the employer has a statutory duty to raise the affirmative defense of the statute of limitations at the first hearing at which all parties are present and on notice, failure to so assert the bar at that time constitutes a waiver of the employer's defense. *Petrov v. Jaff Bros. Woodworks, Inc.*, 65 A.D. 2d 833, 409 N.Y.S. 2d 829 (1978), *Gill v. Woodcrest Nursing Home*, 56 A.D. 2d 700, 391 N.Y.S. 2d 754 (1977), *Patton v. Refrigerated Transport Co., Inc.*, 149 Ga. App. 302, 254 S.E. 2d 391 (1979), *Perry v. Robbins & Son Roofing Co.*, Fla., 145 So. 2d 225 (1962), *reh. denied* (1962). Similarly, the federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. C.A. § 901 *et seq.*, requires the employer to raise the defense at the first hearing at which all the parties are present with notice. 33 U.S. C.A. § 913(b). Again, if the bar of the time limitation is not affirmatively pleaded at that time, it is deemed waived. *Feeney v. Willard*, 129 F. Supp. 414 (S.D. N.Y. 1955), *Grain Handling Co. v. McManigal*, 30 F. Supp. 974 (W.D. N.Y. 1940).

Other jurisdictions have held that the defense is inoperative if brought up initially on appeal. *Safeway Stores, Inc. v. Workers' Compensation Fund*, 3 Kan. App. 283, 593 P. 2d 1009 (1979), *Stange Co. v. Industrial Commission of Arizona*, 120 Az. 241 (App.), 585 P. 2d 261 (1978), *Kaiser Foundation Hospitals v. WCAB*, 83 Cal. App. 3d 413, 148 Cal. Rptr. 54 (1st Dist. 1978). *Paull v. Preston Theatres Corp.*, 63 Ida. 594, 124 P. 2d 562 (1942), Rich's Case, 301 Mass. 545, 17 N.E. 2d 903 (1938), *Bates v. Asbury Iron & Bridge Works*, 130 N.J.L. 394, 33 A. 2d 692 (1943). Schneider states the rule as follows:

> "Failure to assert or plead the bar of the limitation provisions of the act, both as to notice and claim, constitutes a waiver in those states wherein the timely notice and claim requirements are not jurisdictional. In such non-jurisdictional states the defense of limitation, in order to avoid waiver, must be made at the first opportunity or first hearing."

12 Schneider, supra, Limitations and Notice, § 2375, *see also* 3 Larson's *Workmen's Compensation Law*, §§ 78.70, 81.20; Horovitz, *Injury and Death Under Workmen's Compensation Laws*, p. 255,

Mastoris, "The Statutes of Limitation in Workers' Compensation Proceedings," 15 Calif. Western L. Rev. 32-92, (1979); Blair, *Reference Guide to Workmen's Compensation Law*, § 18.00.

We have not found any cases from this State dealing directly with the question of what constitutes timely pleading of the time limitations set out in G.S. 97-47. We do find guidance, however, in the decision of our Supreme Court in *Watkins v. Motor Lines*, supra, which dealt with the question of whether defendants in that case were estopped to plead the G.S. 97-47 limitation. The court held that the law of estoppel may apply in certain Workers' Compensation cases so as to deny the defense of lapse of time. The Court noted that "the lapse of time, when properly pleaded, is a technical legal defense". *See also Willis v. Davis Industries*, 280 N.C. 709, 186 S.E. 2d 913 (1972). We note that in both *Watkins* and *Willis*, the defendants asserted the defense of the running of the two year period set out in G.S. 97-47 prior to hearing.

The time limitation in G.S. 97-47 is a non-jurisdictional limit, and is a technical, legal defense. Sound public policy and the fair, effective disposition of contested Workers' Compensation claims requires that if the time limitation of G.S. 97-47 is to be available as a defense to claims based upon a change of condition, such defense must be asserted prior to hearing on the merits, and if not so asserted, it must be deemed to have been waived.

Plaintiff has argued that the evidence in this case was sufficient to show that defendants should be estopped to assert the time limitation defense in this case and that Deputy Commissioner Delbridge erred in concluding as a matter of law to the contrary. While we find considerable merit in plaintiff's argument, we deem it unnecessary to reach that question.

The order of the Commission is reversed and the case is remanded for further hearing and decision on the merits of plaintiff's claim.

Reversed and remanded.

Judges MARTIN (Robert) and WEBB concur.

DEBORAH P. CLAYTON (NOW RICHARDSON) v. JAMES R. CLAYTON

No. 817DC257

(Filed 17 November 1981)

1. **Divorce and Alimony §§ 23.4, 25.7— change of child custody—insufficient notice of hearing**

A petition for a temporary restraining order and the temporary order issued which referred only to allowing child visitation privileges to the defendant and to restraining the movement of plaintiff and the child did not constitute proper notice of a hearing on change of custody of the child and gave no ten-day notice as to change of custody as required by G.S. 50-13.5.

2. **Abductions § 1— transportation of child outside State in violation of custody order**

The trial court erred in ordering that a bench warrant be issued for plaintiff's arrest for transporting her child outside the State with intent to violate a custody order in violation of G.S. 14-320.1 where plaintiff had custody of her child when she left the State with him and did not remove him from the State in violation of a custody order.

3. **Contempt of Court § 3.2— violation of temporary restraining order—absence of notice of order**

The trial court erred in ordering plaintiff to show cause why she should not be held in contempt for violating a temporary restraining order enjoining her from removing her child from the State where there was no evidence that plaintiff had notice of the temporary restraining order prior to leaving the State. G.S. 5A-11(a)(3).

Judge WEBB dissenting.

APPEAL by plaintiff from *Britt, Judge*. Judgment entered 15 December 1980 in District Court, EDGECOMBE County. Heard in the Court of Appeals 16 October 1981.

In 1978 defendant husband was granted an absolute divorce from plaintiff wife and wife was granted custody of the minor child of the marriage, subject to the visitation rights of the husband. In July 1979 plaintiff remarried, and plaintiff and her new husband decided to move to Tulsa, Oklahoma where the husband had been accepted into a Bible college.

On 8 August 1979, defendant petitioned the court for a temporary restraining order to prevent the wife from taking their child outside of the State. The defendant alleged that the wife was planning to move to Oklahoma to frustrate his visitation

rights and that the resulting loss in visitation would result in irreparable harm to both the child and the father.

At 11:52 a.m. on 8 August 1979, Judge Tom Matthews issued a temporary restraining order enjoining the plaintiff from removing the child from the State pending a hearing on 14 August 1979. The sheriff was directed to serve the complaint and order on the plaintiff. The sheriff's certificate shows process was received on 8 August 1979 and was returned to the court on 10 August 1979. The time of service was not indicated. Substitute service was attained by leaving copies with plaintiff's husband at plaintiff's dwelling house.

Between 1:00 and 1:30 p.m. on 8 August 1979, plaintiff left Rocky Mount and drove to the Raleigh-Durham Airport with the child. They departed on a plane for Nashville, Tennessee at approximately 2:30 or 3:00 p.m. On or about 13 August 1979, plaintiff's husband picked up plaintiff and her son in Nashville, Tennessee driving on to Tulsa, Oklahoma. Plaintiff has not returned to North Carolina since that time.

On 14 August 1979 a hearing was held on defendant's petition for a temporary restraining order. The plaintiff was not present in person or by counsel. The court found that the plaintiff had been served by leaving a copy of the temporary restraining order with her husband at her usual place of abode. The court ordered that temporary custody of the child be awarded to the defendant. The court further concluded that a bench warrant should be issued for the arrest of the plaintiff pursuant to N.C. Gen. Stat. § 14-320.1 unless the child was found in North Carolina before 12:15 a.m. on 16 August 1979. The court ordered plaintiff to appear on 11 September 1979 to show cause why she should not be held in contempt of court for violating the temporary restraining order.

On 4 October 1979, plaintiff filed a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure seeking relief from the 16 August 1979 order of the court because of insufficient notice and service.

By order of the court filed 15 December 1980 the trial court concluded that the temporary restraining order had been properly served on plaintiff. The court ordered that plaintiff's Rule 60

motion be denied, and kept in force its previous orders in regard to custody and visitation of the child. Plaintiff appealed from the judgment.

Biggs, Meadows, Etheridge & Johnson by William D. Etheridge and Lee A. Spinks, and C. Ray Joyner, for the plaintiff-appellant.

Hopkins & Allen by Grover Prevatte Hopkins and Janice Watson Davidson for the defendant-appellee.

MARTIN (Robert M.), Judge.

[1] We initially consider plaintiff's assignment of error concerning the change in custody ordered by the court on 16 August 1979. The petition for a temporary restraining order and the temporary order filed on 8 August 1979 refer only to allowing visitation privileges to the defendant and to restraining the movement of the plaintiff and child. This petition and order were inadequate to constitute proper notice of a hearing on change of custody, and gave no 10-day notice as to change of custody as required by N.C. Gen. Stat. § 50-13.5. Therefore the trial court erred in giving the defendant temporary custody in its 16 August 1979 order.

N.C. Gen. Stat. § 50-13.5 outlines the procedure in actions for custody or support of minor children. § 50-13.5(d)(1) provides that "[m]otions for custody of a minor child in a pending action may be made on 10 days notice to the other parties and after compliance with G.S. 50A-4."

Defendant asserts that because he did not move to get custody, the provisions of § 50-13.5(d)(1) are not applicable. We disagree. N.C. Gen. Stat. § 50-13.5(d)(1) is designed to give the parties to a custody action adequate notice in order to insure a fair hearing. Before divesting plaintiff of custody of her son, she was entitled to the notice set forth in the statute.

The petition for the temporary restraining order and the temporary order issued did not provide notice of a potential change in custody and in no way provided ten days notice. As a result, that portion of the 16 August 1979 order granting custody to the defendant must be reversed pursuant to plaintiff's Rule 60 motion.

[2] Plaintiff is seeking relief from the 16 August 1979 order of the court. That order, in addition to changing the custody of the child, also ordered that a bench warrant be issued for plaintiff's arrest for violating N.C. Gen. Stat. § 14-320.1 and ordered plaintiff to appear before the court to show why she should not be held in contempt for violating the terms of the temporary restraining order.

N.C. Gen. Stat. § 14-320.1 reads in part as follows:

> When any court of competent jurisdiction in this State shall have awarded custody of a child under the age of sixteen years, it shall be a felony for any person with the intent to violate the court order to take or transport, or cause to be taken or transported, any such child from any point within this State to any point outside the limits of this State or to keep any such child outside the limits of this State.

Clearly on 8 August 1979 when plaintiff left the State with her son she had custody of the child and did not remove him from the State in violation of a custody order. Thus it was error for the judge not to relieve the plaintiff, pursuant to her Rule 60 motion, from this portion of the 16 August 1980 order.

[3] Finally plaintiff was ordered to appear and show cause why she should not be held in contempt for violating the temporary restraining order of the court.

N.C. Gen. Stat. § 5A-11(a)(3) provides that "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution" constitutes criminal contempt. *In re Hege*, 205 N.C. 625, 630, 172 S.E. 345, 347 (1934) states that "[t]he word 'wilful,' when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law." (Citation omitted.) *State v. Falkner*, 182 N.C. 793, 798, 108 S.E. 756, 758 (1921), holds that "[t]he term *unlawfully* implies that an act is done, or not done, as the law allows, or requires; while the term *willfully* implies that the act is done knowingly and of stubborn purpose."

There is no evidence in the record that the plaintiff wilfully disobeyed any order lawfully issued by the court. The judge signed the temporary restraining order on 8 August 1979 at 11:52 a.m. There is no evidence regarding the time at which the order

was served on plaintiff by substituted service on her husband. Plaintiff left her home between 1:00 and 1:30 p.m. on 8 August 1979 and proceeded to fly out of the State. Without any evidence that plaintiff had notice of the temporary restraining order prior to leaving the State, she cannot be held in contempt for purposely violating this order.

For the foregoing reasons the trial court's refusal to grant relief to plaintiff from the 16 August 1979 order must be reversed.

Reversed.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from that portion of the majority opinion which holds the record does not support a finding that the temporary restraining order had been served on the plaintiff. The return on the restraining order shows it was received on 8 August 1979 by T. E. Moore, a deputy sheriff of Edgecombe County and returned 10 August 1979 showing it had been served on the plaintiff by leaving a copy with her husband at 1604 Lynn Ave., in Rocky Mount. There is evidence that the plaintiff and her husband resided at this address. I believe this shows proper service on the plaintiff. *See* G.S. 1A-1, Rule 4(j)(1)a.

I vote to reverse that portion of the order which awarded the defendant custody of the children and affirm the rest of the court's order.

STATE OF NORTH CAROLINA v. BARRY D. GILLIAM AND MILTON LOCKLEAR

No. 8112SC431

(Filed 17 November 1981)

1. **Criminal Law § 89.5— corroborative evidence—admission proper**

The trial court did not commit reversible error when it admitted testimony by an officer which substantially corroborated the testimony of one of the State's witnesses. A slight variation in testimony concerning the amount of time it took the witness to pick out the photographs did not render the testimony of the officer inadmissible.

2. **Robbery § 4.5— armed robbery—sufficiency of evidence**

The evidence was sufficient to take the issue of defendant's guilt of armed robbery to the jury where the evidence tended to show that defendant was present in a store at the time of the robbery, that he counseled codefendant in the robbery, and that he and codefendant fled the scene together with defendant driving the car used in the getaway.

3. **Criminal Law § 113.7— instruction on acting in concert—no error**

The evidence was sufficient to support a charge on acting in concert where the evidence tended to show defendant was the driver of the automobile used in the robbery, that he parked it across from the store robbed, that he entered the store with a codefendant who was carrying a gun and who actually robbed the attendant, that while in the store he repeatedly told the attendant to move it and to hurry up, and that he and codefendant fled the store together.

APPEALS by defendants from *Herring, Judge.* Judgments entered 17 December 1980 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 14 October 1981.

Defendants appeal their convictions of armed robbery. At trial, the State called Nellene Cole, the store clerk who was on duty when the defendants allegedly robbed the Cottonade 7-Eleven. She testified that she identified the defendants upon being shown several photographs by the Cumberland County Sheriff's Department. She also identified the defendants in open court as being her assailants. The State also offered testimony by a police officer which corroborated the testimony of Mrs. Cole regarding the photographic identification. The defendants offered no evidence. Both defendants appeal on different grounds.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Cooper, Davis & Eaglin, by James M. Cooper, for defendant-appellant Gilliam.

Downing, David, Vallery, Maxwell & Hudson, by Edward J. David, for defendant-appellant Locklear.

BECTON, Judge.

BARRY GILLIAM'S APPEAL

[1] Defendant Gilliam argues that the trial court committed reversible error when it admitted testimony by Officer Burgess of the Cumberland County Sheriff's Department which, he contends, tended to clarify statements made by Nellene Cole, the prosecuting witness.

Our courts have been most liberal in allowing testimony to corroborate a witness. Our Supreme Court, in *State v. Rogers*, 299 N.C. 597, 601, 264 S.E. 2d 89 (1980), summarized the law of corroborative testimony thusly:

> Corroborative testimony is testimony which tends to strengthen, confirm, or make more certain the testimony of another witness. Where testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation. It is the responsibility of the jury to decide if the proffered testimony does, in fact, corroborate the testimony of another witness. [Citations omitted.]

The testimony of Officer Burgess, while containing some slight variations, substantially corroborated the testimony of Mrs. Cole. Mrs. Cole testified that she identified photographs of Billy Ray Locklear and Milton Locklear from the first set of composites offered by Officer Burgess and that she later identified Gilliam's photograph when she was shown the second set of composites. She further testified that she identified Gilliam's photograph within two minutes of being shown it, and that it took her one minute to pick out Milton Locklear's photograph and two minutes to pick out Billy Ray Locklear's photograph. She testified that Billy Ray Locklear was not one of the robbers but that she iden-

tified him because he had been in the store earlier that day. Further, she asserted repeatedly that Gilliam was present and had committed most of the acts constituting the robbery.

Officer Burgess testified that Mrs. Cole identified the pictures of the defendants and Billy Ray Locklear after he showed her some composites. He testified that it took Mrs. Cole one minute and forty-five seconds to identify Gilliam's photograph and that she identified Billy Ray Locklear's photograph within fifteen seconds. He, too, testified that she explained that she identified Billy Locklear because he had been in the store earlier. This slight variation in the amount of time it took Mrs. Cole to pick out the photographs does not render the testimony of Officer Burgess inadmissible. Further, since Officer Burgess was present, he could testify as to what he saw or observed. Any discrepancies in the testimony of the two witnesses went to the weight of the evidence, not to its admissibility. *See State v. Rogers.* Consequently, defendant Gilliam's assignment of error is overruled.

MILTON LOCKLEAR'S APPEAL

Milton Locklear argues (1) that the trial court committed prejudicial error in denying his motion to dismiss at the close of the State's evidence and at the close of all of the evidence; (2) that the trial court erred in instructing the jury on acting in concert; and (3) that the trial court erred in not instructing the jury on common law robbery.

[2] Locklear's first argument is without merit. In determining if a motion to dismiss at the close of the State's evidence is to be granted, the trial court is required "to consider the evidence in its light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968). The evidence, taken in the light most favorable to the State tends to show that Milton Locklear was present in the store at the time of the robbery, that he counseled Gilliam in the robbery, and that he and Gilliam fled the scene together. Further, Milton Locklear was the driver of the car used in the getaway, and while in the store, he repeatedly told Mrs. Cole to move it and to hurry up. This evidence is sufficient to take the issue of Locklear's guilt to the jury. Consequently, the trial court properly

denied the defendant's motion to dismiss at the end of the State's evidence.

Locklear also contends on this appeal that the trial court erred by denying his motion to dismiss at the end of all of the evidence. In considering a motion to dismiss made at the close of all the evidence the trial court's *sole* function is to determine "whether a reasonable inference of the defendant's guilt of the crime charged *may* be drawn from the evidence." *State v. Smith*, 40 N.C. App. 72, 78-79, 252 S.E. 2d 535, 540 (1979). There is substantial evidence in the record which puts Locklear at the scene of the crime and which details his involvement in the crime. We believe the trial court was correct in submitting the case to the jury.

[3] Locklear next contends that the trial court erred in instructing the jury on "acting in concert." We disagree.

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

State v. Joyner, 297 N.C. 349, 357, 255 S.E. 2d 390, 395 (1979).

The defendant is correct that mere presence at the scene of a crime is not enough to convict an accused. *State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967); *State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952). However, one who is present but

> who does not actually participate in the commission of a crime [is guilty of that crime if there is] some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator of the crime or by his conduct made it known to such perpetrator that he was standing by to lend assistance when and if it should become necessary.

272 N.C. at 51, 157 S.E. 2d at 657 *quoting State v. Ham*, 238 N.C. 94, 97, 76 S.E. 2d 346, 349 (1953).

The evidence offered at trial tends to show that Locklear was the driver of the automobile and that he parked it across

from the 7-Eleven Store; that he entered the store with Gilliam who was carrying a shotgun and who actually robbed Mrs. Cole; that while in the store he repeatedly told Mrs. Cole to move it and to hurry up; that he and Gilliam fled the store together; and that he drove away from the scene at a fast speed. Although Locklear may not have actually robbed Mrs. Cole, we think the evidence shows that he was acting in concert with Gilliam. This assignment is, therefore, overruled.

Locklear's next and final argument is that the court failed to instruct on the lesser offense of common law robbery. This argument is also without merit. The trial court is required to instruct the jury on lesser included offenses when the evidence sustains such a charge or when there is a genuine conflict in the evidence. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). However, when there is no evidence to support the lesser offense charge, the trial court is under no duty to so instruct the jury. The defendant was charged with armed robbery. All of the evidence tendered clearly establishes each and every element of armed robbery. The court properly instructed the jury on armed robbery under the acting in concert theory only.

For the foregoing reasons, we find

No error.

Chief Judge MORRIS and Judge ARNOLD concur.

WARREN G. RHYNE, ADMINISTRATOR OF THE ESTATE OF LINDA KAREN RHYNE v. PATRICK SHELLEY O'BRIEN AND FRED S. O'BRIEN

No. 8021SC1212

(Filed 17 November 1981)

1. Appeal and Error § 49.2— exclusion of evidence—other evidence of same import

Any error in the court's exclusion of an expert witness's response to a hypothetical question regarding the probable effect of alcohol on defendant's ability to drive was harmless where the expert earlier had given extensive testimony in response to hypothetical questions regarding the effect of alcohol on defendant's nighttime vision, judgment, coordination, attention span, and reaction time.

2. Automobiles § 50.2— impairment of driving ability by intoxicants—sufficient evidence

The trial court in a wrongful death action erred in instructing the jury that there was insufficient evidence to indicate that drinking visibily or appreciably impaired defendant's driving ability at the time of the accident where there was evidence that defendant driver had consumed three or four 12-ounce beers prior to the accident and that the percentage of alcohol in defendant's blood two hours after the accident was .06 by weight; the investigating officer testified that he smelled an odor of alcohol on defendant after the accident, that defendant's eyes were dilated, and that defendant fell to the ground when he got out of the officer's car; and plaintiff's expert gave opinion testimony in response to hypothetical questions as to the probable effect that a blood alcohol content of .06 would have on defendant's nighttime vision, judgment, coordination, attention span, and reaction time.

APPEAL by plaintiff from *DeRamus, Judge.* Judgment entered 12 September 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 29 May 1981.

Plaintiff's intestate was killed in a single car collision which occurred at approximately 1:15 a.m. on 7 January 1979. The car, a small Triumph, was driven by defendant Patrick O'Brien [hereinafter defendant].

The evidence shows that defendant was having a party at his apartment on the evening of 6 January 1979. Defendant bought two six packs of beer for his guests and drank a portion of the beer himself. Plaintiff's intestate brought rum to the party and was seen drinking the rum during the evening. Two hours after the accident, the percentage of alcohol in defendant's blood was .06 by weight. The percentage in the deceased's blood was .25.

After midnight, defendant left his apartment to drive Linda Rhyne home. Defendant testified that he began to drive down a slight hill. Defendant downshifted, put his foot on the brake, and glanced down to check his speed. When he looked up, defendant saw a large dog in front of the car and swerved to the right to avoid it. The car went into a ditch and overturned. Linda Rhyne died at the scene.

Plaintiff brought this action seeking to recover two million dollars in compensatory damages and two million dollars in punitive damages. The jury found that Linda's death was not caused by negligence on the part of defendant. From the judgment, plaintiff appealed.

Finger, Park & Parker, by Daniel J. Park, M. Neil Finger and Raymond A. Parker, II, for plaintiff-appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by J. Robert Elster & Grover G. Wilson, for defendant-appellees.

HILL, Judge.

[1] By his first assignment of error, plaintiff contends the trial judge erred in striking an expert witness's response to a hypothetical question regarding the probable effect of alcohol on the defendant's ability to drive. While it may have been error for the court to exclude the expert's opinion, the error was harmless. Plaintiff's expert earlier had given extensive testimony in response to hypothetical questions regarding the effect of alcohol on defendant's nighttime vision, judgment, coordination, attention span, and reaction time. The exclusion of testimony cannot be held prejudicial when the same witness has just testified to facts with substantially the same meaning. *Terrell v. Insurance Co.*, 269 N.C. 259, 152 S.E. 2d 196 (1967). The same rationale applies to opinion testimony. Plaintiff's first assignment of error is overruled.

[2] In his second assignment of error, plaintiff argues that the trial judge erred in his instruction to the jury, and ruling as a matter of law, that there was insufficient evidence to indicate that defendant had consumed sufficient intoxicants to visibly or appreciably impair his driving ability, or that he was driving under the influence at the time of the collision. The portion of the judge's charge to which objection is made is as follows:

> Both the plaintiff and the defendants have introduced evidence which tends to show that the defendant, Patrick O'Brien, had consumed alcoholic beverages prior to the collision. [There is no sufficient evidence to indicate that drinking visibly or appreciably impaired Patrick O'Brien's driving ability at any time prior to reaching the general area of the collision.]
>
> * * *
>
> [The evidence is legally insufficient for you to find that he was driving under the influence.]
>
> * * *

[The plaintiff has introduced evidence which tends to show that Patrick O'Brien's driving ability was somewhat impaired in various ways, and that he had a blood alcohol content of .06 percent by weight at approximately 3:15 a.m. on January 7, 1979. On the other hand, the defendant has introduced evidence which tends to show that Patrick Shelley O'Brien was sober, and that he had manifested no effect from three or four 12-ounce beers consumed by him in the evening hours prior to approximately 10:30 P.M. on January 6, 1979. You may consider evidence relative to Patrick O'Brien's drinking and the effect, if any, on his driving as a part of all the circumstances existing on the occasion in question in deciding what a reasonably careful and prudent person would or would not have done.]

The record reveals defendant had a party at his apartment during the early part of the evening on which the accident occurred. Defendant had consumed three or four 12-ounce beers between 5:30 p.m. and 10:30 p.m. The accident occurred at 1:15 a.m. Trooper Smith arrived at the scene some 20 minutes thereafter. Smith testified that when he and defendant started from one patrol car to the other, he smelled alcohol on defendant; he knew by his appearance defendant had been drinking before he smelled anything on him. Defendant's pupils were dilated, and he fell to the ground when he got out of the trooper's car. Trooper Smith further testified that "I told him [defendant] that in my opinion . . . he was not under the influence of an alcoholic beverage *per se* by law statute but it was also my opinion that he was close." Defendant consented to a blood test for alcohol which was administered at 3:15 a.m., some two hours after the accident. The test showed an alcohol content of .06.

Dr. Evan Ashby observed defendant at the hospital after the accident and was of the opinion that defendant was not under the influence. Bayne McConnell, who was at the apartment, testified defendant exhibited no visible signs of alcohol effect. Defendant denied any effects of alcohol at the time he left his apartment to go to the Linda Rhyne home.

Plaintiff contends that defendant was guilty of culpable conduct in that he operated his vehicle upon a public highway recklessly after consuming intoxicating liquor that directly af-

fected his driving. Plaintiff thereby alleges a violation of G.S. 20-140(c), which is as follows:

> Any person who operates a motor vehicle upon a highway or public vehicular area after consuming such quantity of intoxicating liquor as directly and visibly affects his operation of said vehicle shall be guilty of reckless driving and such offense shall be a lesser included offense of driving under the influence of intoxicating liquor as defined in G.S. 20-138 as amended.

A violation of this section gives rise to both civil and criminal liability. *Ingle v. Roy Stone Transfer Corp.*, 271 N.C. 276, 156 S.E. 2d 265 (1967). A motorist is guilty of negligence if he operates a motor vehicle on a highway while under the influence of intoxicating liquor. Such conduct, however, will not constitute actionable negligence unless it is causally connected to the accident. *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970). A person is under the influence of intoxicating liquor when he has drunk "a sufficient quantity of intoxicating liquor 'to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.' " *State v. Hairr*, 244 N.C. 506, 510-11, 94 S.E. 2d 472, 475 (1956). *See* 2 Strong's N.C. Index, Automobiles § 120, p. 398.

A mere finding by the jury that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal relation between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was a proximate cause of the collision. *State v. Lowery*, 223 N.C. 598, 27 S.E. 2d 638 (1943). *See Atkins v. Moye, supra.*

In view of the testimony which plaintiff's expert had given earlier in response to hypothetical questions regarding the effect of alcohol on defendant's nighttime vision, judgment, coordination, attention span, and reaction time, the jury could have found that defendant had consumed such quantity of intoxicating liquor as directly affected his operation of the vehicle and was a proximate cause of the accident.

The charge by the trial judge that "[t]here is no sufficient evidence to indicate that drinking visibly or appreciably impaired

Patrick O'Brien's driving ability at any time prior to reaching the general area of the collision" was error and in conflict with the remainder of the charge. Plaintiff must have a new trial.

We have carefully considered plaintiff's remaining assignments of error and defendant's cross-assignment of error and find them to be without merit.

New trial.

Judges MARTIN (Robert M.) and ARNOLD concur.

ELEC-TROL, INC., PLAINTIFF v. C. J. KERN CONTRACTORS, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. NORTH CAROLINA BAPTIST HOSPITALS, INC., THIRD-PARTY DEFENDANT

No. 8121SC315

(Filed 17 November 1981)

1. **Contracts §§ 12.1, 21.2— construction contract—unambigious terms**

In a construction contract action where plaintiff alleged it was entitled to additional compensation for change orders performed, and the contract provided that the architect would determine the amount of claims for additional cost if the owner and contractor could not agree, as the provision was clear it constituted a final determination of the parties' rights unless plaintiff showed bad faith or failure to exercise honest judgment on the part of the architect. Therefore, where plaintiff did not properly raise the question of bad faith, the trial court did not err in concluding that defendants were entitled to summary judgments on claims that were not approved by the architect in compliance with the terms of the contract and subcontract.

2. **Contracts § 21— recovery under quantum meruit precluded by express contract**

A subcontractor was not entitled to recovery pursuant to a theory of *quantum meruit* where the contract and the subcontract expressly provided that the architect shall determine the amount of adjustment if the owner and contractor cannot agree. An express contract precludes an implied contract with reference to the same subject matter.

APPEAL by plaintiff from *Collier, Judge.* Judgment entered 17 December 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 October 1981.

Plaintiff and defendant entered into a contract dated 11 April 1973 whereby plaintiff agreed to perform the electrical subcontracting work for an ambulatory care building for third-party defendant. The subcontract between plaintiff and defendant contained language incorporating it into the provisions of the contract between the defendant and the third-party defendant. The terms of the contract between defendant and third-party defendant, which were incorporated by reference into the subcontract between plaintiff and defendant, contained provisions governing the procedure by which claims for additional costs would be resolved, including Section 12.2.1 of the General and Supplementary Conditions which provides that "[i]f the Owner and Contractor cannot agree on the amount of the adjustment in the contract sum, it shall be determined by the Architect."

Plaintiff's complaint and amended complaint allege that plaintiff is entitled to additional compensation for change orders performed resulting from alterations made in the specifications for the work to be performed. Defendant and third-party defendant contend that all sums approved by the architect as proper payment for additional work performed by plaintiff have either been paid or tendered to plaintiff.

The trial court concluded that plaintiff was entitled to be paid for such sums as the architect determined to be due to the plaintiff for additional work performed. As to all other sums alleged by plaintiff to be due for work performed, the trial court concluded that defendant and third-party defendant were entitled to summary judgment because these claims were not approved by the architect in compliance with the terms of the contract and subcontract. From this judgment, plaintiff appealed.

Adams, Kleemeier, Hagan, Hannah & Fouts by Walter L. Hannah and Bruce H. Connors and Tornow and Lewis by Michael J. Lewis, for the plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard by James T. Williams, Jr. and Anthony Brett and Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr. and Anthony Brett for defendant-appellees.

MARTIN (Robert M.), Judge.

Plaintiff assigns as error the entry of summary judgment for the defendant and the third-party defendant. It argues that where the parties have not agreed that the architect's decisions are final, the subcontractor may bring an action for payment of certain accepted change order work when changes were ordered by the contractor and the architect either failed to rule on the change order requests or ruled erroneously.

[1] In support of this argument the plaintiff relies on three theories, the first of which is that the contract and subcontract do not provide that the architect's determinations shall be final. We disagree.

The terms of the contract between the defendant and the third-party defendant, which terms were incorporated by reference into the contract between plaintiff and defendant, contained provisions governing the procedures by which claims for additional costs were to be determined. Section 12.2.1 of the General and Supplementary Conditions provided that "[i]f the Owner and the Contractor cannot agree on the amount of the adjustment in the contract sum, it shall be determined by the Architect."

The North Carolina courts have recognized that a provision in a contract, providing for the architect's approval before the contractor can recover compensation on his contract, is binding on the parties. When the contract so provides, the architect's certificate is a condition precedent to the contractor's recovery, absent a showing of bad faith or failure to exercise honest judgment. *J. R. Graham and Son, Inc. v. Board of Education*, 25 N.C. App. 163, 212 S.E. 2d 542, *cert. denied*, 287 N.C. 465, 215 S.E. 2d 623 (1975). In *Heating Co. v. Board of Education*, 268 N.C. 85, 89-90, 150 S.E. 2d 65, 68 (1966) the Court stated as follows:

> "In building and construction contracts the parties frequently provide that the completion, sufficiency, classification, or amount of the work done by the contractor shall be determined by a third person, usually an architect or engineer. Such stipulations which, in their origin, were designed to avoid harassing litigation over questions that can be determined honestly only by those possessed of scientific

knowledge, have generally been held valid. This is true even though the architect or engineer is employed by the owner unless unknown to the contractor, he has guaranteed to keep the cost of the work below a certain sum."

. . .

"Although plain language in the contract is required in order to make the decision or certificate of an architect or engineer acting thereunder final and conclusive, it may be stated generally that the decision of the architect or engineer is conclusive as to any matter connected with the contract if the parties, by any stipulation, constitute the architect or engineer the final arbiter of such matter as between the parties. Accordingly, where the contract provides that the work shall be done to the satisfaction, approval, or acceptance of an architect or engineer, such architect or engineer is thereby constituted sole arbitrator between the parties, and the parties are bound by his decision, in the absence of fraud or gross mistake. The same rule applies where it is provided that payments shall be made only upon the certificate of the architect.

"It is also clear that where the parties stipulate expressly or in necessary effect, that the determination of the architect or engineer shall be final and conclusive, both parties are bound by his determination of those matters which he is authorized to determine, except in case of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. The reason underlying this rule is that under such circumstances the contract makes the architect or engineer the arbitrator, and his determination can be attacked only in the same manner as that of any other arbitrator. On the other hand, where the stipulations are such that the meaning to be gathered therefrom is that the architect's or engineer's certificate shall not be final, the parties are not bound by the certificate." [Citations omitted.]

In the present case the contract provided that the architect would determine the amount of claims for additional cost if the owner and contractor could not agree. This provision is clear and binding on the parties. Thus it constitutes a final determination of the parties' rights unless plaintiff shows bad faith or failure to ex-

ercise honest judgment on the part of the architect. *J. R. Graham and Son, Inc. v. Board of Education, supra.*

The plaintiff contends that a significant question of fact exists as to the independence of the architect. Neither plaintiff's complaint nor its amended complaint raised this issue. The trial court found as fact that "[t]here are no allegations in the complaint that the architect's determination of the additional amounts due to the plaintiff for additional work done were made as a result of bad faith, gross mistake or fraud, or that the parties waived the requirements of the contract that the architect would make the determination as to the sums to be paid for additional work performed." Because plaintiff did not take exception to this finding of fact, plaintiff cannot raise this issue on appeal to reverse the grant of defendant's motion for summary judgment. Rule 10, N.C. Rules App. Proc.

[2] The plaintiff's final argument is that it is entitled to the reasonable value of its work from the general contractor, Kern, regardless of whether the owner, North Carolina Baptist Hospitals, Inc., paid the contractor. Plaintiff is seeking, in essence, a recovery pursuant to a theory of *quantum meruit.*

An express contract precludes an implied contract with reference to the same subject matter. *Concrete Company v. Lumber Company,* 256 N.C. 709, 124 S.E. 2d 905 (1962). For example, in *Brokers, Inc. v. Board of Education,* 33 N.C. App. 24, 234 S.E. 2d 56, *discr. rev. denied,* 293 N.C. 159, 236 S.E. 2d 702 (1977), a contractor sued to recover the value of work performed by plaintiff in excess of that specified in the written contract between the parties. The written contract provided in part that "The Contract Sum and the Contract Time may be changed only by Change Order." The evidence tended to show that the sum sued for by plaintiff was not authorized by change order. In holding that the plaintiff was not entitled to recover on the theory of *quantum meruit* or implied contract, the Court stated at 33 N.C. App. at 30, 234 S.E. 2d 60 (1977) the following:

> "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. 2d, *Restitution and Implied Contract*, § 6, pp. 948, 949.

In the present case the contract and the subcontract expressly provide that the architect shall determine the amount of adjustment if the owner and contractor cannot agree. Plaintiff is bound by the express terms of these contracts.

The material facts involved in this action are not in dispute. The only questions involved in this action are questions of law requiring the interpretation of the contract and the subcontract. These questions were properly resolved by the trial court's grant of defendant's motion for summary judgment.

For the foregoing reasons, the order of the trial court should be

Affirmed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. THOMAS TURNER, JR.

No. 8126SC421

(Filed 17 November 1981)

1. **Criminal Law § 149— order suppressing evidence—appeal by State—time for filing prosecutor's certificate**

In order for the State to appeal a pretrial order allowing a motion to suppress evidence, the prosecutor's certificate required by G.S. 15A-979(c) stating that the appeal is not taken for the purpose of delay and that the evidence is essential to the case must be submitted to the trial judge within the ten-day period the case remains viable for appeal under G.S. 15A-1448(a)(1).

2. **Criminal Law § 148— appeal of order denying motion to suppress**

Appellate review of an order which denies a motion to suppress may be had only after a judgment of conviction, including a judgment entered upon a plea of guilty. G.S. 15A-979(b).

Judge WEBB dissenting.

State v. Turner

APPEAL by the State and cross-appeal by defendant from *Johnson, Judge.* Order dated 29 December 1980 entered in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 October 1981.

Defendant was indicted for the breaking and entering of a dwelling house with the intent to commit a felony and felonious larceny after breaking and entering. Prior to trial, defendant moved to suppress the identification testimony of Aleasia Mungo and Eddy Mungo on the grounds that he was illegally arrested and subjected to an unconstitutional identification procedure. After a hearing on the motion, the trial judge entered an order granting defendant's motion to suppress the identification testimony of Aleasia Mungo and denying the motion to suppress the identification testimony of Eddy Mungo.

The State has appealed from that part of the order granting defendant's motion to suppress. The defendant has cross-appealed from that part of the order denying his motion to suppress.

Attorney General Edmisten, by Assistant Attorney General Joan H. Byers, for the State-appellant.

Ellis M. Bragg for defendant-appellant.

MARTIN (Robert M.), Judge.

[1] We dismiss the appeal by the State for lack of jurisdiction by this Court. The general rule is that the prosecution cannot appeal from a judgment in favor of a defendant in a criminal case in the absence of a statute clearly conferring that right. *State v. Harrell,* 279 N.C. 464, 183 S.E. 2d 638 (1971); *State v. Dobson,* 51 N.C. App. 445, 276 S.E. 2d 480 (1981). Statutes which authorize an appeal by the State must be strictly construed. *State v. Harrell, supra.*

N.C. G.S. § 15A-1445 grants to the State the right to appeal an order allowing a motion to suppress evidence as provided in N.C. G.S. § 15A-979. Subsection (c) of N.C. G.S. § 15A-979 states as follows:

> An order by the superior court granting a motion to suppress prior to trial is appealable to the appellate division of the General Court of Justice prior to trial upon certificate by

the prosecutor to the judge who granted the motion that the appeal is not taken for the purpose of delay and that the evidence is essential to the case.

We believe that the above statutory provision must be read in conjunction with N.C. G.S. § 15A-1448(a)(1) providing that "[a] case remains open for the taking of an appeal to the appellate division for a period of ten days after the entry of judgment." Construed as a whole, these statutes mandate that the State pursue its right to appeal by submitting to the trial judge the certificate required by N.C. G.S. § 15A-979(c) within the time period the case remains viable for appeal under N.C. G.S. § 15A-1448(a)(1) or the order will not be held appealable. The legislature has accorded to the State a specific procedure for appeal of this particular type of order granting a motion to suppress prior to trial. The burden is on the State to demonstrate that it has fully complied with all statutory requirements. *State v. Dobson*, 51 N.C. App. 445, 276 S.E. 2d 480 (1981).

In the case at hand the appeal entry states that the prosecution gave oral notice of appeal in open court on 9 December 1980. The record on appeal includes a document entitled "certification by prosecutor." Although we find nothing in error regarding the substance of this document, we note that the certificate, which is signed by the Attorney General on behalf of the District Attorney, is dated 16 February 1981 and bears no indication that it was either filed in the clerk's office of Mecklenburg County or actually submitted to the trial judge in apt time. Because of the State's failure to properly perfect its appeal, we find that this appeal is not authorized by statute and our court has no jurisdiction. The appeal must be dismissed.

[2] We also find that this Court lacks jurisdiction to hear the appeal of defendant from that portion of the order denying his motion to suppress. Appellate review of an order which denies a motion to suppress may be had only after a judgment of conviction, including a judgment entered upon a plea of guilty. N.C. G.S. § 15A-979(b); *State v. Grogan*, 40 N.C. App. 371, 253 S.E. 2d 20 (1979). Defendant's appeal is premature and must also be dismissed.

The appeal by the State is

Dismissed.

The appeal by the defendant is

Dismissed.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. The majority states that G.S. 15A-1445, G.S. 15A-1448(a)(1), and G.S. 15A-979 must be read together, which requires the prosecutor within ten days of an order suppressing testimony to file a certificate to the judge who granted the motion stating the appeal is not taken for the purpose of delay and the evidence is essential to the case. I do not so read these statutes together or singly. G.S. 15A-1448(a)(1) provides an appeal must be taken within ten days. This was done. G.S. 15A-979 requires the prosecutor's certificate must be filed. This was done. I would hold this Court should entertain the appeal.

I also believe the order of the superior court should be reversed because the findings of fact are not supported by the evidence. Among the facts found by the court was the following:

> "That although she struggled with the individual in her bedroom, she was unable to recognize the face of the individual to the point of making an identification of the face."

The only testimony on this finding of fact was as follows:

> "Q. Did you recognize him at that time?
>
> A. Not when he grabbed me but when he first came in the room and I saw him.
>
> Q. You recognized him when?
>
> A. When he first came in the room."

I believe the evidence is to the effect that the witness had recognized the defendant before she struggled with him and not that she could not recognize him when they were struggling as found by the court.

The court also found as a fact that the witness's identification was based upon a name given to her by her brother. As I read her testimony, the witness testified she recognized the defendant as being a man she had seen in the neighborhood and when she told her brother who the intruder was, her brother told the witness the name of the defendant. This is the only evidence as to this finding of fact and it does not support the fact found in superior court.

The suppression of the witness's identification testimony was based on these two findings of fact which I do not believe were supported by the evidence. I would reverse and remand for another hearing on the State's appeal. I vote with the majority on the defendant's appeal.

JAMES LAWRENCE SMITH v. BYNUM McRARY D/B/A McRARY HARLEY-DAVIDSON

No. 8128DC258

(Filed 17 November 1981)

Bailment § 3.1— deviation from bailment contract—failure to instruct error

In a negligence action involving a nongratuitous bailment, it was error for the trial court to fail to instruct, upon request, that if plaintiff had a reasonable expectation that his property would be stored in defendant's main building, defendant stored it in a smaller building and defendant had no authority to move it outside the main building, defendant would be liable for its loss irrespective of any negligence as the evidence supported the charge.

APPEAL by plaintiff from *Roda, Judge.* Judgment entered 17 October 1980 in District Court, BUNCOMBE County. Heard in the Court of Appeals 16 October 1981.

Plaintiff brought this negligence action for defendant's failure to return plaintiff's motorcycle, which was the subject of a nongratuitous bailment. The jury answered the issue of

negligence against the plaintiff. From the trial court's entry of judgment on the jury's verdict, plaintiff has appealed.

Stephen D. Kaylor, for plaintiff-appellant.

Harrell and Leake, by Larry Leake, for defendant-appellee.

WELLS, Judge.

Plaintiff's assignments of error relate to the trial judge's denial of plaintiff's motion to amend his complaint, the court's refusal to allow the opinion testimony of plaintiff's expert witness, and the failure of the judge to adequately define proximate cause and foreseeability, to apply the law to the evidence, and to instruct the jury on absolute liability. We find error in the jury instructions and order a new trial.

Plaintiff's evidence pertinent to this appeal may be summarized as follows. Plaintiff testified that he purchased his motorcycle from defendant. On 29 September 1979, plaintiff took the motorcycle to defendant for a warranty check and for servicing. Plaintiff delivered the motorcycle to defendant's main building, which plaintiff knew to be equipped with a burglar alarm system. When plaintiff delivered the motorcycle to defendant he observed that there was another, smaller building on defendant's premises. On previous visits to defendant's premises, plaintiff had observed other motorcycles, both new and used, being repaired and stored in defendant's main building. At the time plaintiff delivered his motorcycle, defendant gave plaintiff no indication that the motorcycle would be stored in the separate, smaller building. Plaintiff was subsequently informed by defendant that on the weekend of 14 October 1979 his motorcycle had been stolen while it was being stored in the separate, smaller building. Defendant's main building was not broken into that weekend.

Defendant was called by plaintiff as an adverse witness. Defendant testified as to the bailment of the motorcycle, described the premises and its security system, and recalled the theft of plaintiff's motorcycle. Defendant testified that the building in which plaintiff's motorcycle was stored was often used for the purpose of storing motorcycles; the building was protected by padlocks, one on a door and one on a fence gate near the entrance to the building, and by a burglar alarm system. Defendant

testified that his premises had been burglarized three times within the previous 18 months and that his burglar alarm system was not functioning when plaintiff's motorcycle was stolen. He also testified that plaintiff's motorcycle was stored with the key in the ignition and gasoline in the tank. Defendant testified that when the motorcycle was delivered, he did not indicate to plaintiff where the motorcycle would be stored, but that he did not indicate that it would be stored anywhere except the main building.

Louie Logan, a special investigator in the Buncombe County Sheriff's Department, was tendered as and found by the trial court to be an expert in the area of preventive security measures. Officer Logan testified that defendant's fence and building in which plaintiff's motorcycle was stored were secured by padlocks which could be cut with bolt cutters and that they were of a type his department would not recommend, and that it is not a good idea for a shop or garage to leave keys in the ignitions of vehicles stored on their premises.

Plaintiff's evidence brings this case clearly within the rule stated by our Supreme Court in *Pennington v. Styron*, 270 N.C. 80, 153 S.E. 2d 776 (1967), properly applied in this case as follows: if the jury should find that there was an implied understanding between plaintiff and defendant that plaintiff's motorcycle could be moved from defendant's main building to defendant's separate, smaller building at defendant's convenience, defendant's duty to plaintiff was one of ordinary care and defendant would be liable only for his failure to exercise such care. If, however, the jury should find that under the circumstances of this bailment plaintiff had a reasonable expectation that his motorcycle would be stored in defendant's main building where plaintiff delivered it and that defendant had no authority to move it outside that building, defendant would be liable for its loss irrespective of any negligence. Plaintiff was entitled to have the trial court instruct the jury on this aspect of the case. Plaintiff submitted a requested charge in writing, which was denied by the trial court. The requested charge is as follows:

> "Ladies and Gentlemen of the jury, when you come to the _____ issue, the Court instructs you that:
>
> If the bailee, without authority, deviates from the contract as to the place of storage or keeping of the property,

and a loss occurs which would not have occurred had the property been stored or kept in the place agreed upon, he is liable even though he is not negligent. The bailee assumes the risk of any injury which would not have resulted had he not moved the property, even though the place to which he moves the goods is equally safe and proper for the purpose. An unauthorized deviation would make the Defendant's liability absolute, and the Plaintiff would not be required to prove negligence of any type or degree.

Ladies and Gentlemen of the jury, if you find from all the evidence that the agreement between the parties was that the Plaintiff's motorcycle was stored at the office and service building of the Defendant, and that the Defendant stored the motorcycle in an outbuilding, without the authority or consent of the Plaintiff, then you must answer this issue in favor of the Plaintiff, regardless of the negligence of the Defendant.

The trial court should have given, in substance, the requested charge.[1] The failure to give this requested charge was error and requires a new trial.

Plaintiff has also assigned as error certain portions of the trial court's charge as it relates to the issue of defendant's duty of ordinary care as a bailee. The trial court charged the jury in pertinent part as follows:

Now, members of the jury, the parties have stipulated that this was a bailment for hire. That means that the property was delivered by Mr. Smith to Mr. McRary for their mutual benefit. A party who receives the property of another under a bailment of this nature is under a duty imposed by law to exercise due care to protect the property from loss, damage or destruction and return the property tc the owner in as good a condition as when he received it.

Now, in this matter, members of the jury, the plaintiff contends that the defendant was negligent in that his burglar alarm was not working; that the locks he used for both the

1. The initial paragraph substantially reflects the rule stated in *Pennington v. Styron*, supra.

fence and for the building were not of a proper type, and that he left the key in the ignition. There is no statute in North Carolina that would require the defendant to do any of these things. There is no law that you cannot—the defendant in this case has violated no law so these would be for your concern only as it applies to the question of "Was the defendant negligent?"

The concluding sentences in the above-quoted portion of the charge were substantially misleading, carrying with them the implication that the absence of a statutory duty had a bearing on defendant's duty of due care. Such an instruction was prejudicial to plaintiff, regardless of whether the other portions correctly stated defendant's duty under the bailment. *See McNair v. Goodwin*, 264 N.C. 146, 141 S.E. 2d 22 (1965).

For the reasons we have stated, there must be a

New trial.

Judges MARTIN (Robert) and WEBB concur.

STATE OF NORTH CAROLINA v. STEPHEN J. MAHER

No. 813SC281

(Filed 17 November 1981)

1. Constitutional Law § 48— effective assistance of counsel—denial of continuance

Defendant was not denied the right to the effective assistance of counsel by the denial of his motion for continuance after his original counsel withdrew and his trial counsel was retained only four days before the trial began where original counsel had prepared the case for trial and offered to assist trial counsel in his preparation for trial; the prosecutor reminded both defendant and his counsel on Friday that the case would be tried the following Monday; the case was not a complex one; defendant's trial counsel showed a good grasp of the case during the trial; and defendant failed to show how his case would have been better presented had the continuance been granted.

2. Criminal Law § 102.8— no comment on defendant's failure to testify

The prosecutor's comments in his jury argument concerning the absence of any evidence to contradict the State's case in chief did not constitute an improper reference to defendant's failure to testify.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 24 November 1980 in Superior Court, CARTERET County. Heard in the Court of Appeals 16 September 1981.

Defendant was arrested on 27 July 1980 and charged with sale and delivery of a controlled substance and possession with intent to sell and deliver a controlled substance. He filed a waiver of venue on 26 August 1980. He was indicted 17 November, and the indictment was issued on 19 November 1980. Defendant and a codefendant, Lawrence Edward Whittis, in August retained Mr. David Work to represent them, but Mr. Work withdrew as counsel for defendant on 19 November. Defendant's new counsel, Mr. Frazier, through his associate, Mr. King, entered an appearance the same day. At that time Mr. Work reportedly told the court that he had readied the case for trial and that he would assist Mr. Frazier's preparation. Mr. King was informed by the prosecutor, Mr. Bestwick, on 20 November that defendant's case was set for trial on Monday, 24 November. Mr. King moved for a continuance, but the request was denied. Defendant was served on 20 November. There is evidence that on Friday, 21 November, Mr. Bestwick approached defendant and told him the case would be tried the following Monday. On 24 November, Mr. Frazier appeared and moved for a continuance on the grounds that he was unprepared to try the case. The court denied the request and a request to withdraw.

Defendant appeals from convictions of possession with intent to deliver diazepam and sale and delivery of diazepam, and an order of imprisonment.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defenders M. Christopher Kemp and Ann Pederson, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant alleges a denial of his right to effective assistance of counsel by denial of the motion for continuance. A motion to continue is ordinarily addressed to the trial judge's discretion and review is limited to a showing that he abused that discretion.

However, when a motion to continue is based on a constitutional right, the ruling of the trial court is reviewable on appeal because the motion then presents a question of law rather than discretion. *State v. Moore*, 39 N.C. App. 643, 251 S.E. 2d 647 (1979), *appeal dismissed* 297 N.C. 178 (1979); *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978), *cert. denied* 440 U.S. 984, 60 L.Ed. 2d 246, 99 S.Ct. 1797 (1979); *State v. Huffman*, 38 N.C. App. 584, 248 S.E. 2d 407 (1978); *State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977). The denial of defendant's motion in this case presents a constitutional question. Defendant must demonstrate, however, that there was both error in the denial of the motion and that he was prejudiced thereby before a new trial will be granted. *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978); *State v. Robinson*, 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617 (1968). Defendant has shown neither here.

The right to assistance of counsel is guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution and by Article I, Sections 19 and 23 of the Constitution of North Carolina. *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974). A defendant is not denied this right unless the attorney's representation is so inadequate that the trial has become "a farce and mockery of justice." *Id.* at 612, 201 S.E. 2d at 871. With regard to claims of ineffective representation, the North Carolina Supreme Court has said:

> The Courts rarely grant relief on the grounds here asserted, and have consistently required a stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation. We think such a standard is necessary, since every practicing attorney knows that a "hindsight" combing of a criminal record will in nearly every case reveal some possible error in judgment or disclose at least one trial tactic more attractive than those employed at trial.

State v. Sneed, supra at 613, 201 S.E. 2d at 871-72. Determination of whether defendant's right was violated is based on the circumstances of each case. *State v. Huffman*, supra; *State v. McFadden*, supra; *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976).

Defendant contends that denial of his motion to continue prejudiced him by giving counsel insufficient time to prepare for

trial. He says that his counsel, who was retained two days after return of indictment and on the same day prior counsel withdrew, was denied a reasonable opportunity to investigate and ready the case, because this left four days, including a weekend, to prepare for trial. We note that "[t]he constitutional right to assistance of counsel necessarily includes that counsel should have a reasonable time to prepare for trial. However, no set length of time for investigation, preparation and presentation is required. . . ." *State v. Harris*, supra, at 687.

We are, of course, bound by the record of the trial proceedings. *State v. Milano*, 297 N.C. 485, 256 S.E. 2d 154 (1979). That record, when scrutinized according to the recognized rules of law outlined above, does not show that defendant was denied effective representation at trial. Mr. Work had prepared the case before his withdrawal, and offered to assist Mr. Frazier with his own trial preparation. Mr. Work communicated with the prosecutor, Mr. Bestwick, between the months of August and November 1980. They discussed possible deposition and exchanged documents. Motions were filed and discovery complied with. Further, Mr. Bestwick reminded defendant on the preceding Friday that his case would be tried on Monday, and Mr. Frazier's associate was so apprised, as well. The case was not a complex one and the trial itself was conducted well. Mr. Frazier in his arguments to the jury showed a good grasp of the case, and cross examination was spirited. Defendant fails to show how his case would have been better presented had the continuance been granted. We find no prejudice under the circumstances and determine that effective assistance of counsel was not denied.

[2] Defendant also asserts that he was denied his Fifth Amendment right to remain silent when the prosecutor allegedly commented, in closing argument, on defendant's failure to testify. It is our opinion based on the record that the prosecutor made no such comment.

The portions of the state's argument that we have been asked to consider are the following:

> This is a simple case, a very simple case, factually. His Honor at some appropriate time will charge you as to what the law

> is in this case that is to be applied to these facts; but let me argue to you what it was that the State contends happened here and let me argue to you that this is the uncontradicted evidence. There is no evidence to the contrary.

And several lines later:

> Who is it under the uncontradicted evidence? The gentleman over here who doesn't particularly want to look at you right now; prefers to look away because he knows he is the Supplier.

The prosecutor, by these words, merely commented on the absence of any evidence to contradict the state's case in chief. "[T]he remark to which the objection is made does not specifically point to the failure of the defendants to take the stand. It does not argue any admission of guilt by them because of such failure." *State v. Walker*, 251 N.C. 465, 479-80, 112 S.E. 2d 61, 72 (1960), *cert. denied*, 364 U.S. 832, 5 L.Ed. 2d 58, 81 S.Ct. 45. Therefore, this portion of the argument does not violate the restriction prohibiting reference to the failure of the defendant to testify.

In defendant's trial and in the judgment rendered we find

No error.

Judges HEDRICK and WELLS concur.

JACK A. HOFFMAN, EMPLOYEE, PLAINTIFF v. RYDER TRUCK LINES, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. 8110IC295

(Filed 17 November 1981)

Master and Servant § 50— workers' compensation—injury repairing truck leased to defendant—not compensable

Plaintiff's injury, received while repairing a truck he both leased to defendant and drove for defendant, was not compensable under the Workers' Compensation Act as the injury occurred pursuant to his obligation under the lease agreement rather than within the scope of his employment as a driver for defendant.

APPEAL by defendant from the North Carolina Industrial Commission. Opinion and award filed 12 January 1981. Heard in the Court of Appeals 21 October 1981.

This case arises under the N.C. Workers' Compensation Act, G.S. 97-1 *et seq.*, from injuries suffered by plaintiff on 4 November 1978 while he was repairing a universal joint on the tractor-trailer rig he owned and leased to defendant. There was uncontroverted evidence that plaintiff rendered services to Ryder Truck Lines in two capacities: as a driver employed to make long-distance deliveries, and as an independent contractor required to keep his rig maintained and in good repair. These services were performed under separate contractual agreements with Ryder, and plaintiff's compensation for each was calculated as a separate percentage of the value of each load. The only issue raised in this action is whether plaintiff was performing as a driver-employee at the time of his injury or whether he was fulfilling his duties as an independent contractor.

The facts are largely undisputed. In 1977, plaintiff leased the tractor-trailer rig he owned to Ryder. Under the terms of the lease agreement, plaintiff agreed to perform, or arrange for performance of, all needed maintenance and repairs on the equipment, and to absorb all costs associated therewith. In consideration for these services, and for the use of the rig, plaintiff-lessor received a percentage of the gross income generated by each load transported.

In addition to the lessor-lessee relationship between the plaintiff and Ryder, an employment relationship also existed between the parties. Plaintiff was employed as a driver for Ryder and, as such, was paid a percentage of transport fees over and above that received under the lease agreement.

On 31 October 1978, plaintiff picked up a load for transport from Ryder's terminal in Greenville, South Carolina to two destinations in Illinois. With Ryder's permission, plaintiff drove from Greenville to his home in Connelly Springs, North Carolina, to take a few days off before continuing his trip to Illinois. Between Greenville and his home, however, plaintiff noticed a vibration which he recognized as caused by a bad universal joint. On 4 November 1978, shortly before his intended resumption of his trip to Illinois, plaintiff undertook to replace the faulty universal joint

and, in the course of this repair, was injured. Plaintiff's brother-in-law completed the haul for him and was compensated by Ryder at the "driver" rate. Plaintiff was unable to return to work until his medical release in May, 1979.

The Industrial Commission held that plaintiff's injuries occurred in the course of his employment as a driver for Ryder, and that plaintiff was therefore entitled to compensation under the Workers' Compensation Act. Ryder appeals, contending that the greater weight of the evidence showed plaintiff was rendering services as an independent contractor, not as an employee, at the time he was injured.

Byrd, Byrd, Ervin, Blanton & Whisnant, by C. Scott Whisant, for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes & Davis, by Russell P. Brannon, for defendant appellant.

ARNOLD, Judge.

We note at the outset that plaintiff presented no evidence or argument that either of the agreements between the parties was unconscionable or the product of unequal bargaining power. Thus, unless the contracts are found to have been intended to relieve the employer of its obligations under the Workers' Compensation Act, we can see no reason why the agreements of the parties should not be allowed to stand. Ryder concedes that plaintiff was its employee at the time of his injury, and that he is entitled to Workers' Compensation coverage if he was acting within the scope of his employment when the injury occurred. The only question before us is whether replacement of a universal joint pursuant to his obligation under the lease agreement with Ryder came within the scope of plaintiff's employment as a driver for Ryder. We find that it did not.

In determining whether a given relationship is that of employer and employee or that of employer and independent contractor, the test is one of control by the employer over the manner in which the employee does the required work. *Alford v. Victory Cab Co.*, 30 N.C. App. 657, 228 S.E. 2d 43 (1976). In the case at bar, the plaintiff was obligated under the lease agreement to repair and maintain his tractor-trailer rig. The manner in which

he fulfilled this obligation was entirely within plaintiff's discretion. While the rig was required to pass a monthly inspection by Ryder, the repairs in question were not being made in anticipation of such an inspection. Moreover, there is no evidence that plaintiff's employment as a driver for Ryder was in any way contingent upon his making these repairs. This renders the case factually distinguishable from *Thompson v. Transport Co.*, 32 N.C. App. 693, 236 S.E. 2d 312 (1977), on which plaintiff relies. In *Thompson*, the plaintiff was injured while preparing his rig for a pre-trip inspection which was required by the company. Furthermore, the equipment was required to pass inspection in order for the plaintiff to receive a load for transport. Here, plaintiff's decision to replace the universal joint was entirely his own, based on his own observations and determination that the repair was needed. No company-imposed requirement such as the pre-trip inspection involved in *Thompson* was a factor here.

We have carefully considered the opinion of the New York court in *Harding v. Herr's Motor Express, Inc.*, 35 App. Div. 2d 883, 315 N.Y.S. 2d 693 (1970), *appeal denied* 28 N.Y. 2d 487, 322 N.Y.S. 2d 1026 (1971), relied upon by the Commission. While that case is factually similar to the one before us, we find no indication in the court's brief memorandum opinion of any agreement which specifically placed the repairs involved within the scope of the lease agreement, rather than the employment agreement, of the parties. Since, in the case at bar, the lease agreement clearly designates routine repairs and maintenance as duties of the lessor, we are not persuaded that the two cases turn on the same legal issue.

We find it significant that the plaintiff here was the owner of the tractor-trailer rig he was responsible for maintaining. Since Ryder knew plaintiff had a personal interest in the proper maintenance of his equipment, it had no reason to believe close supervision of his performance of that maintenance was necessary.

In the absence of evidence that Ryder retained any control over the manner in which plaintiff performed the maintenance and repair duties required by the lease agreement, we hold that plaintiff's injury arose, not from the course of his employment but from the performance of his duties as an independent contractor.

The injury, therefore, is not covered by the Workers' Compensation Act.

The opinion and award entered by the Industrial Commission are accordingly

Reversed.

Judges CLARK and BECTON concur.

STATE OF NORTH CAROLINA v. CURTIS WAYNE ALLEY

No. 819SC557

(Filed 17 November 1981)

Criminal Law § 34.1— evidence of prior, non-criminal fires—inadmissibility

In a prosecution for procuring another to burn a building used for trade, the trial court erred in permitting the prosecutor to cross-examine defendant and defendant's wife about a number of prior fires which had damaged cars, trucks, trailers and a store owned by defendant where there was no evidence that any of the prior fires had been deliberately set or that they were criminal in nature.

APPEAL by defendant from *Battle, Judge.* Judgment and commitment entered on the verdict 15 January 1981. Heard in the Court of Appeals 11 November 1981.

Defendant was indicted and tried on consolidated charges of soliciting and enticing another to commit murder, soliciting and enticing another to burn a building used for trade, procuring another to burn a dwelling, and procuring another to burn a building used for trade. Verdicts of not guilty were returned as to the first two charges. The jury was unable to reach a verdict on the charge of procuring another to burn a dwelling, and a mistrial was declared as to that count. From judgment and an active sentence imposed on the jury's verdict of guilty on the charge of procuring another to burn a building used for trade, defendant appeals.

Attorney General Rufus L. Edmisten, by Assistant Attorney General David Gordon, for the State.

Adam Stein and Ann Peterson, Appellate Defenders, for defendant-appellant.

WELLS, Judge.

Defendant brings forth assignments of error relating to the trial court's admission, over defendant's objection, evidence of previous, unrelated, non-criminal fires which caused property damage to defendant's real and personal property. We find error in the trial and reverse.

The District Attorney questioned both defendant's wife and defendant on cross-examination as to a number of previous, apparently non-criminal fires which had damaged defendant's real and personal property.

On cross-examination, the district attorney questioned defendant's wife as follows:

Q. And what happened to this trailer?

MS. LOFLIN: Objection, your Honor.

COURT: Overruled.

A. It burned.

Q. It what?

A. It burned.

. . .

Q. And the trailer that you were living in when you came back from Richmond, is that the one that burned?

A. Yes.

Q. Did you ever live on any other trailer at that site?

A. On the same farm; not in the same particular spot.

Q. And what happened to that trailer?

MS. LOFLIN: Objection.

COURT: Overruled.

A. It burned.

Q. And in February of, 16th, 1979, was there a fire down at the store there as well?

A. The only fire I know of at the store happened in December. That's the only time the fire department was called.

Q. Didn't you have a fire on February 16th, 1979, at the store?

A. Not to my knowledge.

Q. You don't deny it?

MS. LOFLIN: Objection.

COURT: Well, sustained.

. . .

Q. Well, don't you know whether or not your husband had a truck in February of, 19th, 1972, that burned?

MS. LOFLIN: Objection.

COURT: 19 what?

Q. 1972.

MS. LOFLIN: Objection.

COURT: Objection sustained.

Q. Did your husband have a 1972, two-door Pontiac that burned February 19th, 1979?

MS. LOFLIN: Objection.

COURT: Overruled.

Q. Did you understand the date?

A. February of 1979?

Q. February 5, 1979, did your husband own a 1972 Pontiac automobile?

A. Yes.

Q. What happened to that?

MS. LOFLIN: Objection.

COURT: Overruled.

A. It caught fire and burned up.

The District Attorney was also permitted to ask defendant, over defendant's objections, similar questions regarding earlier fires.

Q. How many automobiles have you lost by fire?

MS. LOFLIN: Objection.

COURT: Overruled.

A. I don't know; two or three.

Q. How many trucks have you lost by fire?

MS. LOFLIN: Objection.

COURT: Overruled.

A. One, I think.

Q. Lost two, haven't you?

A. Might have been. If you got a record that says I have, I have.

Q. And how many trailers have you lost by fire?

MS. LOFLIN: Objection.

COURT: Overruled.

A. Two.

Q. Haven't you lost three trailers by fire?

MS. LOFLIN: Objection.

COURT: Overruled.

A. No, I lost two and had fire damage done to one. . . .

To be relevant, evidence must have some logical tendency to prove a fact at issue in the case. 1 Stansbury's North Carolina Evidence, § 77 (Brandis Rev. 1973). Evidence of a set of circumstances unrelated to those at issue in a case is irrelevant

because it has no value in proving facts in issue; it also may confuse, mislead or prejudice the jury. 6 Strong's N.C. Index 3d, Evidence, § 15.1. In the present case, no evidence was adduced showing that any of the previous fires had been deliberately set, or that they were criminal in nature. No evidence indicated that charges were ever brought or convictions entered against either defendant or defendant's wife for any of the previous burnings. The prior fires were too vaguely described to have any relevance to the charge for which defendant was being tried except to create a prejudicial inference that the fires occurred because of defendant's unlawful conduct.

It is well settled in North Carolina that evidence of other crimes, offenses, or circumstances is inadmissible if its only relevance is to show the character of defendant or his disposition to commit an offense of the nature of the one charged. 1 Stansbury, supra, § 91, *State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1977), *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). There are exceptions to this rule, however, which allow admission of evidence of other crimes if the evidence tends to prove knowledge, intent, motive, plan, identity, connected crimes, or sex offenses. 1 Stansbury, supra, § 92, *State v. McClain*, supra, *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980). None of the exceptions apply to these facts.

Neither were the previous, unrelated fires about which the district attorney questioned defendant and defendant's wife evidence of criminal offenses or other "bad acts", which could be used to impeach defendant's credibility. 1 Stansbury, supra, § 112, *State v. Wright*, 282 N.C. 364, 192 S.E. 2d 818 (1972), *State v. Smith*, 294 N.C. 365, 241 S.E. 2d 674 (1978). The only logical relevance the excepted-to evidence had was to infer defendant's disposition to set fires to his property, and this is not a permissible tendency. *See State v. Currie*, 53 N.C. App. 485, 281 S.E. 2d 66 (1981). Because of the inevitable prejudice resulting from the erroneous admission of this evidence, this case must be reversed. Defendant is hereby granted a

New trial.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. JOSEPH D. WALKER

No. 815SC487

(Filed 17 November 1981)

1. **Criminal Law § 66.6— lineup identification and in-court identification—properly admitted**

The trial court properly concluded that the out-of-court line-up identification of defendant was not based on suggestive procedures likely to lead to misidentification and that the in-court identification of defendant was of independent origin where five middle aged, white males wearing glasses were selected and included in a lineup with defendant, which was conducted even though defendant had dyed his hair, grown a beard and changed his glasses, and where two witnesses to the robbery identified defendant after observing him for periods of up to eight minutes under good lighting conditions at the time of the robbery.

2. **Criminal Law §§ 85.2, 169.3— character witness—questions concerning defendant's acts of misconduct—error—cured by subsequent testimony**

It was error to allow the district attorney to inquire of defendant's character witness on cross-examination whether the witness knew that defendant was on parole for armed robbery as it related to a specific act of misconduct; however, the error was cured by the subsequent testimony of other witnesses for defendant.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 17 December 1980 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 21 October 1981.

Defendant was indicted for and convicted of armed robbery. The State presented evidence which tended to show that at approximately 9:00 o'clock p.m. on 26 September 1980, Mrs. Virginia Falls was working at the Kayo Gas Station in Castle Hayne, a suburb of Wilmington. Defendant came into the Kayo Station and asked Mrs. Falls for some cigarettes. Defendant paid for the cigarettes and also purchased a lighter. Mrs. Falls turned away from defendant and when she turned around again, defendant had a pocketknife in his hand. The pocketknife had a blade two and one-half to three inches long. Defendant told Mrs. Falls to give him the money in the cash register and pointed the knife at her. Mrs. Falls was approximately three feet away from defendant and was afraid defendant would hurt her. She gave defendant all the money from the cash register, approximately $258.00 to $358.00. Defendant stayed in the gas station for approximately eight

minutes. During this time the station was lighted on the outside as well as the inside. While defendant was in the station a Mr. Douglas Pope came into the Station to pay for some gas. Mrs. Falls got behind Mr. Pope and told Mr. Pope that defendant was robbing her. Defendant then turned around with the pocketknife in his hand and said that he did not want to take the money but he was having problems. Defendant then went outside of the gas station, untied a dog which was outside and walked away toward Wrightsboro. From judgment and commitment entered on the verdict, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Arnold Smith, for defendant-appellant.

WELLS, Judge.

[1] Defendant brings forward assignments of error relating to the admission of *voir dire* testimony on photographic identification, to the admission of photographic line-up evidence, and to the admission of testimony regarding defendant's prior criminal record. We find no error in the trial.

Defendant's first assignments of error relate to the trial court's ruling on his motion to suppress the pre-trial identification of defendant by Virginia Falls and Douglas Pope. At the *voir dire* hearing on defendant's motion, the trial court heard the testimony of Mrs. Falls, the victim of the robbery, Mr. Pope, an eyewitness to the robbery, and Officers Evans and Stinson of the New Hanover County Sheriff's Department who prepared and conducted a photographic and actual line-up of possible suspects in the robbery. Following the hearing, the trial court entered findings of fact and conclusions of law and denied the motion. The pertinent portions of the trial court's ruling are as follows:

> "[T]hat this hearing was held in the absence of the jury; that the Court has had the opportunity to see and observe each of the witnesses to determine what weight and credibility to give each witness's testimony; that in addition to the facts heretofore found by the Court in a related suppression hearing in this case, which are incorporated herein by reference thereto, the Court further finds as a fact that Det. Stinson

pursuant to Motion of the Defendant, Joseph Walker, through his then attorney Mrs. Charleene Wilson, prepared a lineup having first gone through photographs of all prisoners with the general appearance of being middle aged, white males wearing glasses; that five of such individuals were selected and included in a lineup with the Defendant, which was then conducted even though the Defendant had dyed his hair, grew a beard, and changed his glasses; that on October 29th of 1980, Virginia Falls and Douglas Pope attended this lineup and each identified the Defendant, Joseph Walker, as being Number Five in the lineup; that the observations were made through a one-way mirror at the same time with the consent of the Defendant's attorney. Mr. Pope and Mrs. Falls each having said that the man numbered five was the person that robbed the Kayo Station in Castle Hayne and the same person as each identified in the Courtroom as the Defendant, Joseph Walker.

That upon the foregoing findings of fact the Court concludes as a matter of law that the pre-trial identification procedure involving the Defendant was not so unnecessarily suggestive and conductive to irreparable mistake in identification as to violate the Defendant's rights to due process of law and the Court rules that the in-court identification by Mrs. Virginia Falls and Mr. Douglas Pope is of independent origin based solely upon what the witnesses saw at the time of the robbery of the Kayo Service Station in Castle Hayne at about 9:00 p.m. on September 26th, 1980 and is not tainted by any pre-trial identification procedure so unnecessarily suggestive and conductive to irreparable mistake in identification to constitute a denial of due process of law."

The trial court's findings of fact are supported by the evidence and are therefore binding on us. *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1973). We hold that under the circumstances reflected in the trial court's findings of fact, the trial court properly concluded that the out-of-court identification of defendant was not based on suggestive procedures likely to lead to misidentification and that the in-court identification of defendant was of independent origin. *Tuggle*, supra. These assignments are overruled.

[2] Defendant also assigns as error the trial court's allowing the district attorney, over defendant's objection, to inquire on cross-examination of defendant's character witness Sanders whether the witness knew that defendant was on parole for armed robbery. The general rule in North Carolina is that a character witness may be cross-examined as to the general reputation of the defendant as to particular vices or virtues, but not as to specific acts of misconduct. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). The State argues that if there was error in the question in this case, it was harmless error. We do not agree. The prosecutor's error in asking the question and the trial court's error in allowing it were cured, however, by the subsequent testimony of other witnesses for the defendant. Eula Dudney, a defense witness, testified on direct examination that she had previously employed defendant in her business and that at that time, she knew defendant "had a criminal record for armed robbery and that he was on parole". Steve Clemmons, a defense witness, testified on direct examination that he was a Probation-Parole Officer, that defendant was under his supervision, and that defendant was on parole for robbery with a firearm, carrying a concealed weapon, felonious escape, auto larceny, and larceny of property of a value less than $200.00. Defendant, testifying in his own behalf, testified on direct examination that he was on parole "for Armed Robbery from Forsyth County and for Escape," that he had pled guilty to the armed robbery charge in Forsyth County; and that prior to the armed robbery charge, he had been convicted of auto theft in the Federal Court. By testifying as to the Forsyth County conviction and his subsequent parole and other similar specific acts of misconduct on his part, defendant waived his objection to the inadmissible testimony from the witness Sanders. *State v. Wills*, 293 N.C. 546, 240 S.E. 2d 328 (1977). This assignment is overruled.

No error.

Judges MARTIN (Robert M.) and WEBB concur.

STATE OF NORTH CAROLINA v. STEPHEN JAMES DUNN

No. 8118SC555

(Filed 17 November 1981)

1. **Larceny § 7.2— felonious larceny—sufficiency of evidence**

The State's evidence was sufficient for the jury to find that defendant was guilty of felonious larceny in the theft of manhole covers valued in excess of $400.

2. **Criminal Law § 76.5— confession—request for attorney—conflicting evidence—failure to make finding**

Where there was conflicting evidence on voir dire as to whether defendant, after having signed a waiver of rights form, requested an attorney before making an in-custody statement, the trial court erred in concluding that the statement was admissible into evidence without making a specific finding with respect to whether defendant had requested an attorney prior to making the statement.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 18 March 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 November 1981.

Defendant was convicted of felonious larceny. Judgment imposing a prison sentence was entered.

Defendant was convicted of the felonious larceny of City of Greensboro manhole covers. His conviction was based, in part, on a statement he gave police officers which was admitted into evidence after the court conducted a *voir dire.* Officer Cobbler testified for the State on *voir dire* that he had read defendant his *Miranda* rights before interrogating him. Defendant stated he had no questions concerning them and signed the rights' form. Defendant also signed a waiver provision which stated he did not want an attorney present at that time. Defendant then gave Officer Cobbler a statement concerning the theft of manhole covers. At no time during the interrogation did defendant request an attorney.

Defendant testified that Officer Cobbler read him his rights before the interrogation. Defendant requested an attorney but was informed he could not obtain one unless he waited for court. If he wanted one at the moment, he would have to pay for the services himself. Defendant was unemployed and could not pay an attorney. It was after this conversation that he signed the waiver and made his statement.

At the conclusion of the evidence on *voir dire*, the court made the following findings of fact:

> "That on December 30, 1980, the defendant was taken to the interrogation room in the police department; that at that time the defendant was twenty-one years of age, had completed the twelfth grade in high school, could read and write; that at that time the officer advised the defendant that he had a right to remain silent and anything he said could be used against him; that he had a right to an attorney; that if he could not afford an attorney, one would be appointed to represent him and he could exercise those rights at any time; that the defendant stated he had no questions about it; that he understood what the officer had said; that the officer testified that in the officer's opinion he was not under the influence of intoxicants or drugs; that thereafter the defendant signed a waiver of rights; that the waiver of rights was read to the defendant and in the waiver of rights, the defendant said he did not want an attorney; that a statement was given to the police officer about 6:30 p.m. after the defendant was advised of his Miranda Rights.
>
> Based on the foregoing, the Court concludes that any statement the defendant gave to Officer Cobbler on or about 6:30 p.m. on December 30, 1980, was freely, voluntarily, and understandingly given. . . ."

Attorney General Edmisten, by Assistant Attorney General Douglas A. Johnston, for the State.

Appellate Defender Project for North Carolina, by Marc D. Towler, for defendant appellant.

VAUGHN, Judge.

[1] At the outset, we overrule defendant's exception to the denial of his motion for nonsuit based on insufficient evidence to support a charge of felony larceny. There was evidence from which a jury could reasonably infer defendant had stolen manhole covers valued in excess of $400.00.

[2] Defendant also argues the court committed reversible error by its inadequate findings on *voir dire*. Defendant argues that conflicting evidence was presented on *voir dire* as to whether he

requested an attorney during the interrogation prior to his confession. The judge made no finding addressing the conflicting evidence. Defendant contends that the absence of such a finding nullifies any conclusion by the court that his statement was freely, voluntarily, and understandingly given. We agree.

When the admissibility of an in-custody confession is contested, the court must conduct a *voir dire* to determine whether the procedural safeguards required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), have been met. *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977); *State v. Waddell*, 34 N.C. App. 188, 237 S.E. 2d 558 (1977). At the conclusion of the *voir dire*, the judge should make findings of fact to indicate the bases of his ruling. If there is conflicting evidence, however, to a material fact, the judge *must* make specific findings in order to resolve the conflict. *State v. Siler*, 292 N.C. 543, 548-49, 234 S.E. 2d 733, 737 (1977).

Whether defendant requested an attorney before giving his statement is unquestionably a material fact under *Miranda*: if defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444-45, 86 S.Ct. at 1612, 16 L.Ed. 2d at 707. In the present cause, there was conflicting evidence to that issue. The court, however, failed to include any finding of fact as to whether defendant made such a request.

This case is very similar to the situation in *State v. Waddell*, 34 N.C. App. 188, 237 S.E. 2d 558 (1977). The defendant in that action had also signed a waiver of rights form. There was conflicting evidence, however, as to whether after signing the waiver, he had requested an attorney before making his statement. As in the present case, the court found that defendant had been advised of his rights, that he had understood his rights and had signed a waiver form, and that the written waiver of rights stated defendant did not want an attorney and agreed to make a statement. The court's finding, however, omitted any reference as to whether defendant had requested an attorney before making his confession. Emphasizing that the existence or nonexistence of a request was a material consideration, this Court held the failure of the judge to make a finding as to whether defendant requested counsel during interrogation was error entitling defendant to a new trial.

In the present cause, the State argues that the court sufficiently addressed the conflicting evidence by its finding that "the waiver of rights was read to the defendant and in the waiver of rights, the defendant said he did not want an attorney." It cites *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2164, 64 L.Ed. 2d 795 (1980), as holding that where a mention of counsel appears in the court's findings, there is no error.

The State is mistaken in its analysis of *State v. Reynolds*. The Supreme Court held that *waiver* of counsel, not mention of counsel, is the essential finding which must be made. 298 N.C. at 400, 259 S.E. 2d at 855. In *Reynolds*, the defendant signed a waiver form and then *verbally reiterated* that he did not want an attorney present. Such evidence supported the court's finding that defendant "freely and voluntarily and understandingly *waived his right* to have an attorney present . . . and that he freely and voluntarily gave his statement to the interrogating officer." (Emphasis added.)

In this cause, however, the court's finding is that defendant signed a waiver form. Such a finding is not equivalent to the finding that defendant in fact waived his right to an attorney upon request. We point out that defendant testified he signed the waiver form under the belief that he could not receive legal assistance until he was appointed an attorney in court. The Supreme Court in *State v. Steptoe*, 296 N.C. 711, 717, 252 S.E. 2d 707, 711 (1979), held that such discouragement would not support a finding that "defendant was fully informed of his rights and *knowingly, understandingly, and voluntarily* waived his right to counsel."

We conclude that before the court could admit the present defendant's confession, it was required to make a clear finding that he had waived his right to counsel. Because the court failed to make such a finding in the presence of conflicting evidence, the admissibility of any confession must be determined at a new trial.

New trial.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. WARD MAXTON ROSSER AND ROBERT EDWARD BACKLUND

No. 8111SC237

(Filed 17 November 1981)

1. **Narcotics § 5— inconsistent verdicts—failure to set aside—no error**

It was not error to fail to set aside as inconsistent verdicts of not guilty of possession of marijuana and guilty of felonious manufacture of marijuana as a jury is not required to be consistent and incongruity alone will not invalidate a verdict.

2. **Narcotics § 4— manufacture of marijuana—sufficiency of evidence**

Evidence was sufficient to convict defendants of manufacture of marijuana where it tended to show defendants visited the plot where it grew on two occasions; they spread white powder on the plants on one occasion; there were no weeds around the plants; and one of the defendants was overheard telling the other defendant that the plants should be pinched to induce the plant's expansion.

APPEAL by defendants from *Brannon, Judge.* Judgment entered 28 August 1980 in Superior Court, LEE County. Heard in the Court of Appeals 14 September 1981.

Defendants were charged individually and in separate indictments for violation of G.S. 90-95(a)(1), felonious manufacture of marijuana, and for violation of G.S. 90-95(a)(3), felonious possession of marijuana. Defendants were acquitted by a jury of felonious possession, but appeal from a guilty verdict and judgment of suspended imprisonment and fine on the manufacturing charge.

The evidence tended to show that officers of the Lee County Sheriff's Department in July of 1980 twice had occasion to be in a secluded area of southern Lee County where marijuana plants were growing. Officer Wayne Campbell located the plants on 5 July 1980, and testified that the ground directly around the plants was without weeds or trash. Officer Campbell began a surveillance of the site and observed, within an hour of the plants' discovery, a green and white pickup truck approach the area and stop. Defendants emerged, removed a bucket from the bed of the truck, and advanced toward the marijuana plants. They remained in the area approximately 45 minutes, returned to the vehicle, then left. Officer Campbell examined the marijuana plants after defendants departed and testified that "[a]t that time there

was a white powder covering nearly all of the plants. . . ." He testified that the powder was not present when he inspected the marijuana earlier. Officer Campbell saw no one in the vicinity other than the defendants on that day. Officer Campbell returned to the site on 11 July, accompanied by Captain Jimmie Parker and Deputy Blue Cameron of the Lee County Sheriff's Department. They concealed themselves near the growing marijuana. Defendants approached in the green and white pickup, got out of the truck, and proceeded on a foot path to the marijuana. Deputy Cameron testified that when the defendants came upon the first plant, defendant Backlund bent over the plant and explained to defendant Rosser that one should pinch the plant to make it expand. The officers then announced their presence and arrested defendants.

Attorney General Edmisten, by Associate Attorney William R. Shenton, for the State.

Kirk, Tantum and Hamrick, by Andy W. Gay, for defendant appellants.

MORRIS, Chief Judge.

[1] Defendants submit that the convictions should be set aside as inconsistent with the finding of not guilty of possession of marijuana. They allege that without the control element of possession it is impossible to meet the legal definition of manufacturing.

We find no merit in this contention. It is well established in North Carolina that a jury is not required to be consistent and that incongruity alone will not invalidate a verdict. *State v. Brown*, 36 N.C. App. 152, 242 S.E. 2d 890 (1978); *State v. Shufford*, 34 N.C. App. 115, 237 S.E. 2d 481, *cert. denied* 293 N.C. 592, 239 S.E. 2d 265 (1977); *State v. Best*, 31 N.C. App. 250, 229 S.E. 2d 581 (1976), *rev. on other grounds*, 292 N.C. 294, 233 S.E. 2d 544 (1977); *State v. Black*, 14 N.C. App. 373, 188 S.E. 2d 634, *appeal dismissed* 281 N.C. 624, 190 S.E. 2d 467 (1972); *State v. Lindquist*, 14 N.C. App. 361, 188 S.E. 2d 686 (1972); *State v. Davis*, 214 N.C. 787, 1 S.E. 2d 104 (1939); *State v. Sigmon*, 190 N.C. 684, 130 S.E. 854 (1925). In *State v. Davis*, supra, the defendant was charged with unlawful possession of intoxicating liquors and transportation for the purpose of sale. Defendant was found guilty of the transporta-

tion charge but acquitted on the possession charge. Quoting *State v. Sigmon*, supra, at 691, the *Davis* Court wrote:

> The offenses are designated in the statute separately and while the jury would have been fully justified in finding the defendant guilty on both counts under the evidence in this case, their failure to do so does not as a matter of law vitiate the verdict on the count of transporting. It goes without saying that the jury would have to find from the circumstantial evidence that defendant had in his possession liquors that he was transporting before they could convict him.

State v. Davis, supra at 794. Similarly, in the case at hand "[t]he offenses charged in the two indictments, though closely related, were separate and distinct statutory offenses, neither being a lesser included offense of the other." *State v. Brown*, supra at 153; *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Yelverton*, 18 N.C. App. 337, 196 S.E. 2d 551, *cert. denied* 283 N.C. 670, 197 S.E. 2d 880 (1973). Both charges arose on the same evidence, and conviction on both charges would seem to have been the more cogent result. Yet failure of the jury to find the defendants guilty of the possession of marijuana does not preclude it from finding the defendants guilty of manufacturing the illicit drug. We will not speculate as to why the jury convicted on one count and not on the other. " '[A] jury is not required to be consistent and mere inconsistency will not invalidate the verdict.' " *State v. Black*, supra at 377, 188 S.E. 2d at 637.

[2] Defendants also assign as error the denial of the trial court of a motion to set aside the guilty verdicts as contrary to the weight of the evidence. Defendants contend that their mere presence among live marijuana plants is not enough to sustain an inference of intent to manufacture. They fail to acknowledge that the evidence of their visits to the plot, of white powder on the plants, of lack of weeds around the plants, and the statement about pinching to induce the plants' expansion could be interpreted to show active cultivation. Considering the body of facts in the light most favorable to the state, we think the evidence was clearly sufficient to survive the defendants' motion, and we perceive no abuse of discretion in the trial judge's refusal to set aside the verdict in this case.

By analogy, it has been held that a defendant's presence at a place where illegal whiskey is being manufactured, along with other supporting evidence, is sufficient to go to the jury. *State v. Adams*, 191 N.C. 526, 132 S.E. 281 (1926); *State v. Perry*, 179 N.C. 718, 102 S.E. 277 (1920). As pointed out in *State v. Shufford*, supra, a manufacture of marijuana case, the conduct of the defendants, when found at active distilleries, was an important factor in allowing a case to go to the jury. *State v. Moore*, 190 N.C. 876, 130 S.E. 713 (1925); *State v. Sykes*, 180 N.C. 679, 104 S.E. 2d 83 (1920); *State v. Ogleston and Perry*, 177 N.C. 541, 98 S.E. 537 (1919).

There is ample evidence in the record to sustain a conviction on both the possession and manufacturing charges. The jury was free to accept or reject that evidence and the inferences arising thereon.

No error.

Judges CLARK and WELLS concur.

DWIGHT STEVEN TERRY v. LOWRANCE HOSPITAL, INC., AND E. DANIEL GRIFFIN, JR.

No. 8126SC184

(Filed 17 November 1981)

Process § 5.1; Rules of Civil Procedure §§ 4, 15— incorrect middle name on complaint—relation back of amendment—amendment of summons to correct defendant's name

Where the original complaint contained an incorrect middle name for defendant, the original summons was returned unserved, the complaint was amended "as a matter of course" pursuant to G.S. 1A-1, Rule 15(a) to correct defendant's name, the summons, complaint and amended complaint were thereafter served on defendant, and identical transactions or occurrences were described in the original and amended complaints, the amendment related back to the filing of the original complaint, G.S. 1A-1, Rule 15(c), the amended complaint gave defendant, correctly named, full, adequate and timely notice of plaintiff's claim, and the summons could properly be amended to reflect defendant's correct name. G.S. 1A-1, Rule 4(i).

Terry v. Lowrance Hospital

APPEAL by plaintiff from *Smith, Judge.* Order entered 8 October 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 22 September 1981.

Plaintiff appeals from an order quashing the return of service of process as to defendant E. Daniel Griffin, Jr., and dismissing the action against said defendant.

Wardlow, Knox, Knox, Freeman & Scofield, by Charles E. Knox and John B. Yorke, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Richard T. Feerick and Mel Garofalo, for defendant appellee E. Daniel Griffin, Jr.

WHICHARD, Judge.

On or about 7 February 1977 defendant Griffin, a licensed physician, treated plaintiff at defendant hospital for an injured wrist. Plaintiff commenced this action for negligent treatment on that occasion on 6 February 1980 by issuing summons and securing an order extending through 26 February 1980 the time for filing complaint. Plaintiff filed his complaint on 26 February 1980, referring to defendant Griffin therein as E. David Griffin, Jr., rather than E. Daniel Griffin, Jr., his correct name. The original summons was returned unserved, because the Sheriff was unable to locate defendant Griffin in the alleged county of his residence.

By amended complaint filed 12 March 1980, plaintiff corrected defendant Griffin's name. The summons was endorsed pursuant to G.S. 1A-1, Rule 4(d)(1), and was served on defendant Griffin on 14 March 1980. Defendant Griffin on 9 April 1980 moved "to quash the return of any purported service of summons . . . for that any purported service of summons on said defendant is defective and void, and the Court ha[s] not acquired jurisdiction over said defendant." The trial court granted the motion, quashing the return of service and dismissing the action as to defendant Griffin.

The essence of defendant Griffin's position is that "any designation of the proper defendant occurred on March 12, 1980, when an amended Complaint was filed, designating the proper defendant [,] and this point in time was beyond the running of the

applicable period of limitations of actions." We disagree, and we therefore reverse.

Plaintiff could amend his complaint "once as a matter of course at any time before a responsive pleading [was] served." G.S. 1A-1, Rule 15(a). His amended complaint, filed 12 March 1980, preceded service of any responsive pleading, the only responsive pleading in the record being defendant Griffin's motions dated 9 April 1980. The amended complaint, which corrected defendant Griffin's name, thus was filed "as a matter of course." *Id.*

Unless the original complaint did not "give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended [complaint]," the claim asserted in the amended complaint "is deemed to have been interposed at the time the claim in the original [complaint] was interposed." G.S. 1A-1, Rule 15(c). Identical transactions or occurrences were described in the original and in the amended complaint. Only the middle name of defendant Griffin was altered. Hence, the exception in Rule 15(c) is inapplicable; and the claim asserted in the amended complaint is "deemed to have been interposed at the time the claim in the original [complaint] was interposed." By virtue of the 6 February 1980 issuance of summons and extension of time to file complaint, and of the filing of the original complaint within the time allowed, G.S. 1A-1, Rule 3, the claim in the original complaint was interposed within the three year period allowed by the applicable statute of limitations, G.S. 1-52.

The parties stipulated that the summons, complaint, and amended complaint were served on the defendant, Dr. E. Daniel Griffin, Jr., on 14 March 1980. The record thus clearly establishes that defendant Griffin was timely served with a timely filed complaint which, because the amendment thereto related back to the filing of the original complaint, timely and correctly identified defendant Griffin as the appropriate party defendant. The amended complaint gave defendant Griffin, correctly named, full, adequate, and timely notice of plaintiff's claim; and he could not have been misled as to the intended party defendant by an incorrect designation of his middle name on the summons. Under these circumstances, no "material prejudice would result to substantial rights of the party against whom the [summons] issued," defendant Griffin, if the summons, like the complaint, were amended to

reflect this name correctly. G.S. 1A-1, Rule 4(i). Further, plaintiff, having by his amended complaint given defendant Griffin full, adequate, and timely notice of his alleged claim against him, would suffer substantial injustice if such amendment were disallowed.

For the foregoing reasons, the order appealed from is reversed. The cause is remanded with instructions to amend the summons, pursuant to G.S. 1A-1, Rule 4(i), to reflect defendant Griffin's name correctly as it appears in the amended complaint.

Reversed and remanded.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JAMES MICHAEL MEARS

No. 817SC293

(Filed 17 November 1981)

Burglary and Unlawful Breakings § 4.1— evidence of fluorescent particles—immaterial—no testing procedures

In a prosecution for breaking and entering and larceny where the stolen money had been dusted with an ultraviolet powder, the State's failure to establish the probative value of testimony regarding the presence of fluorescent particles on defendant's body rendered it immaterial and its admission erroneous as defendant presented evidence explaining the presence of fluorescent material on his body which was consistent with his innocence.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 25 November 1980 in Superior Court, NASH County. Heard in the Court of Appeals 12 October 1981.

Defendant was charged in a bill of indictment with breaking and entering and larceny.

Evidence presented by the State tended to show that sometime between the evening of 27 June 1980 and the morning of 28 June 1980, about $50 was taken from the vault of defendant's employer, Cummins Engine Company. Following earlier disappearances of cash from the vault, it had been

discovered that a pass key used by plant guards had been altered to permit access to the vault. The sheriff's office had been called in to investigate, and an officer had dusted the money contained in the vault with an ultraviolet powder. At the time the last shortage was discovered, defendant was on duty as a security guard for Cummins, and he was still on the premises when officers arrived to investigate. Defendant was met and questioned by an officer and the plant manager as he emerged from an employee rest room. He was taken into an office and exposed to an ultraviolet light which revealed fluorescent particles on his arms from the wrist to the shirt sleeves of his short-sleeved shirt and on his right rear pants pocket. A plastic bag containing about $50 was found above the ceiling of the rest room and smudges were found on the toilet seat where someone had apparently stood to hide the money. No tests or comparisons were made to link the smudges to the defendant or the fluorescent particles found on defendant to those in the vault. However, the court admitted the testimony of witnesses who observed the particles under ultraviolet light and said they were similar. No other evidence was presented which tended to place the defendant inside the vault at any time.

Defendant's testimony tended to show that the source of the fluorescent particles observed on his arms and pants was a product he had used on the day of his arrest to find a leak in his car's air conditioning system. Defendant had given this explanation to officers shortly after he was exposed to the ultraviolet light on the day of his arrest.

The jury returned a verdict of guilty of breaking and entering and defendant was sentenced to five years imprisonment. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Thomas B. Wood and Associate Attorney Evelyn M. Coman, for the State.

Evans and Rountree, by Charles S. Rountree, for defendant appellant.

ARNOLD, Judge.

The major issue as presented by defendant in this appeal is whether evidence of fluorescent particles found on defendant's

body and clothing was erroneously admitted where none of the particles were retained for comparison or analysis.

The defendant argues that such evidence is "scientific" evidence requiring the State to establish relevance through proven testing procedures or "real" evidence which had to be preserved for comparison by the fact-finder. We agree that the evidence must fall into one of these categories, but find the issue to be more appropriately one of materiality than of relevance. Even conceding that the testimony meets the nominal test for relevance, the State's failure to produce any proof whatsoever that the presence of fluorescent particles was more consistent with guilt than with innocence renders the evidence immaterial.

The recent State Supreme Court holding in *State v. Bass*, 303 N.C. 267, 278 S.E. 2d 209 (1981), is directly on point. In *Bass*, the defendant's fingerprint was found at the scene of the crime. However, defendant presented a plausible explanation for its presence which made the fingerprint equally consistent with innocence as with guilt. Absent corroborative real or circumstantial evidence, the Court held the defendant was entitled to a nonsuit. Similarly, the defendant in the case at bar presented evidence explaining the presence of fluorescent material on his body which was consistent with his innocence. The State presented no evidence tending to refute this explanation and no other evidence which tended to place the defendant at the scene of the crime. Circumstantial evidence presented by the State to show the defendant had access to the vault and had been in the rest room where the money was found was insufficient to make defendant's guilt more likely than that of several other employees who likewise had access to the vault and rest room.

We hold, therefore, that the State's failure to establish the probative value of testimony regarding the presence of fluorescent particles on defendant's body rendered its admission erroneous. Moreover, this error prejudiced the defendant in that the other evidence presented by the State was insufficient as a matter of law to support the verdict. Accordingly, the judgment is

Reversed.

Chief Judge MORRIS and Judge BECTON concur.

THOMAS E. MOORE v. BEACON INSURANCE COMPANY

No. 8126DC245

(Filed 17 November 1981)

Insurance §§ 68.7, 69— automobile insurance—uninsured motorist—medical payments—no double recovery

An insured cannot collect his medical expenses for injuries received in an automobile accident under the uninsured motorist provision of his automobile policy and then again under the medical payments provision. However, where defendant insurer paid plaintiff insured $2,200 under the uninsured motorist provision and plaintiff executed a general release which made no specific reference to medical expenses, and the evidence was conflicting as to whether plaintiff's medical expenses were included in the $2,200, a genuine issue of material fact was presented as to whether the $2,200 paid by defendant to plaintiff included payment for plaintiff's medical expenses.

APPEAL by defendant from *Bennett, Judge.* Judgment entered 1 December 1980 in District Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1981.

This is a civil action wherein plaintiff, insured, seeks to recover from defendant, insurer, $300 pursuant to the medical payments provision in plaintiff's automobile insurance policy.

On 18 September 1978 plaintiff, while driving his automobile, was injured in a collision with an automobile operated by an uninsured motorist. On 2 July 1979 the defendant paid to plaintiff, under the provisions of the uninsured motorists clause in the liability insurance policy, $2,200 for which plaintiff executed and delivered to defendant a general release.

Thereafter, plaintiff instituted this action, pursuant to the medical payments clause in the insurance policy, against the defendant to recover his medical expenses incurred as a result of injuries received in the accident. Defendant filed answer denying any liability to plaintiff under the medical payments provision in the policy and alleged that such expenses had been paid under the uninsured motorists provision in the policy.

Both parties filed motions for summary judgment. Defendant, during discovery, filed a request that plaintiff "[a]dmit that a portion of the $2,200 settlement of the Plaintiff's uninsured motorist claim was for the purpose of reimbursing the Plaintiff for his

medical expenses incurred as a result of the automobile accident in which he was involved on September 18, 1978. . . ." Plaintiff, in his answer to defendant's request for admission, filed a denial. The court thereafter entered a summary judgment that plaintiff recover $290 pursuant to the medical payments coverage afforded by defendant and that defendant pay plaintiff's attorney's fees. From such summary judgment, defendant appealed.

Haynes, Baucom, Chandler, Claytor & Benton, by W. J. Chandler, for plaintiff appellee.

Casstevens & Hanner, by Dorian H. Gunter, for defendant appellant.

HEDRICK, Judge.

In order to determine the propriety of summary judgment for plaintiff, we first consider the nature of the protection afforded plaintiff by the uninsured motorist provision in his automobile liability policy. Uninsured motorist coverage provides the same protection to a person injured by an uninsured motorist as one injured by a tortfeasor with standard liability coverage. *Williams v. Nationwide Mutual Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967); 7 Am. Jur. 2d, Automobile Insurance, § 293 (1980). We therefore conclude that plaintiff's claims or rights against the defendant pursuant to the uninsured motorist provision in his policy are the same as his rights against a tortfeasor with an ordinary liability insurance policy.

We next consider plaintiff's and defendant's rights and obligations under the medical payments provision of the insurance policy. It is well-settled in North Carolina that an insurer is subrogated to its insured's rights to recover medical expenses resulting from injuries inflicted by a tortfeasor when the insurer has paid such medical expenses pursuant to a medical payments provision in the insurance policy. *See Carver v. Mills*, 22 N.C. App. 745, 207 S.E. 2d 394, *cert. denied*, 285 N.C. 756, 209 S.E. 2d 280 (1974); *Milwaukee Insurance Co. v. McLean Trucking Co.*, 256 N.C. 721, 125 S.E. 2d 25 (1962). On the same equitable principles, if the insurer has made payments to the insured for the loss covered by the policy and the insured thereafter recovers for such loss from the tortfeasor, the insurer can recover from the insured the amount it had paid the insured, on the theory that

otherwise the insured would be unjustly enriched by having been paid twice for the same loss. *North Carolina Farm Bureau Mutual Insurance Co. v. Greer*, 54 N.C. App. 170, 282 S.E. 2d 553 (1981); *see also United States Fidelity & Guaranty Co. v. Reagan*, 256 N.C. 1, 122 S.E. 2d 774 (1961) and *Fidelity Insurance Co. v. Atlantic Coast Line Railroad Co.*, 165 N.C. 136, 80 S.E. 1069 (1914). We perceive no reason why the rule against unjust enrichment should be any different whether the injured party recovers his medical expenses from the liability carrier of the tortfeasor or the insurance company providing the uninsured motorist coverage. We hold, therefore, that plaintiff in the present case cannot collect his medical expenses pursuant to the uninsured motorists provision and then again under the medical payments provision.

Defendant argues the record discloses a genuine issue as to whether the payment by it of $2,200 included plaintiff's medical expenses. We agree. Upon receipt of the $2,200 plaintiff executed a general release which made no specific reference to medical expenses. Had the release specified that the $2,200 included plaintiff's medical expenses, even though such payment was made pursuant to the uninsured motorists provision, the release would be a bar to plaintiff's claim under the medical payments provision on the theory that plaintiff cannot recover twice for the same damage. On the other hand, if the release had specified that plaintiff's medical expenses were not included, on this record, plaintiff would be entitled to summary judgment under the contract providing for defendant to pay medical expenses. Whether plaintiff's medical expenses were included in the $2,200 is for the jury to determine. There is evidence in this record to support both parties' contentions in this regard. For the reasons stated, summary judgment for plaintiff, including the order for attorney's fees, is vacated and the cause is remanded to the district court for further proceedings.

Vacated and remanded.

Judges CLARK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. HOWARD JOHN HALL

No. 8112SC484

(Filed 17 November 1981)

Homicide § 30.3— instruction on involuntary manslaughter proper

In a prosecution for second degree murder, the court correctly included an instruction on involuntary manslaughter where defendant's evidence tended to show that he intended to discharge his pistol to empty it so that it would not be used by his attackers; however, at the time he decided to empty the pistol, he was surrounded and grabbed and the shots hit decedent rather than the ground. The intentional act of discharging the pistol did not amount to an assault because he neither intentionally pointed the pistol at anyone nor intentionally shot decedent.

APPEAL by defendant from *Clark, Judge.* Judgment entered 15 January 1981, in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 October 1981.

Defendant appeals from judgment entered upon conviction of involuntary manslaughter.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Assistant Public Defender, 12th Judicial District, Gregory A. Weeks, for defendant appellant.

WHICHARD, Judge.

Defendant was indicted and tried on the charge of second degree murder. The sole question presented is whether the trial court erred in submitting a possible verdict of involuntary manslaughter. We hold that it did not.

Generally, the evidence tended to show that the decedent, Tony Dalton, died from gunshot wounds inflicted by defendant during a fight among several people. The state's witnesses, primarily other persons involved in the fight, testified that defendant and the deceased exchanged heated words and a few blows in a parking lot, that defendant then went to his girl friend's car and obtained a pistol, and that defendant fired the pistol at the decedent immediately upon turning from the car. They testified that they became involved in the fight only after

defendant fired at decedent and then merely attempted to take the pistol from defendant.

Defendant and his girl friend testified that decedent and several of his friends (the state's witnesses) attacked and beat defendant in the parking lot, and that defendant ran to the car to obtain the pistol upon breaking free from his attackers. They testified that at least two or three of decedent's friends jumped on defendant and grabbed his arm as soon as he straightened up from the car with the pistol in his hand. They testified that the pistol discharged four times during the ensuing struggle before the attackers wrestled it from defendant. Defendant testified:

> I was halfway in the front window on the drivers' side. I got the gun and pulled out. Everything was happening in one motion. I saw people on the other side of the car about the time that I came out the window and I heard somebody coming over the car. As soon as I came out of the car, I was facing Tony Dalton. I didn't see anybody climbing over the car because my attention was directed at Tony when I came out of the window. As I turned around, Tony was face to face with me. I didn't just shoot him. At that time I was being grabbed from behind. The gun was in my left hand. I was aiming for the ground. I saw that the situation called for that. I had to empty the weapon because I felt at that time, purely out of fear, that the weapon would be taken away from me, which it was, and that it would be turned on me. I felt that they were going to kill me. I did not intend to shoot Tony. When I did shoot, I didn't intend to kill Tony Dalton. About the time that I squeezed the trigger I was grabbed from behind. I was aiming at a lower angle but when I was jerked back, it might have been when he hit me and knocked me back, it was all mass confusion.

Defendant asserts one cannot be guilty of involuntary manslaughter if the evidence unequivocally establishes that the killing resulted from the doing of an intentional act, and because defendant intentionally discharged the pistol he thus could not be convicted of involuntary manslaughter. Defendant relies on *State v. Ray,* 299 N.C. 151, 261 S.E. 2d 789 (1980). We disagree with defendant's interpretation of the law of homicide.

Involuntary manslaughter "is the unintentional killing of a human being without either express or implied malice (1) by some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence." *State v. Wilkerson*, 295 N.C. 559, 579, 247 S.E. 2d 905, 916 (1978). "[T]he crime of involuntary manslaughter involves the commission of an act, *whether intentional or not*, which in itself is not a felony or likely to result in death or great bodily harm." *Ray*, 299 N.C. at 158, 261 S.E. 2d at 794 (emphasis added).

Defendant testified he intended to discharge the pistol to empty it so that it would not be used by his attackers. He testified that he did not intend to shoot at anyone. At the time he decided to empty the pistol, however, he was surrounded by people. His testimony thus raised a jury question whether his act (1) was "likely to result in death or great bodily harm," which would render the killing second degree murder or voluntary manslaughter, (2) was culpable negligence, which would render the killing involuntary manslaughter, or (3) was a proper exercise of the right of self-defense, which would render the killing not unlawful. According to defendant's evidence, the act of discharging the pistol did not amount to an assault because he neither intentionally pointed the pistol at anyone nor intentionally shot decedent. We would usurp the function of the jury were we to declare that under the evidence in this case a reasonable person could not find that defendant's conduct in discharging a pistol while surrounded by people amounted to culpable negligence rather than to conduct naturally dangerous to human life.

The facts of *State v. Ray*, which defendant relies on, can be distinguished from the facts here. In *Ray*, defendant testified that he *intentionally pointed the gun at and intentionally shot at decedent*. 299 N.C. at 154-156, 261 S.E. 2d at 792-793. Ray's testimony, the only evidence before the court as to his conduct, thus indicated that he feloniously assaulted the decedent. Consequently, the court erred in instructing on involuntary manslaughter. *State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981) and *State v. Brooks*, 46 N.C. App. 833, 266 S.E. 2d 3 (1980), are also distinguishable, in that the evidence in those cases, like the evidence in *Ray*, showed that the defendants intentionally pointed a gun at and intentionally shot at the victims.

By contrast, in the case before us, defendant's evidence indicates that he did not intentionally fire the pistol at a person, and that he thus did not commit a felonious assault. The question whether his actions were (1) inherently dangerous, (2) culpably negligent, or (3) excusable, was properly decided by the jury.

No error.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. ALFRED W. McNEILL

No. 8112SC361

(Filed 17 November 1981)

1. **Burglary and Unlawful Breakings § 6.5; Larceny § 7.4— application of doctrine of possession of recently stolen property—no violation of due process**

Application of the doctrine of possession of recently stolen property in a prosecution for breaking and entering and larceny did not lessen the State's burden of proof and thereby result in a violation of due process.

2. **Burglary and Unlawful Breakings § 6.5; Larceny § 8.4— possession of recently stolen property—failure to give requested instructions**

The trial court did not err in refusing to give defendant's requested instructions that, in order to find defendant guilty of breaking and entering and larceny pursuant to the doctrine of possession of recently stolen property, the State must prove beyond a reasonable doubt that the property possessed by defendant was "the identical property stolen" where the instructions given by the court sufficiently apprised the jurors that the State must prove that the articles in defendant's possession soon after the theft were those articles stolen.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 14 November 1980, Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 September 1981.

Defendant was charged with and convicted of breaking or entering and larceny and appeals from judgment entered upon the guilty verdicts.

Attorney General Edmisten, by Assistant Attorney General Ben G. Irons, II, for the state.

Assistant Public Defender Jodie Ellis for defendant appellant.

MORRIS, Chief Judge.

The evidence for the state tended to show that the residence of the prosecuting witness had been entered and certain items stolen therefrom. Among the items stolen was a Sears black and white television, serial No. 74025742, and an Emerson heater. Entrance to the residence was gained by the thief's having split the front door "down the middle from top to bottom." On the same day defendant pawned a Sears television set, serial No. 74025742 to one pawn shop, and sold an Emerson heater to another pawn shop, both pawn shops being on the same street in Fayetteville.

The state relied on the doctrine of possession of recently stolen property. It is to the application of this principle that defendant's two assignments of error are directed. He contends that the application of the doctrine is unconstitutional and that the court committed reversible error in denying his tendered request for instructions to the jury that the state must prove beyond a reasonable doubt that the property possessed by defendant was "the identical property stolen." We reject both arguments and find no error in defendant's trial.

[1] With respect to the first contention, defendant's position is that to allow the state to rely on a "presumption" such as in this case lessens the state's burden of proof and thereby results in a violation of the due process clause. This argument was rejected in *State v. DeGina*, 42 N.C. App. 156, 256 S.E. 2d 275 (1979), following *Barnes v. U.S.*, 412 U.S. 837, 37 L.Ed. 2d 380, 93 S.Ct. 2357 (1973), and *State v. Fair*, 291 N.C. 171, 229 S.E. 2d 189 (1976). See generally *State v. Maines*, 301 N.C. 669, 273 S.E. 2d 289 (1981). We adhere to these precedents and overrule this assignment of error.

[2] Defendant argues that the court erred in not allowing his request for instructions; specifically "[b]efore the defendant's guilt may be inferred from his possession of certain property, the jury must first find from the evidence, and beyond a reasonable doubt that the property in the defendant's possession was the identical property stolen."

It is completely obvious that the instructions given could leave no juror in doubt that the state must prove that the articles in defendant's possession soon after the theft must be those articles stolen.

After instructing the jury that the inference arising from the possession of recently stolen property is one of fact and not of law and is strong or weak as the length of time elapsing between the stealing and the possession is short or long; that the inference is an inference to be considered by the jury merely as an evidentiary fact in determining whether the state has carried its burden of satisfying the jury beyond a reasonable doubt of defendant's guilt, the court charged the jury as follows:

> The duty to offer such explanation of his possession as is sufficient to raise in the minds of the jury a reasonable doubt that he stole the property or the burden of establishing a reasonable doubt as to his guilt is not placed on the defendant however recent the possession by him of the stolen goods may have been. The burden of establishing the defendant's guilt beyond a reasonable doubt remains upon the State at all stages of the trial. When the State proves to the jury beyond a reasonable doubt that there was a larceny, after the State has proved beyond a reasonable doubt from circumstantial evidence that there has been a felonious breaking or entering of the apartment of William J. Collins on said occasion with the intent to commit the crime of larceny and there has been a discovery of these stolen articles in the defendant's possession soon after the theft, this raises an inference of facts from which the jury may infer that the defendant was guilty of breaking or entering of the apartment of William J. Collins.

Further the court, in pointing out the three things which must be proved by the state beyond a reasonable doubt before the doctrine can apply, said:

> Second, that the defendant has possession of *these* or *this same* black and white TV and *this same* Emerson electric heater. (Emphasis supplied.)

This instruction comes from North Carolina Pattern Instructions Criminal 104.40. Additionally, the Supreme Court, in *State v. Jackson*, 274 N.C. 594, 597, 164 S.E. 2d 369 (1968), said:

> However, before the defendant's guilt on either count may be inferred from the defendant's unexplained possession of the money, the jury should have been required to find from the

evidence and beyond a reasonable doubt that the money in the defendant's possession was the identical money taken from the Steele home.

The Court awarded the defendant a new trial because "[t]he Court's charge failed to require the jury to find from the evidence and beyond a reasonable doubt that the bills found on the defendant were the *same* bills stolen from the Steele home." (Emphasis supplied.) See also *State v. Frazier*, 9 N.C. App. 44, 175 S.E. 2d 377 (1970); Webster's Third New International Dictionary (Unabridged). Merriam Webster (1968) defines "identical" as "being the same." We fail to perceive how defendant could possibly have been prejudiced by the court's refusal to adopt verbatim the instruction submitted by defendant. This assignment of error is overruled.

In the defendant's trial we find

No error.

Judges CLARK and WELLS concur.

BEATRICE S. SHORE, EMPLOYEE-PLAINTIFF v. CHATHAM MANUFACTURING CO., EMPLOYER, AETNA LIFE & CASUALTY INS. CO., CARRIER-DEFENDANTS

No. 8110IC308

(Filed 17 November 1981)

Master and Servant § 85.2— authority of Commission to enter an order for the taking of a deposition

Even though neither party moved under G.S. 97-80(a) to take a doctor's deposition, it was not error for the Industrial Commission to order the deposition taken as under Rule XXA of the Rules of the Industrial Commission, a commissioner has the authority to order on his own motion the taking of a deposition to provide missing evidence.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 18 December 1980. Heard in the Court of Appeals 22 October 1981.

On 19 April 1978, plaintiff sustained an injury in an accident arising out of and in the course of her employment. Pursuant to

an agreement of the parties, defendant paid compensation to plaintiff for temporary total disability from 20 April 1978 to 28 May 1978, from 30 May 1978 to 11 July 1978, and from 15 August 1978 to 29 October 1978.

A hearing was held on 11 July 1979 to determine plaintiff's entitlement to additional temporary disability subsequent to 29 October 1978. Plaintiff testified to physical examinations by Dr. Richard Adams, who was not present to testify.

On 26 September 1979, the hearing officer filed an order that the deposition of Dr. Adams be taken within 45 days at defendant's expense. On 16 January 1980, having received no communication with respect to the deposition, the Deputy Commissioner sent a letter to plaintiff's attorney. The Deputy Commissioner stated that the present evidence of record was insufficient to support an award of additional benefits. He would, however, leave the record open for an additional 15 days for any motion or request by plaintiff: "Unless I hear from you within that time, I will proceed with a determination based on the evidence now of record."

On 2 February 1980, plaintiff moved for additional time within which to take the deposition of Dr. Adams. The Deputy Commissioner denied the motion as not being timely, and on 28 February 1980, filed an opinion and award denying plaintiff's claim for additional compensation benefits. Plaintiff appealed. The Industrial Commission affirmed and adopted as its own the Deputy Commissioner's opinion and award.

Franklin Smith, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by Keith W. Vaughan and Joseph T. Carruthers, for defendant appellee.

VAUGHN, Judge.

The issue on appeal is whether the Commission, on its own motion, may enter an order for the taking of a deposition. We conclude it does have such authority.

North Carolina's Workers' Compensation Act is administered exclusively by the Industrial Commission. Plaintiff argues, however, that the administrative powers of the Commission do

not include the power to order depositions on its own motion. He cites G.S. 97-80(a) which states in part that "Any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken. . . ." Since neither party in this cause moved to take Dr. Adams' deposition, plaintiff contends the Commissioner's order was unlawful.

That provision of G.S. 97-80(a), however, is not the exclusive procedure for the taking of depositions. Our legislature has empowered the Industrial Commission to make rules "not inconsistent with this Article, for carrying out the provisions of this Article." G.S. 97-80(a). Pursuant to G.S. 97-80, the Industrial Commission promulgated Rule XXA (effective 1 February 1979). The rule provides the following:

> "When additional medical testimony is necessary to the disposition of a case, the original hearing officer may order the deposition of medical witnesses, such depositions to be taken on or before a day certain not to exceed sixty (60) days from the date of the ruling, provided the date may be postponed for good cause shown. The hearing officer shall issue a written order setting time within which such deposition shall be taken. The costs of such depositions shall be borne by the defendants for those medical witnesses whom defendants paid for the initial examination of the plaintiff, and in those cases where defendants are requesting the depositions."

The Deputy Commissioner in the present cause complied with Rule XXA. In his written order of 26 September 1979, he found that "some evidence from Dr. Adams is necessary before a determination can be made herein." He ordered the deposition to be taken within 45 days, a period well within the 60 days allowed by the rule. He also ordered defendant to bear the cost of the deposition. Plaintiff at that time did not request a postponement for good cause. In fact, the first reference plaintiff makes to the deposition of Dr. Adams occurs 2 February 1980, 17 days after the Commissioner's letter to plaintiff and more than four months after the Commissioner's original order.

Our courts have stated that the North Carolina Industrial Commission has the power not only to make rules governing its administration of the Workers' Compensation Act, but also to construe and apply such rules. "Its construction and application of its rules, duly made and promulgated, in proceedings pending before the said Commission, ordinarily are final . . . and not subject to review . . . on an appeal from an award made by said Industrial Commission." *Winslow v. Carolina Conference Association*, 211 N.C. 571, 579-80, 191 S.E. 403, 408 (1937).

We conclude that the Commissioner in the present cause had the authority to keep the case open in order to give the claimant another opportunity to gather missing evidence. *Conklin v. Freight Lines*, 27 N.C. App. 260, 218 S.E. 2d 484 (1975). Under Rule XXA of the Rules of the Industrial Commission, he also had the authority to order on his own motion the taking of a deposition to provide such evidence.

The opinion and award of the Commission is affirmed.

Affirmed.

Judges HILL and WHICHARD concur.

WAYNE GREESON v. H. W. BYRD

No. 8115DC262

(Filed 17 November 1981)

1. Agriculture § 6— assignment of sharecropping agreement

A farm lease (sharecropping) agreement is personal in nature and is thus non-assignable without the landlord's consent since the landlord's receipts under the contract are directly related to the sharecropper's skill and industry.

2. Agriculture § 7— sharecropping agreement—plowing of land—inability to complete cultivation of crop—no recovery for value of services

Plaintiff sharecropper who plowed defendant owner's land in preparation for planting but was unable to complete the farming of a crop due to illness could not recover the fair market value of the plowing from defendant under the theory of partial performance of the contract since it was the crop to be cultivated and harvested by plaintiff, not plaintiff's labor, for which defendant

bargained. Nor was plaintiff entitled to recover the value of his services under the theory of unjust enrichment where there was no evidence that any benefit inured to defendant as a result of plaintiff's partial performance.

APPEAL by defendant from *Harris, Judge.* Judgment entered 10 December 1980 in District Court, ALAMANCE County. Heard in the Court of Appeals 12 October 1981.

Plaintiff brought this action to recover payment for services he allegedly rendered to defendant when he plowed defendant's land in partial performance of his obligations under a farm lease agreement.

It is undisputed that plaintiff entered into a lease agreement with defendant under the terms of which he was to produce a crop on defendant's land in exchange for a share of the proceeds of sale. Plaintiff plowed the land in preparation for planting, but was unable to complete the farming of the crop due to illness. Defendant leased the land, upon surrender by plaintiff, to another "cropper" under a similar arrangement. Plaintiff sought payment for his labor according to the fair market value of the plowing. Judgment was entered pursuant to a jury verdict for plaintiff in the amount prayed for, $1,232.50, plus interest and costs. Defendant appeals.

North State Legal Services, Inc., by Philip N. Lehman, for plaintiff appellee.

Aubrey G. Blanchard, Jr. and Hemric, Hemric and Elder, by H. Clay Hemric, Jr., for defendant appellant.

ARNOLD, Judge.

[1] We note at the outset that defendant's argument that the court erred in admitting evidence of plaintiff's willingness to secure substitute performance of the contract is well taken. A farm lease (sharecropping) agreement is personal in nature and thus non-assignable without the landlord's consent since the landlord's receipts under the contract are directly related to the lessee's skill and industry. *See* 49 Am. Jur. 2d, *Landlord and Tenant,* Sec. 400. However, for the reasons set forth below, we find it unnecessary to reach the question of whether this error was prejudicial.

[2] The trial court's entry of judgment in accordance with the jury's finding that the defendant was obligated to the plaintiff to the extent of the market value of plaintiff's labor was error. It is true that a "cropper" who, through no fault of his own, surrenders the leasehold before harvesting the crop has been held to have an interest in the proceeds of the sale of the crop. *Parker v. Brown*, 136 N.C. 280, 48 S.E. 657 (1904). However, the case at bar is distinguishable on its facts from *Parker* in that no crop had been planted in which plaintiff could claim an interest at the time he surrendered the leasehold. Moreover, it was the crop to be cultivated and harvested by the plaintiff, not the plaintiff's labor, for which the defendant bargained. Thus, there could be no recovery for the value of partial performance of the contract since no part of the crop was produced.

The jury could have based its award only on a finding that defendant had been unjustly enriched, and that equity therefore justified imposition of a contract implied in law. On this theory, the plaintiff would be entitled to recover the value of his services (*quantum meruit*). However, one of the necessary elements for recovery on a contract implied in law is missing here—there is no evidence in the record to indicate that any benefit inured to the defendant as a result of plaintiff's partial performance. Without enrichment, there can be no "unjust enrichment" and therefore no recovery on an implied contract. Dobbs, *Remedies* § 4.2 (1973).

Accordingly, defendant was entitled to a directed verdict.

Reversed.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. BEATRICE WASHINGTON

No. 815SC549

(Filed 17 November 1981)

Escape § 4— fatal variance between indictment and proof

There was a fatal variance between the indictment and proof where defendant was charged in the indictment with escape under G.S. 148-45(b); however, the evidence supported a finding of a violation, if any, of G.S. 148-45(g)(1).

State v. Washington

APPEAL by defendant from *Strickland, Judge.* Judgment entered 21 January 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 November 1981.

Defendant was convicted of felonious escape in violation of G.S. 148-45. Judgment imposing a prison sentence was entered.

On 5 September 1979, defendant was convicted of involuntary manslaughter. She was placed in the custody of the North Carolina Department of Correction. In December 1979, she was assigned to Half-Way house, a minimum custody unit for women. She was approved for their work-release program. On the morning of 25 June 1980, defendant left the unit for her job but never showed for work. Her failure to appear for work was unauthorized.

At the close of the State's evidence, defendant's motion to dismiss was denied. The motion was renewed at the close of all the evidence.

Attorney General Edmisten, by Assistant Attorney General R. Darrell Hancock, for the State.

Billy H. Mason, for defendant appellant.

VAUGHN, Judge.

Defendant appeals the denial of the motion for nonsuit. "A defendant must be convicted, if at all, of the particular offense charged in the bill of indictment. [Citations omitted.] Whether there is a fatal variance between the indictment and the proof is properly presented by defendant's motion to dismiss." *State v. Cooper,* 275 N.C. 283, 286-87, 167 S.E. 2d 266, 268 (1969). At issue is whether the offense charged conforms with the evidence presented. We hold that it does not.

The governing statute is G.S. 148-45. G.S. 148-45(b) provides that any convicted felon in the custody of the North Carolina Department of Correction who escapes from the State Prison System, "shall for the first offense, except as provided in subsection (g) of this section, be guilty of a felony. . . ." G.S. 148-45(g) states the following:

"(g)(1) Any person convicted and in the custody of the North Carolina Department of Correction and ordered or otherwise

assigned to work under the work-release program, G.S. 148-33.1 . . . who shall fail to return to the custody of the North Carolina Department of Correction, shall be guilty of the crime of escape and subject to the applicable provisions of this section and shall be deemed an escapee. For the purpose of this subsection, escape is defined to include, but is not restricted to, willful failure to return to an appointed place and at an appointed time as ordered."

In the present cause, the indictment and charge followed the language of G.S. 148-45(b). The evidence, however, supports a finding of a violation, if any, of G.S. 148-45(g)(1).

The Supreme Court was faced with a similar situation in *State v. Kimball*, 261 N.C. 582, 135 S.E. 2d 568 (1964). The statute involved there was a forerunner of the present G.S. 148-45. G.S. 148-45(a) made it unlawful for any prisoner serving a sentence in the State Prison System to escape. It provided the same varying penalties for misdemeanants and felons as does the current G.S. 148-45(a) and (b). G.S. 148-45(b), added in 1963, stated almost verbatim the current (g)(1) provision regarding inmates on work-release:

"(b) Any defendant convicted and in the custody of the North Carolina Prison Department and ordered or otherwise assigned to work under the work-release program, G.S. 148-33.1, or any convicted defendant in the custody of the North Carolina Prison Department and on a temporary parole by permission of the State Board of Paroles or other authority of law, who shall fail to return to the custody of the North Carolina Prison Department, shall be guilty of the crime of escape and subject to the provisions of subsection (a) of this section and shall be deemed an escapee. For the purpose of this subsection, escape is defined to include, but is not restricted to, wilful failure to return to an appointed place and at an appointed time as ordered."

In *Kimball*, Judge Sharp (later Chief Justice) wrote the following:

"This section [G.S. 148-45(b)], while providing the same penalties listed in subsection (a) creates a new and distinct offense which can only be committed by a work-release

prisoner or a convicted defendant temporarily on parole. The indictment in this case follows the language of subsection (a), but the evidence discloses a violation of subsection (b)."

261 N.C. at 584, 135 S.E. 2d at 570. The Court then stated that upon proper motion, defendant would have been entitled to a nonsuit "for this *fatal variance*." (Emphasis added.)

The Supreme Court's reasoning as regards the 1963 version of G.S. 148-45 applies to the 1977 version. Both codifications contain essentially the same provisions, the differences occurring largely in the numbering of the subsections. Since the uncontradicted evidence is that defendant was a person assigned to work under an authorized work-release program, she was guilty—if at all—of the separate offense of G.S. 148-45(g)(1). We hold a fatal variance between the indictment and proof exists. It was error to deny defendant's motion to dismiss. *See also State v. Best*, 292 N.C. 294, 233 S.E. 2d 544 (1977); *State v. Daye*, 23 N.C. App. 267, 208 S.E. 2d 891 (1974).

Reversed.

Judges HILL and WHICHARD concur.

ANNIE MABLE D. ANGE, BY AND THROUGH LAMAR E. SLEDGE, HER GUARDIAN AD LITEM v. MACK D. ANGE AND PEARL M. ANGE

No. 813SC188

(Filed 17 November 1981)

1. **Cancellation and Rescission of Instruments § 9.1; Witnesses § 1— limitation on number of witnesses**

Where plaintiff presented five witnesses who testified concerning plaintiff's lack of mental capacity to make the deed in question, the trial court did not abuse its discretion in refusing to permit plaintiff to call an additional thirteen witnesses who would have given similar testimony.

2. **Evidence § 13— attorney-client privilege—attorney's opinion as to mental capacity**

Testimony by the attorney who prepared a deed that in his opinion plaintiff had the mental capacity to execute the deed did not violate the attorney-client privilege.

Ange v. Ange

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 3 November 1980 in Superior Court, CRAVEN County. Heard in the Court of Appeals 22 September 1981.

The plaintiff brought this action to set aside a deed conveying real property to the defendants on the grounds of undue influence and lack of mental capacity to make a deed. At trial, plaintiff called five witnesses who gave testimony as to the plaintiff's inability to make a deed. Plaintiff's counsel had thirteen more witnesses who would have testified to the same thing. The trial court instructed plaintiff's counsel not to call anymore witnesses who would "say the same thing the last five have said." Plaintiff's counsel informed the court these witnesses would say the same thing as the others and tendered them to the court for cross-examination, which defendants declined.

The plaintiff's former attorney was called by the defendants. He testified, over plaintiff's objection, that the plaintiff was competent to make a deed.

At the conclusion of the evidence, Judge Barefoot found that plaintiff had sufficient mental capacity to execute a deed and entered judgment in favor of defendants. Plaintiff appealed.

Barker, Kafer and Mills, by James C. Mills, for plaintiff appellant.

Henderson and Baxter, by B. Hunt Baxter, Jr. and Carl D. Lee, for defendant appellees.

WEBB, Judge.

[1] Plaintiff first argues that the court erred in refusing to allow an additional thirteen witnesses to testify as to their opinion of plaintiff's mental capacity. It is clear that a trial judge, in his discretion, may limit the number of witnesses that a party may call so as to prevent needless waste of time. *See State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968); *Board of Transportation v. Rentals, Inc.*, 28 N.C. App. 114, 220 S.E. 2d 198 (1975); 5 A.L.R. 3d 238. In the case sub judice, plaintiff's counsel inquired of five witnesses as to their opinion of plaintiff's mental capacity and was prepared to call thirteen more. It was within the judge's discretion to limit the number of witnesses to be called on this issue. This assignment of error is overruled.

[2] Plaintiff next argues that it was error for the court to let the plaintiff's attorney who drew the deed testify. She bases this argument on the confidential relationship existing between attorney and client. We do not believe there is merit in this argument. The attorney testified that in his opinion the plaintiff had sufficient mental capacity to know the things necessary to make a deed. He based this opinion on his dealings with the plaintiff. He did not testify as to any confidential communication between the plaintiff and him. *See In re Will of Kemp*, 236 N.C. 680, 73 S.E. 2d 906 (1953).

Plaintiff finally argues that the court erred in its findings of fact, conclusions of law and judgment thereon. The rule is that the facts found by the judge without a jury have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. *Knutton v. Cofield*, 273 N.C. 355, 160 S.E. 2d 29 (1968). In the case sub judice, there was competent evidence that plaintiff had sufficient mental capacity to make a deed and the judge so found. We are bound by his findings.

Affirmed.

Judges VAUGHN and ARNOLD concur.

LELA J. TEACHY, ADMINISTRATRIX OF THE ESTATE OF JAMES EVERETTE TEACHY, JR., PLAINTIFF v. COBLE DAIRIES, INC., A NORTH CAROLINA CORPORATION AND EDWARD DEAN HOLMES, ORIGINAL DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. DEPARTMENT OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA, THIRD-PARTY DEFENDANT

No. 818SC305

(Filed 17 November 1981)

Appeal and Error § 6.2— appeal from denial of motion to dismiss—interlocutory

The denial of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not immediately appealable.

APPEAL by the third-party defendant, Department of Transportation of the State of North Carolina, from *Battle, Judge.*

Order entered 4 February 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals on 22 October 1981.

This is a civil action wherein plaintiff seeks to recover damages for the wrongful death of her intestate allegedly resulting from the negligent operation of a truck owned by defendant Coble Dairies, Inc., and operated by the defendant Edward Dean Holmes at the intersection of N.C. Highway 111 and Highway 70 Bypass, East, in Goldsboro, North Carolina. The defendants Coble Dairies, Inc., and Holmes filed answers denying negligence and alleging contributory negligence. The defendants Coble Dairies, Inc., and Holmes filed a third-party complaint against the Department of Transportation of the State of North Carolina [hereinafter "Department of Transportation"] alleging that it was negligent in the maintenance of a stop light at the intersection where the collision occurred.

The Department of Transportation filed a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b) upon the following grounds:

> 1. The Court lacks jurisdiction of the subject matter presented by the third-party complaint in that neither the State of North Carolina nor any of its agencies or institutions may be sued in tort in the Superior Court of the State either as original party defendants or third-party defendants in that they are immune from said suits under the doctrine of sovereign immunity.
>
> 2. The complaint fails to state a claim against this third-party defendant upon which relief can be granted.

The third-party (Department of Transportation) appealed from the denial of the two motions.

Taylor, Warren, Kerr & Walker, by John H. Kerr, III, for the third-party plaintiff appellees.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Ralf F. Haskell for the third-party defendant appellant.

HEDRICK, Judge.

On 2 June 1981 the original defendants Coble Dairies and Edward Holmes filed in this Court a motion to dismiss the appeal as being from interlocutory orders. By order dated 16 June 1981 this

Court denied the motion. In its brief, the original defendants have renewed the motion.

The denial of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not immediately appealable. The denial of a motion to dismiss on the grounds that the superior court lacks subject matter jurisdiction is not immediately appealable. We believe the decision in *Shaver v. N. C. Monroe Construction*, --- N.C. App. ---, --- S.E. 2d --- (filed 3 November 1981) is controlling and further elaboration in this case is unnecessary.

Appeal dismissed.

Judges CLARK and MARTIN (Harry C.) concur.

BARRY L. BONENO, RICHARD D. SEARS, FRANK L. FRYE AND RODGER JUNK ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. THE STATE OF NORTH CAROLINA; JAMES B. HUNT, JR., GOVERNOR OF THE STATE OF NORTH CAROLINA AND EX OFFICIO DIRECTOR OF THE BUDGET; THOMAS W. BRADSHAW, JR., SECRETARY OF THE DEPARTMENT OF TRANSPORTATION AND CHAIRMAN OF THE BOARD OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA; JOHN A. WILLIAMS, STATE BUDGET OFFICER, GEORGE LAMBERT, STATE DISBURSING OFFICER; HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA; MARK BASNIGHT, T. G. JOYNER, GEORGE G. HARPER, GARLAND B. GARRETT, JR., WILLIAM C. HERRING, ILEY DEAN, JOE HAMME, ARTHUR WILLIAMSON, MICHAEL B. FLEMING, MARTHA C. HOLLERS, JOHN K. GALLAHER, JOHN Q. BURNETTE, M. R. PHILLIPS, DAVID W. HOYLE, JOHN N. GILKEY, JACK E. BRYANT, OSCAR LEDFORD, DAVID W. BUMGARDNER, JR., JEANNETTE CARL, JAMES B. GARRISON, SEDDON GOODE, HELEN H. LITTLE, MOSES RAY, MEMBERS OF THE BOARD OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA; RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 8110SC266

(Filed 17 November 1981)

Highways and Cartways § 8— cash flow financing for highways—constitutionality

The statute providing for "cash flow" financing for highway construction and maintenance contracts, G.S. 143-28.1, does not violate Art. III, § 5(3) of the N.C. Constitution which prohibits the Governor from incurring a deficit in ad-

ministering the State's budget, does not violate Art. V, § 3 of the N.C. Constitution which prohibits the General Assembly from contracting debt without voter approval, does not restrict the right of succeeding legislatures to govern, and does not allow the State to execute void contracts.

APPEAL by plaintiffs from *Lee, Judge.* Judgment entered 10 October 1980 in Superior Court, WAKE County. Heard in the Court of Appeals 19 October 1981.

Plaintiffs brought this action under the Declaratory Judgment Act, seeking to have the Cash Flow Financing Act, G.S. 143-28.1, declared unconstitutional. From summary judgment for the defendants, plaintiffs appeal.

Attorney General Edmisten, by Assistant Attorney General J. Chris Prather, for the State.

Craige, Brawley, Liipfert & Ross, by C. Thomas Ross, for plaintiff appellants.

ARNOLD, Judge.

As their first assignment of error, plaintiffs argue that G.S. 143-28.1 violates Article III, § 5(3) of the North Carolina Constitution which provides for a balanced budget. We disagree.

The provision to which plaintiffs refer provides that the Governor shall not, in administering the budget, permit a deficit to be incurred by the State on account of total expenditures exceeding total receipts. Plaintiffs apparently argue that the incurring of a contractual obligation constitutes an expenditure within the meaning of this provision. We hold, however, that an expenditure occurs only when funds are disbursed. The statute's authorization of construction and maintenance contracts by the Department of Transportation using "cash flow" financing does not violate the prohibition against incurring a deficit. Only actual expenditures in excess of receipts would violate the provision.

Plaintiffs next contend that G.S. 143-28.1 violates Article V, § 3 of the Constitution which prohibits the General Assembly from contracting debt without voter approval. It is clear that the intent of this provision is to restrict the State's power to borrow money, not its power to enter into long-term contracts. *See* N.C.

Const. Art. V, § 3(3). We find no merit in plaintiffs' arguments to the contrary.

Plaintiffs' remaining contentions, that G.S. 143-28.1 restricts the right of succeeding legislatures to govern, and that it allows the State to execute void contracts, are equally without merit.

The judgment of the trial court is

Affirmed.

Chief Judge MORRIS concurs.

Judge BECTON concurs in the result.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 NOVEMBER 1981

CARLTON v. MOORE No. 818SC174	Lenoir (79CVS450)	Reversed
ELKINS v. CURTIS No. 8130DC253	Cherokee (80CVD89)	No Error
EPTING-BALLENGER v. BENTON No. 8113DC179	Brunswick (79CVD328)	Reversed & Remanded
HARRINGTON MFG. v. LOGAN TONTZ CO. No. 806SC1140	Northampton (76CVS54)	New Trial
IN RE HENSON No. 8112DC472	Cumberland (81SP111)	Affirmed
JENKINS v. JENKINS No. 813DC318	Pitt (80CVD1476)	Affirmed
LANDURA CORP. v. ROANOKE CONSTRUCT. No. 816SC260	Halifax (79CVS295)	Affirmed
McCOTTER v. THORPE No. 812DC302	Beaufort (78CVD381)	Dismissed
SILVERTHORNE v. CHRYSLER CREDIT CORP. No. 812SC244	Beaufort (75CVS164)	Affirmed
SOUND APPLIANCE v. DALTON No. 813DC309	Carteret (79CVD718)	Affirmed
STATE v. BRANCH No. 8129SC499	McDowell (80CRS3165)	Dismissed
STATE v. BROWN No. 8115SC508	Orange (80CRS9405) (80CRS13000)	No Error
STATE v. CAUDLE No. 8114SC458	Durham (80CRS10806)	No Error
STATE v. DeSHIELDS No. 815SC371	New Hanover (79CRS26652) (80CRS11173)	No Error
STATE v. DOVE No. 8114SC235	Durham (80CRS3869)	No Error
STATE v. HAUSER No. 8121SC461	Forsyth (80CR27379)	No Error
STATE v. HILL No. 8112SC372	Cumberland (80CRS34218)	No Error

STATE v. HUMPHREY, JR. No. 813SC272	Craven (80CRS5511)	Vacated & Remanded For Judgment
STATE v. JONES & KEARNEY No. 819SC463	Warren (79CRS2247) (79CRS2526)	No Error
STATE v. REVELL No. 811SC434	Chowan (80CRS1527) (80CRS1528)	No Error
STATE v. SUTTON No. 8127SC462	Gaston (80CRS23688)	No Error
STATE v. SWAIN No. 816SC506	Bertie (80CRS931)	No Error
STATE v. SWANN No. 8115SC504	Orange (80CRS4017)	No Error
STATE v. WILLIAMSON No. 815SC284	New Hanover (80CRS14087) (80CRS14088) (80CRS13692)	No Error
WADDILL v. COLONIAL LIFE No. 8110SC291	Wake (79CVS7064)	Affirmed

NOLAND COMPANY, INC. v. TED A. POOVEY, T/A TED A. POOVEY PLUMBING COMPANY, AND THE OHIO CASUALTY INSURANCE COMPANY

No. 8025SC1110

(Filed 6 October 1981)

1. Uniform Commercial Code § 18— recovery of payment for goods—delivery and acceptance

In order for plaintiff to show that defendant was indebted to it for payment for certain goods, plaintiff did not have to show that defendant received these goods but had to show that it delivered these goods and defendant accepted delivery. G.S. 25-2-503; G.S. 25-2-606.

2. Uniform Commercial Code § 20— delivery of goods—acceptance or rejection by buyer—jury question

In an action to recover payment for plumbing materials allegedly sold by plaintiff to defendant for use in a construction project, a jury question was presented as to whether plaintiff was entitled to recover for all materials shown on its exhibits, and the trial court properly refused to direct a verdict for defendant as to all invoices not actually signed by defendant, where plaintiff's evidence tended to show that it tendered delivery of all the materials listed on its exhibits and that defendant accepted delivery of such materials, and where defendant's evidence tended to show that the goods were all delivered to him but that he notified plaintiff of his rejection of those in excess of his needs.

3. Accounts § 2— account stated—sufficiency of evidence

The trial court properly instructed on an account stated where plaintiff presented evidence tending to show that it sold and delivered numerous goods to defendant, that defendant was periodically invoiced for these goods between August 1976 and February 1977, and that defendant did not make his objections to the sale and delivery of these goods known to plaintiff until March 1979, since the jury could find that defendant impliedly agreed to the account stated by failing to object to the bills and invoices he received from plaintiff within a reasonable time.

4. Accounts § 1— open account—sufficiency of evidence

The trial court properly instructed the jury with regard to defendant's possible indebtedness to plaintiff on an open account where plaintiff's evidence tended to show that plaintiff established a $40,000 line of credit for defendant to purchase plumbing supplies for a construction project; defendant was billed periodically on this credit account; a running balance was maintained on the account; and continuous dealings based on this account were contemplated and did occur.

5. Accounts § 2— account stated—express or implied admission—instructions

The trial court did not err in instructing the jury that it should determine whether defendant was indebted to plaintiff on an account stated and that an account stated results if the debtor admits the correctness of the account but that such "would not apply in this case" where it is clear from the court's further instructions on an account stated arising from an implied admission that the court was referring to the fact that there was no evidence of an account stated by express admission.

6. Trial § 34— statement of contentions—failure to refer to exhibits

The trial court's failure to refer to defendant's exhibits when instructing the jury on his contentions was not error.

7. Sales § 10.1; Uniform Commercial Code § 20— acceptance of goods—authority to take delivery—instruction not necessary

In an action to recover for goods allegedly sold and delivered to defendant, the trial court did not err in failing to give an instruction as to who was authorized to take delivery of goods for defendant since the identity of the person accepting the goods is immaterial to the question of whether there was a delivery. G.S. 25-2-503.

8. Sales § 10.1— action for goods sold and delivered—instructions on contract not required

In an action to recover for plumbing materials allegedly sold and delivered to defendant for use in a construction project, defendant's evidence did not require the court to give instructions to the jury relating to whether the parties contracted that plaintiff would supply all materials needed to complete the plumbing work on the project for a specified sum where it showed only that defendant and plaintiff's agent compiled a list of materials which might have been used on the project and the prices thereof.

9. Principal and Surety § 9.1— goods sold and delivered—contractor's payment bond—separate issues as to liability of contractor and surety

The surety on a plumbing contractor's payment bond for materials used in the construction of a county building was liable only for materials actually used by the contractor in constructing such building, and the trial court erred in refusing to submit separate issues as to the amount of the contractor's liability to plaintiff for materials delivered to him at the construction site of the county building and the amount of the surety's liability on the payment bond where there was evidence tending to show that some of the materials delivered to defendant at such construction site were not used by defendant in constructing the county building but were used in other construction projects. G.S. 44A-25(5).

10. Interest § 2; Judgments § 55— account stated—interest on judgment

The trial court did not err in permitting interest on plaintiff's judgment against defendant on an account stated from the date of judgment, rather than from the date of demand and refusal of payment, where defendant presented evidence that some of the materials listed on plaintiff's invoices had not in fact

been delivered to him, and the amount due on defendant's stated account was thus not ascertainable until the jury returned its verdict.

APPEAL by defendants and by plaintiff from *Friday (John R.), Judge.* Judgment entered 23 July 1980 in Superior Court, BURKE County. Heard in the Court of Appeals 6 May 1981.

In this action plaintiff seeks to recover payment for plumbing materials it delivered to defendant Poovey for use in the construction of the Burke County Human Resources Center in Morganton, North Carolina (hereinafter Center). Plaintiff alleged that defendant Poovey contracted on 28 June 1976 with Burke County to perform the plumbing work in the construction of the Center. Pursuant to G.S. 44A-25 *et seq.* defendant Ohio Casualty Insurance Company (hereinafter Insurance Company) executed as surety a "Labor and Material Payment Bond" guaranteeing payment for all labor and materials "used or reasonably required for use" by the principal on the bond, defendant Poovey, in his performance of his contract to complete the plumbing work at the Center. Defendant Insurance Company guaranteed such payment to the extent of $81,513. Subsequently, plaintiff sold and delivered supplies and materials to defendant Poovey which were necessary for completion of the plumbing on this project. Plaintiff alleged that the total price of the materials so delivered was $29,692.42. These materials were listed in plaintiff's invoices which were allegedly sent to defendant Poovey at the time of the delivery of the materials at the job site. Plaintiff requested that the trial court award it $29,692.42 representing the balance due since 6 June 1977 for these supplies and materials.

Plaintiff also alleged that defendant Insurance Company was also indebted to plaintiff for the sum of $29,692.42 with interest as surety on its payment bond with defendant Poovey and requested that the trial court enter judgment for $81,513 against defendant Insurance Company to be discharged upon the payment of $29,692.64 with interest, costs, and attorney's fees.

In its answer, defendant Insurance Company admitted that it gave its labor and material payment bond for defendant Poovey. It averred that a dispute had arisen between defendant Poovey and plaintiff over the amount due plaintiff and the number and type of supplies sold to Poovey by plaintiff. Defendant Insurance Company further averred that defendant Poovey was primarily

liable for any indebtedness to plaintiff, and that if it was indebted to plaintiff, any such liability was secondary to that of defendant Poovey, and should the trial court find it primarily liable, it was entitled as a matter of law to indemnification and judgment over against defendant Poovey by virtue of the terms of the payment bond.

Defendant Insurance Company's answer also contained a cross claim against defendant Poovey. The cross claim realleged the basic factual allegations of the complaint and further alleged that defendant Poovey refused to acknowledge whether he owed the amount claimed by plaintiff. Defendant Insurance Company alleged that in applying for its labor and material payment bond, defendant Poovey agreed to indemnify fully Insurance Company for any loss or expense including attorney's fees which Insurance Company might sustain. Consequently, defendant Insurance Company alleged that in the event it was adjudged to be indebted to plaintiff, it was entitled to indemnification and judgment over against defendant Poovey. Defendant Insurance Company also contended in its cross claim that it was entitled to recover from defendant Poovey for services rendered in completing Poovey's construction contract with Burke County and for investigating this matter. Insurance Company averred that it had already incurred and paid losses of $19,273.04 on behalf of defendant Poovey and that it had possible prospective losses as a result of this action of $29,087.31, plus a claim of Estes Plumbing, Inc., against Poovey for $7,164.61. Defendant Insurance Company averred that it had previously incurred expenses of $805.05 in this matter and that it would incur additional expenses and attorney's fees of $6,000 which it was entitled to have reimbursed. Accordingly, Insurance Company requested that if it and defendant Poovey were adjudged to be liable to plaintiff that it then be entitled to judgment over against Poovey for approximately $62,330.01 less any amount it might receive from Burke County on the construction contract which it had completed.

Defendant Poovey filed his answer on 1 November 1978. He made two motions. First, he moved that the action be dismissed pursuant to G.S. 1A-1, Rule 12(b)(6). Second, he asked that the court dismiss the action because plaintiff had failed to join a necessary party, Ted A. Poovey Plumbing, Inc. He also denied certain allegations of the complaint and asked that plaintiff be allowed to recover nothing.

By order of Judge H. L. Riddle, Jr., entered 29 April 1980, defendant Poovey was permitted to amend his answer to include a counterclaim in which he alleged that before he entered into the construction contract with Burke County, Sonny Hough, who was a salesman and agent for plaintiff, compiled a list of the plumbing materials that would be needed by Poovey to complete the proposed plumbing work on the Center on which Poovey planned to bid. Defendant Poovey alleged that Hough, acting as plaintiff's agent, agreed with Poovey to furnish all supplies and materials needed in the construction of the Center for $19,500, and, as was customary, a commitment was signed by the parties based on that figure. Poovey claimed that plaintiff was aware of this contract to provide materials for $19,500 and wrongfully presented him with a bill for $29,887.31. He alleged that his liability to plaintiff was limited by his purported contract with plaintiff to the extent of $19,500 less any amount awarded him as damages under the counterclaim.

Defendant Poovey further alleged that as a result of this action his credit rating and ability to proceed in the plumbing business were damaged. Consequently, he asked for $50,000 in actual damages for damages to his character and reputation, and $50,000 as punitive damages.

On 27 November 1978 Judge Donald L. Smith entered an order in which he denied both of defendant's motions to dismiss. Judge Smith concluded as a matter of law that plaintiff's complaint was sufficient to state a cause of action and that plaintiff's allegation that some entity other than defendant Poovey was indebted to plaintiff on his account would not discharge him as defendant in this action.

Plaintiff's reply, filed on 25 April 1980, denied the allegations of defendant Poovey's counterclaim, and renewed plaintiff's request for payment of defendants' indebtedness to it in the revised sum of $28,692.43, with interest and costs.

At trial plaintiff called the credit manager of its Charlotte branch, D. M. Nelson, as a witness. Nelson testified that defendant Poovey had an open account with plaintiff and that plumbing materials needed for the job at the Center were purchased by Poovey on this account and delivered to the job site. Nelson was responsible for keeping records on the Poovey account. All of the

invoices of goods delivered to defendant Poovey on this particular account were mailed to him at his Granite Falls address. These invoices were entered into evidence as plaintiff's exhibits 1 through 21.

Nelson stated that salesmen Ernest Varney and F. L. Huff (Hough) handled the Poovey account for plaintiff. Both salesmen were unavailable and did not testify at the trial. In 1977 salesman Huff (Hough) and defendant Poovey compiled a list of materials that Poovey thought would be necessary for the job. Nelson stated:

> It is certainly not unusual that one of the salesmen sit down with a respective (sic) buyer and once the buyer gives a list of items he felt he needed and compiled a list that the salesman would give him a price. As a matter of fact, that is one of the services that is offered by the salesman to help set up credit accounts. . . .

Plaintiff extended to defendant Poovey a $40,000 line of credit on materials for the Burke County job. This line of credit was an approximation drawn from the amount of materials plaintiff expected to sell defendant Poovey for the job. Nelson testified:

> I talked with Mr. Poovey and with the salesman and I arrived at approximately forty thousand dollars needed on the job, so we set up a line of credit.

Nelson's testimony also tended to reveal that plaintiff delivered materials to the Center, and defendant Poovey was billed for them from August 1976 through February 1977. When defendant Poovey had paid nothing on these bills by February 1977, plaintiff placed his account on C.O.D. Defendant Poovey purchased approximately $12,000 worth of goods C.O.D. after his credit was terminated.

Plaintiff's witness Vernon A. Hefner, who was general superintendent of the construction of the Center, testified for plaintiff that materials for defendant Poovey were often delivered at the job site when Poovey was not present. At such times Hefner would sign and take possession of the materials for Poovey. Hefner identified several of plaintiff's receipts which he had signed. Hefner stated that Poovey was involved in two other

construction jobs simultaneously with his work on the Center. Hefner sometimes saw defendant Poovey transport materials away from the Center by truck. Furthermore, he testified that more plumbing materials were delivered to defendant Poovey at the Center construction site than were needed to complete defendant Poovey's job.

Plaintiff offered into evidence portions of defendant Poovey's deposition and called Poovey as an adverse witness. Defendant Poovey's testimony on cross examination tended to show that he worked with plaintiff's salesman Hough in establishing his line of credit for this job. Defendant Poovey's exhibit 2 consisted of the "work sheets" that he and Hough drew up. Poovey testified as to their contents. The work sheets were partially in defendant Poovey's handwriting and partially in Hough's. Hough set the prices on the individual materials and gave Poovey a summary figure of $19,500 for all the materials listed. Poovey testified that he considered this to be a contract price between him and plaintiff. Defendant Poovey testified that Hough told him that: "he had the authority to deal with me [Poovey] and to lock in these prices as a salesman of the Noland Company." Poovey stated that he accepted plaintiff's offer at the price stated in the agreement, and he used that amount in computing and submitting his bid on the Center.

Defendant Poovey signed approximately five of plaintiff's 21 invoices, thus accepting delivery of materials for the job. Poovey testified that no other person, including Hefner, had authority to sign for, and cause him to be indebted for, any of the materials delivered. He testified that a number of the items which plaintiff's invoices showed as having been delivered to him had not in fact been ordered by him nor delivered to him. Poovey made approximately 15 trips to plaintiff's offices to complain about the delivery of unneeded materials and to have improper billing corrected.

Poovey also testified that many of the materials that he received at the Center were not designed to be used on that job, but were to be used on the Alleghany Hospital project on which he was working at the same time. Poovey testified that plaintiff's agents had informed him beforehand that they would do this. They told him that if he ordered a larger quantity of materials

under one job that he would be billed under the one job and receive a discount. Poovey stated that this was a common practice in his business.

At the close of plaintiff's evidence, defendant Poovey stipulated that he was liable to defendant Insurance Company on its cross claim for $31,604.05, and further that Insurance Company was entitled to a judgment on the cross claim against Poovey in that amount plus any amount that the trial court awarded plaintiff against Insurance Company in this action.

Defendant Poovey then offered into evidence two exhibits consisting of the handwritten work sheets on which he and Hough allegedly calculated the total price for plumbing materials to be used on the Center job.

The jury returned its verdict in which it found that defendant Poovey was indebted to plaintiff on a stated account in the amount of $24,096.27. In its judgment filed 17 July 1980, the trial court ordered that plaintiff recover from defendant Poovey $24,096.27 with interest thereon, from the date of judgment until paid, and costs. The trial court further ordered defendant Insurance Company to pay plaintiff $81,513 to be discharged upon the payment of $24,096.27. Defendant Poovey's counterclaim for damages to his character and reputation was dismissed because no evidence was introduced in support of its allegations. The trial court ruled that in the event that defendant Insurance Company paid this judgment or any part thereof, it should have judgment over against defendant Poovey for any such amount it paid. Pursuant to defendant Poovey's stipulation during the trial and evidence there presented, the trial court found that defendant Insurance Company was entitled to recover $30,981.96 from defendant Poovey on its cross claim for money expended, under the terms of its bond, by Insurance Company prior to trial. All of the parties appealed from this judgment.

Purrington and Purrington, by A. L. Purrington, Jr., for plaintiff appellant.

Byrd, Byrd, Ervin, Blanton and Whisnant, by Robert B. Byrd and Lawrence D. McMahon, Jr., for defendant appellant Ohio Casualty Insurance Company.

Triggs and Mull, by C. Gary Triggs and Wayne O. Clontz, for defendant appellant Ted A. Poovey.

MORRIS, Chief Judge.

I. Defendant Poovey's Appeal

Defendant Poovey first contends that it was error for the trial court to deny his motions for directed verdict. Poovey insists that plaintiff presented insufficient evidence of the number and kind of goods that it delivered to him for use in the job at the Center and for which it now claims Poovey is indebted to it for payment. In order to prove the quantity and price of the materials and supplies it allegedly delivered to defendant Poovey plaintiff introduced into evidence some 26 exhibits consisting of invoices and freight bills listing the materials it claims to have delivered and sold to Poovey. Five of these exhibits were signed by Poovey, others show no signature evidencing receipt, and some were receipted by other individuals working at the Center. The general superintendent of the construction job at the Center, Vernon Hefner, testified for plaintiff that he signed for and took delivery of the several shipments of goods delivered to Poovey. Each time Hefner had the goods unloaded at Poovey's tool house and informed Poovey that the goods had arrived. Hefner testified that he did not work for Poovey and that he had no relationship with him other than the fact that they were both contractors on the job. Hefner stated that defendant Poovey was not on the job very much and when there was no one there to receive the materials he would sign for them. Hefner stated with regard to his signing for defendant Poovey's materials: "I thought I was doing him a favor. We had done that for years; as long as I had been in the construction business. Mr. Poovey seemed to appreciate it, but he did not tell me to sign for him."

Defendant Poovey argues that the trial court should have directed a verdict in his favor on all of the invoices "except those particular invoices and freight bills that had, in fact, been received by Mr. Poovey as established in the evidence and shown in the body of the record on appeal." Poovey submits that plaintiff's evidence shows that he only received a portion of the materials and supplies listed on the invoices and freight bills. He contends that this evidence when viewed in the light most favorable to plaintiff did not show that all of the goods either billed or invoiced to defendant Poovey had, in fact, been *received* by Poovey.

A directed verdict may be granted only if, as a matter of law, the plaintiff's evidence when taken as true and considered in the light most favorable to plaintiff is insufficient to justify a verdict for plaintiff. *Investment Properties v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972) (*reversed on other grounds*, 283 N.C. 277 (1973)); W. Shuford, N.C. Practice and Procedures § 50-5 (1975). Conflicts, contradictions and inconsistencies which appear in the evidence must be resolved in plaintiff's favor. *Snider v. Dickens*, 293 N.C. 356, 237 S.E. 2d 832 (1977); *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974); *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). A verdict should not be directed when the facts are in dispute. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971); *Jones v. Development Co.*, 16 N.C. App. 80, 191 S.E. 2d 435, *cert. denied*, 282 N.C. 304, 192 S.E. 2d 194 (1972).

[1] A transaction such as this for the sale of goods is governed by Article 2 of the U.C.C. G.S. 25-2-301 specified "[t]he obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." In order to show that defendant Poovey was indebted to it for payment for certain goods plaintiff did not have to show that defendant Poovey *received* these goods, but rather it had to show that it *delivered* these goods and defendant Poovey accepted delivery. The manner in which a seller must tender delivery is specified in G.S. 25-2-503 which states:

> (1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. . . . (a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but (b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.

According to G.S. 25-2-606:

> (1) Acceptance of goods occurs when the buyer (b) fails to make an effective rejection . . ., but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or (c) does any act inconsistent with the seller's ownership. . . .

G.S. 25-2-602 delineates the manner and effect of a buyer's rightful rejection of goods. Section (1) provides:

> Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

The issue here is not whether defendant Poovey actually received these goods himself, but whether plaintiff adequately tendered delivery of these goods, and whether defendant Poovey accepted or rejected them. The fact that defendant Poovey did not sign all of the invoices himself is not conclusive evidence that these goods were not delivered and that Poovey did not accept them.

[2] The evidence presented in this case was sufficient to create an issue of fact for the jury as to whether plaintiff properly tendered delivery of these plumbing materials and whether defendant Poovey accepted them. The materials listed on the invoices and freight bills were all assigned for delivery to defendant Poovey at the Center. Plaintiff's witness D. M. Nelson testified that copies of all the invoices were sent to Poovey at his Granite Falls address. The last invoice listing goods for which plaintiff did not receive payment was dated 6 June 1977. Mr. Nelson testified:

> Prior to the deposition of the defendant Poovey in March of 1979, I had not received any complaints from the defendant about the invoices of the delivery of merchandise.

In opposition to this evidence defendant Poovey testified on cross examination as follows:

> Yes, sir. While the job was processing, I went and made fourteen or fifteen trips into Mr. Strickland's office and Mr. Vanhorn's, that was the salesman that took over Sonny Hough, and I made all kinds of complaints that we didn't need all this, all this that was coming.

Plaintiff's evidence tended to show that Poovey accepted delivery of all the materials listed on plaintiff's exhibits. Defendant Poovey's testimony tended to indicate that the goods were all delivered to him, but that he notified plaintiff of his rejection of those in excess of his needs. Clearly, the trial court was correct in refusing to direct a verdict for defendant Poovey.

Defendant Poovey alleges that the trial court committed prejudicial error in various portions of its instructions.

[3] The trial court instructed on issue No. 1, which was:

> Is the defendant, Ted A. Poovey, indebted to the plaintiff, Noland Company, Incorporated, on an open account or an account stated?

Defendant Poovey argues that it was error for the trial court to instruct on an account stated because no evidence was presented suggesting that there had been transactions between plaintiff and him which resulted in the creation of matured debts or that the parties by agreement had computed a balance which the debtor promised to pay. Poovey submits that the issue of an account stated should not have been applied in this case because he never admitted the correctness of the invoices and bills sent to him, i.e., the account in question. He also maintains that by so instructing the jury, the trial court left them no option but to find defendant Poovey indebted to plaintiff on either an open or stated account.

Immediately following the disputed portion of the court's instructions it charged as follows:

> [T]he burden of proof is on the plaintiff to satisfy you by the greater weight of the evidence that the defendant is indebted to the plaintiff. Now if you are so satisfied after the Court has instructed you thereon, ladies and gentlemen, you will answer the issue either by writing in the words Open Account, or the words Account Stated as you find the truth to be, or neither or no if the plaintiff has failed to so satisfy you.

Clearly, when the charge on the first issue is read in context with what followed, the jury was given the option to find in ways other than that defendants were indebted on account to plaintiff.

As stated by Judge Webb in *Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978):

> An account stated is a contract. It is an agreement between parties that an account rendered by one of them to the other is correct. Once this agreement is made the account stated constitutes a new and independent cause of action superseding and merging the antecedent cause of action. The

> jury may infer from the retention without objection of an account rendered for a reasonable time by the person receiving a statement of account that the person receiving the statement has agreed that the account is correct. *See Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962) and 1 Am. Jur. 2d, Accounts and Accounting, § 21, p. 395.

38 N.C. App. at 351, 247 S.E. 2d at 774.

Plaintiff presented evidence which tended to show the sale and delivery of numerous goods by it to defendant Poovey and that Poovey was periodically invoiced for these goods between August 1976 and February 1977. Plaintiff's evidence also tends to show that defendant Poovey did not make his objections to the sale and delivery of these goods known to plaintiff until March 1979. Considered alone, this evidence could reasonably warrant a conclusion that by failing to object to the bills and invoices he received from plaintiff within a reasonable time, Poovey impliedly agreed to the account stated thereby. Therefore, it was not error for the court to submit its first issue with regard to an account stated to the jury.

[4] Defendant Poovey further objects to the court's instructions with regard to Poovey's possible indebtedness on an open account on the grounds that there was no evidence to justify such an instruction. We disagree.

> [A]n ordinary open account results where the parties intend that the individual transactions are to be considered as a connected series rather than as independent of each other, a balance is kept by adjustment of debits and credits, and further dealings between the parties are contemplated. . . . *McKinnie Bros. v. Wester*, 188 N.C. 514, 125 S.E. 1 (1924); 1 Am. Jur. 2d Accounts and Accountings § 4 (1962).

Electric Service, Inc. v. Sherrod, 293 N.C. 498, 503, 238 S.E. 2d 607, 611 (1977). Plaintiff's credit manager, D. M. Nelson, testified that plaintiff established a $40,000 line of credit for defendant Poovey on the Center job. Nelson's testimony further tended to show that Poovey was billed periodically on this credit account, a running balance was maintained on the account, and that continuous dealings based on this account were contemplated and did occur. Hence, we think it was entirely proper for the court to instruct the jury with regard to the concept of open accounts.

[5] Defendant Poovey next objects to the following portion of the court's charge:

> Now an Account Stated is an agreement between the parties to the account that the total of the account and each item shown thereon is correct. If the debtor admits the correctness of the account, an Account Stated results. Of course, that would not apply in this case.

Poovey contends that this portion of the instructions was in error because the court had previously instructed the jury that they were to determine whether Poovey was indebted to plaintiff on an open or a stated account and then in this paragraph the court "explicitly indicates to the jury that the concept of an account stated would not apply in this case."

When read in context with the portion of the charge immediately following this disputed paragraph it becomes evident that there was no error. The court continued its charge as follows:

> If a bill is sent to a debtor or he is notified of his balance owing and makes no protest or objection to its correctness within a reasonable time, such failure creates an account stated. But in deciding what was a reasonable time for protest or objection you, the jury, should consider the nature of the transaction, the relationship of the parties, their distance from each other, and the means of communication between them, their business capacity, their intelligence or want of intelligence, and the usual course of business.

This further instruction relates to the possibility that an account stated was created in this case by implied agreement. It becomes clear when the disputed language is read with what followed that the court was referring to the fact that there was no evidence that defendant Poovey ever expressly admitted the correctness of the indebtedness on his account which plaintiff claimed was due. This was consistent with defendant Poovey's contentions. The jury could not find an account stated existed in this case on the basis of an express admission. However, there was evidence presented from which the jury could find that there was an account stated on the basis of an implied admission. Plain-

tiff's witness Nelson's testimony showed that defendant Poovey made no objection to the goods which plaintiff allegedly delivered to the Center until more than a year and a half after the last invoice was mailed by plaintiff. The court's statement of the law with regard to an account stated arising from an implied admission was correct. There was no error in this portion of the court's charge.

[6] Defendant Poovey argues that the court inaccurately summarized his evidence and contentions with regard to his contention that a contract for the sale of plumbing materials existed between him and plaintiff whereby plaintiff agreed to supply the materials needed for the Center job for $19,500. Specifically, Poovey objects to the court's failure to refer to his exhibits I and II, which consisted of the work sheets compiled by Poovey and plaintiff's salesman, Hough, as illustrative or corroborative evidence. With regard to this contention the court charged:

> Now the defendant Poovey, ladies and gentlemen, on the other hand, says and contends to you by his cross examination and other evidence, that he entered into a contract with an agent of the plaintiff, a Mr. Hough, in the sum of Nineteen Thousand Five Hundred Dollars for all of the plumbing materials on the Burke County Job."

"The Judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto, provided, the judge shall give equal stress to the contentions of the various parties." G.S. 1A-1, Rule 51(a). A summary of the material aspects of the evidence which is sufficient to illustrate the controlling legal principles is all that is required of the court's recapitulation of the evidence. W. Shuford, N.C. Civil Practice and Procedure § 51-3 (1975). In view of the laxness of the requirement of Rule 51 with regard to the charge on the evidence, we find that the court's failure to refer to defendant Poovey's exhibits when instructing the jury on his contentions was not error. Defendant Poovey contends that a portion of the court's instruction was erroneous because it only required the jurors to find that plaintiff "sold and delivered" the goods to defendant Poovey. Defendant Poovey "argues and contends that unless the various items of plumbing materials were properly received on the construction job site . . . then this appellant

would not be responsible for tendering the payment thereof. . . ." Moreover, defendant argues that the court erred by not properly instructing on the necessary elements of delivery.

The court did not have to instruct, as defendant Poovey insists, that Poovey *received* the alleged goods. As was previously discussed, the appropriate sections of the U.C.C. require that the fact finder determine only that the seller transferred and delivered the goods and the buyer accepted the goods if they are to find the buyer indebted to the seller for the price of the goods. Hence, we find no error in the court's failure to instruct the jurors that they had to find that defendant Poovey received the goods.

[7] Defendant Poovey submits that the trial court erroneously failed to instruct on the essential elements of delivery "to the proper party or an agent thereof." He argues that such instructions were material in this instance, because plaintiff's exhibits, the invoives and freight bills, as well as other evidence, showed that many of the goods were not delivered to an agent or person authorized to accept them on behalf of Poovey as was required to show an adequate delivery. The premise on which defendant Poovey bases this argument is wrong. The identity of the person accepting the goods is immaterial to the question of whether there was a delivery. G.S. 25-2-503 "Manner of seller's tender of delivery" requires only that "the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery." An instruction as to who was authorized to take delivery of the goods for defendant Poovey was unnecessary.

[8] Defendant Poovey submits that the trial court committed error in failing to instruct the jury with regard to a substantive issue of this case which arose from the evidence and for which he submitted a request for special instructions. Specifically, he argues that the trial court neglected to instruct the jury on the law with regard to contracts. Defendant Poovey claims that his evidence, consisting of his own testimony under cross examination and of his exhibits, showed that he and plaintiff through its agent, salesman Hough, agreed that plaintiff would supply all materials needed to complete the plumbing job at the Center for the price of $19,500. Therefore, he contended plaintiff should not have been allowed to recover in excess of that amount.

The trial judge "shall declare and explain the law arising on the evidence given in the case." G.S. 1A-1, Rule 51(a). In this case the trial court did not err by not including an instruction on the law of contracts in its charge. Insufficient evidence was presented to make the possibility of a contract an issue here. Defendant Poovey's evidence shows that he and plaintiff's agent compiled a list of materials and their prices that might possibly have been used on this job. Nowhere in the evidence was it indicated that this pricing constituted a contract to supply all the materials for the job at a set price as is now contended by Poovey. Defendant Poovey's testimony with regard to the alleged contract consisted of the following:

> I met with Mr. Hough, salesman of the Noland Company to figure the Burke Human Resources job and I met with him several times and helped me price any take over the job when he came to my house. When I first met Mr. Hough, he said he was a salesman from Horn & Wilson but when we were figuring this job, he told me he was working for the Noland Company. Based on the meetings with Mr. Hough of the Noland Company, I began to give orders to the Noland Company and he wrote them up on a pad. Mr. Hough called the fixtures company and other companies to get the figures together for the Burke Human Resources job and he said, "right here's the figure that I'm going to come up with and we will lock them in." The figure was nineteen thousand five hundred and some dollars. That was the price I agreed with the Noland Company.
>
> Poovey Exhibit No. 2 is the work sheets that Mr. Hough and I put together. That exhibit was prepared by Mr. Hough and me and I kept it at my office at home. This exhibit is a take-off on the plans and it comes to a conclusion to figure the job and these materials were the figures that I needed to use to bid on. Mr. Hough set on the prices on the materials himself. Part of this exhibit is in his writing and part of it in mine. And after we went over the plans, he told me how much it would cost for the supplies that I needed on this job and that was the purpose of figuring the job and these papers. I had other supplies left from other jobs that I intend to use at the Burke Resources Center and after my discussion with Mr. Hough, the figures on this exhibit were to lock in the job if I

did business with the Noland Company and if I gave him the Contract. When I discussed the matter with Mr. Hough, I considered it was a Contract and that was the point of the discussion. He told me he had the authority to deal with me and to lock in these prices as a salesman of the Noland Company. He had about three weeks of time and he conferred with other people in the Noland Company and after he came back to see me, I accepted the offer to purchase these materials at the prices he gave me.

I did have a contract with the Noland Company and Mr. Sonny Hough kept the record except records I have where the job was bid. Mr. Hough was the person from the Noland Company that helped me figure the job. He gave me a contract on behalf of the Noland Company and it was acknowledged from the manager. I had to know how much materials that I was buying from the Noland Company would cost before I could make a bid on the job.

. . .

Q. And Mr. Hough and you agreed to the specific things that would be used at the Burke County Human Resources; that's correct, isn't it?

A. Yes, sir.

At most defendant Poovey's evidence showed an offer by plaintiff to sell him the materials at the prices and in the quantities listed on the work sheets upon order of defendant Poovey. Poovey testified that there was a contract, but his evidence does not indicate what any of the terms of that contract were. Defendant Poovey's evidence presented only an issue as to the amount due on his account with plaintiff.

Defendant Poovey has alleged that the court committed error in other portions of its charge. We have examined these other areas of the charge, but we do not think defendant Poovey's contentions with regard to them merit discussion. Thus defendant Poovey's assignments of error with regard to the court's charge are all overruled.

As his last argument defendant Poovey contends that the court erred by failing to grant his motion to set aside the verdict

and to grant a new trial, and that the court erred by signing the judgment. He argues that the evidence presented at trial was insufficient to support the verdict. Similarly, he submits that the court should not have signed its judgment because "the Judgment did not conform to the evidence presented at trial and was rendered by a jury which had not been properly instructed, . . ."

> "The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict. . . ."
>
> The motion for judgment n.o.v. is that judgment be entered in accordance with the movant's earlier motion for a directed verdict, nothwithstanding the contrary verdict actually returned by the jury. Rule 50(b), Rules of Civil Procedure, G.S. Chapter 1A.

Summey v. Cauthen, 283 N.C. 640, 648, 197 S.E. 2d 549, 554 (1973). We previously discussed the court's denial of defendant Poovey's motions for directed verdict, and found that there was sufficient evidence to go to the jury and that the court's action was correct. There is no need for further discussion of this issue with regard to Poovey's argument for judgment notwithstanding the verdict.

We have also determined that the court's charge was without error. This contention needs no further discussion.

II. Defendant Insurance Company's Appeal.

[9] Plaintiff sought to hold defendant Insurance Company liable through its obligation as surety on the payment bond securing payment for all labor and materials used in the performance of defendant Poovey's contract with Burke County to build the Center. The court found defendant Insurance Company to be liable to plaintiff to the full extent of the coverage of the bond, $81,513. This liability was to be discharged upon the payment to plaintiff of $24,096.27, the amount of Poovey's liability to plaintiff.

Defendant Insurance Company contends that the court erred by failing to submit a material issue to the jury. Defendant Insurance Company alleges that no issues were submitted nor any instructions given the jury concerning its liability under the terms of the payment bond as distinguished from the liability of

defendant Poovey on his account. Defendant Insurance Company argues that defendant Poovey would be liable for anything he purchased from plaintiff on his account regardless of whether it was required for use at the Center, but defendant Insurance Company would be liable only for those materials which were used or required for use for the plumbing job at the Center. Therefore, it submits it was entitled to have a separate issue submitted to the jury with regard to its liability under the bond.

The record shows that after all of the evidence was in, defendant Insurance Company requested the court to submit to the jury separate issues with regard to each defendant's recovery. It made this request so that its liability could be determined under the terms of the payment bond. The court denied this oral request. Afterwards, but before the charge, defendant Insurance Company tendered to the court a written request for specific instructions which included a request that the court instruct the jury separately on the issue of its liability. The issues submitted by the court in its charge dealt only with the liability of defendant Poovey. The court evidently assumed that defendant Insurance Company would be liable for the same amount for which the jury found defendant Poovey liable.

> The rule of practice is well established in this jurisdiction that when a request is made for a specific instruction, correct in itself and supported by evidence, the trial court, while not obliged to adopt the precise language of the prayer, is nevertheless required to give the instruction, in substance at least, and unless this is done, either in direct response to the prayer or otherwise in some portion of the charge, the failure will constitute reversible error.

Bass v. Hocutt, 221 N.C. 218, 220, 19 S.E. 2d 871, 872 (1942), quoted in *Camby v. Railway Co.*, 48 N.C. App. 668, 673, 269 S.E. 2d 719, 722, *cert. denied*, 301 N.C. 527, 273 S.E. 2d 452 (1980).

In this case defendant Insurance Company was liable to plaintiff only upon the breach of the terms of the payment bond which it signed as surety for principal, defendant Poovey. The bond itself specified:

> [I]f Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material *used or*

reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal for labor or with a subcontractor of the Principal, material, or both, *used or reasonably required for use* in the performance of the Contract . . . (Emphasis added.)

G.S., Chapter 44A, Article 3, *Model Payment and Performance Bond* establishes requirements for payment bonds. G.S. 44A-30(b) states:

Every bond given by a contractor to a contracting body pursuant to this Article shall be conclusively presumed to have been given in accordance herewith, whether or not (sic) such bond be so drawn as to conform to this Article. This Article shall be conclusively presumed to have been written into every bond given pursuant thereto.

This particular provision took effect on 1 September 1974. 1973 N.C. Sess. Laws Ch. 1194, § 1. The construction contract between defendant Poovey and Burke County which this payment bond was given to secure was executed on 28 June 1976. Therefore, G.S. 44A-30(b) effectively amends this payment bond so that it includes the requirements of G.S., Chapter 44A, Art. 3. G.S. 44A-27 provides generally for actions brought on payment bonds as follows:

(a) Subject to the provisions of subsection (b) hereof, any claimant who has performed labor or furnished materials in the prosecution of the work required by any contract for which a payment bond has been given pursuant to the provisions of this Article, and who has not been paid in full therefor before the expiration of 90 days after the day on which the claimant performed the last such labor or furnished the last such materials for which he claims payment, may bring an action on such payment bond in his own name, to recover any amount due him for such labor or materials and may prosecute such action to final judgment and have execution on the judgment.

G.S. 44A-25(5) defines labor and materials as:

(5) "Labor or materials" shall include all materials furnished or labor performed in the prosecution of the work called for by the construction contract regardless of whether or not the labor or materials enter into or become a component part of the public improvement, and further shall include gas, power, light, heat, oil, gasoline, telephone services and rental of equipment or the reasonable value of the use of equipment directly utilized in the performance of the work called for in the construction contract.

Thus, as surety on this payment bond defendant Insurance Company was liable only for payment for "materials furnished . . . in the prosecution of the work called for by the construction contract." It was not necessarily liable for all of the materials allegedly delivered to Poovey at the Center.

Here there was definitely an issue of fact as to whether all or only part of the materials plaintiff allegedly delivered to defendant Poovey were actually used by him in the construction of the Center. Defendant Poovey testified that plaintiff delivered to the Center far more materials than were needed to complete that job. He further testified that plaintiff's salesman told him that plaintiff would be sending materials needed for other jobs on which Poovey was working to the Center job site so that volume orders could be placed and certain discounts obtained. Both defendant Poovey and construction superintendent Hefner testified that some materials plaintiff delivered to the Center were carried away, and Poovey testified that these materials were used in other jobs. This evidence tended to show that some of the materials were not used at all in the performance of defendant Poovey's work at the Center. If the jury were to find that this was so, defendant Insurance Company would not be liable under G.S., Chapter 44A, Article 3 for the cost of the materials not so used.

The special instruction which defendant Insurance Company tendered to the court with regard to the issue of its liability separate from that of defendant Poovey was correct. Defendant Poovey would be liable for all materials plaintiff delivered to him and charged to his account no matter where they were used, but defendant Insurance Company would be liable only for those goods used by defendant Poovey in the performance of his work

under his contract with Burke County. The issue presented by defendant Insurance Company in its request for special instructions was also supported by the evidence. Hence, we think it was reversible error for the trial court to fail to include the requested instruction in its charge in some manner. We reverse as to defendant Insurance Company and remand this case insofar as it pertains to that defendant to the superior court with instructions that it conduct a new trial to determine what amount of the $24,096.27 of which defendant Poovey was adjudged to be liable to plaintiff represents payment for materials plaintiff furnished defendant Poovey for use in the prosecution of the work called for by the construction contract covered by the payment bond.

III. Plaintiff's Appeal.

[10] Plaintiff submits that the court should have allowed interest on the judgment against defendant Poovey from 10 July 1977. The court allowed interest on plaintiff's $24,096.27 recovery from defendant Poovey from the date of judgment, 23 July 1980, until paid.

The materials listed in the last invoice upon which this recovery is predicated were shipped on 6 June 1977. Plaintiff contends that each invoice was a bill for the materials listed therein and consequently was a demand for payment. D. M. Nelson's testimony with regard to plaintiff's terms for payment of these bills tended to show that the amount billed on each invoice became due and payable by the tenth day of the month following the date of the invoice. If defendant Poovey paid the bill by the tenth day of the following month after he was billed he would receive a two per cent discount. If payment was received after the tenth of the following month Poovey was required to pay the entire amount of the invoice. If the bill was unpaid after two or three months a surcharge was added.

Plaintiff contends that it would be entitled to interest on the amount of each invoice from the tenth day of the month following the month of the invoice date. However, because the jury awarded it a lump sum without distinguishing for which of the materials defendant Poovey was liable, it is impossible to tell which of the materials or invoices were omitted from the gross amount of the verdict. Therefore, plaintiff contends, the court

should have allowed interest from 10 July 1977, the month after the date of the last invoice to defendant Poovey.

Generally, "[i]nterest does not run on an account until there is a demand and refusal to pay. (Citations omitted.)" *Hunt v. Hunt and Lucas v. Hunt*, 261 N.C. 437, 444, 135 S.E. 2d 195, 200 (1964). In this case the jury found that defendant Poovey was indebted to plaintiff on an account stated, which is a new contract based on the acceptance of or failure to object to an account rendered. *Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978); *Carroll v. Industries, Inc.*, 296 N.C. 205, 250 S.E. 2d 60 (1978).

The North Carolina law with regard to the allowance of interest on recoveries for breach of contract was aptly summarized by Justice Moore in *Equipment Co. v. Smith*, 292 N.C. 592, 601-02, 234 S.E. 2d 599, 604 (1977). There he stated:

> The trend in North Carolina is . . . toward allowing interest in almost all cases involving breach of contract, *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973), and where the amount of damages can be ascertained from the contract, interest is allowed from the date of the breach. G.S. 24-5; *Rose v. Materials Co., supra; General Metals v. Manufacturing Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963); *Bond v. Cotton Mills*, 166 N.C. 20, 81 S.E. 936 (1914). In the absence of an agreement, the injured party is entitled to interest at the legal rate of six percent. G.S. 24-1; *Rose v. Materials Co., supra.*

See also, Investment Properties v. Allen, 281 N.C. 174, 188 S.E. 2d 441 (1972).

Defendant Poovey presented evidence which tended to show that some of the materials listed on plaintiff's invoices which had allegedly been delivered to him, had not in fact been so delivered. Thus, the amount due on defendant Poovey's stated account was not ascertainable until the jury returned its verdict. The jury returned a verdict in which it found defendant Poovey to be indebted for several thousand dollars less than the total value of the materials listed on the invoices. It was impossible for the court to determine from this verdict for which of the materials listed on the invoices defendant Poovey was indebted. Under

these circumstances we think it was proper for the court to defer the award of interest against defendant Poovey until the time of the judgment. Only at that time was the amount due plaintiff on the account stated clearly ascertainable.

Likewise, plaintiff submits that the court erred in allowing interest on the recovery against defendant Insurance Company only from the date of judgment. This argument has been rendered moot by our reversal of the court's judgment with regard to defendant Insurance Company.

Plaintiff argues that the judgment in this action is based on a compromise verdict and is, therefore, in error, and that a new trial should be ordered because the verdict and judgment were not supported by the evidence. The record does not indicate that plaintiff made a motion asking the court to set aside the verdict or for a new trial. Therefore, we will not consider these assignments of error. Accordingly, we find no error in this case with regard to plaintiff.

As to defendant Poovey, we find no error.

As to defendant Insurance Company, we find error and remand.

As to plaintiff, we find no error.

Judges WEBB and WHICHARD concur.

APPENDIXES

AMENDMENTS TO RULES OF
APPELLATE PROCEDURE

AMENDMENT TO GENERAL RULES OF PRACTICE
FOR SUPERIOR AND DISTRICT COURTS

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 9 of the North Carolina Rules of Appellate Procedure entitled "THE RECORD ON APPEAL—FUNCTION, COMPOSITION, AND FORM" is amended as follows:

The third paragraph of Rule 9(c)(1) is amended to read as follows:

> As an alternative to narrating the testimonial evidence as a part of the record on appeal, the appellant may cause the complete stenographic transcript of the evidence in the trial tribunal, as agreed to by the opposing party or parties or as settled by the trial tribunal as the case may be, to be filed with the clerk of the court in which the appeal is docketed. This alternative also may be used to present voir dire, jury instructions or other trial proceedings where those proceedings are the basis for one or more assignments of error and a stenographic transcript of those proceedings has been made. If this alternative is selected, the briefs of the parties must comport with Rule 28(b)(4) and 28(c); and, in criminal appeals, the District Attorney upon certification of the record shall forward one copy of the settled, certified transcript to the Attorney General of North Carolina.

Rule 28 of the North Carolina Rules of Appellate Procedure entitled "BRIEFS: FUNCTION AND CONTENT" is amended as follows:

Rule 28(b)(4) is amended to read as follows:

> (4) If pursuant to Rule 9(c)(1) appellant utilizes the stenographic transcript of the evidence in lieu of narrating the evidence as part of the record on appeal, and if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief and if, because of length, a verbatim reproduction is not contained in the body of the brief itself, such verbatim portions of the transcript shall be attached as appendixes to the brief. Reference may then be made in the argument of the question presented to the relevant appendix. It is not intended that an appendix be compiled to show the general nature of evidence or the absence of evidence relating to a particular question presented in the brief.

Adopted by the Court in Conference this 12th day of January, 1982, *to be effective for all appeals docketed after 15 March 1982.*

MEYER, J.
For the Court

Rule 26(c) of the North Carolina Rules of Appellate Procedure, 287 N.C. 671, 738 is hereby amended to read as follows (new material appears in italics):

Manner of Service

Service may be made in the manner provided for service and return of process in Rule 4 of the N.C. Rules of Civil Procedure, and may be so made upon a party or upon his attorney of record. Service may also be made upon a party or his attorney of record by delivering a copy to either or by mailing it to either at his last known address, or if no address is known, by filing it in the office of the clerk with whom the original paper is filed. Delivery of a copy within this Rule means handing it to the attorney or to the party, or leaving it at the attorney's office with a partner or employee. Service by mail is complete upon deposit of the paper enclosed in a postpaid, properly addressed wrapper in a Post Office or official depository under the exclusive care and custody of the United States Post Office Department, *or, for those having access to such services, upon deposit with the State Courier Service or Inter-Office Mail.*

Adopted by the Court in Conference this 11th day of February 1982, to become effective upon adoption. This amendment shall be promulgated by the publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

MITCHELL, J.
For the Court

Rule 26 of the Rules of Appellate Procedure entitled "Filing and Service" is amended by adding a new subsection (g) to read as follows:

(g) Size of Paper. All papers presented to the court for filing shall be letter size (8½" x 11"), with the exception of wills and exhibits.

This rule shall become effective July 1, 1982 for all appeals arising from cases filed in the court of original jurisdiction after that date.

By order of the Supreme Court in conference, this the 5th day of May 1981.

MEYER, J.
For the Court

AMENDMENT TO GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Rule 5 of the General Rules of Practice for the Superior and District Courts entitled "Form of Pleadings" is amended by adding the following paragraph thereto:

> All papers presented to the court for filing shall be letter size (8½" x 11"), with the exception of wills and exhibits. The Clerk of Superior Court shall require a party to refile any paper which does not conform to this size.

This rule shall become effective July 1, 1982. Prior to that date either letter or legal size papers will be accepted.

By order of the Supreme Court in conference, this the 5th day of May 1981.

MEYER, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ABDUCTION

§ 1. Abduction of Children

Court erred in ordering that a bench warrant be issued for plaintiff's arrest for transporting her child outside the State with intent to violate a custody order. *Clayton v. Clayton*, 612.

ACCOUNTS

§ 1. Open and Running Accounts

The trial court properly instructed the jury with regard to defendant's possible indebtedness to plaintiff on an open account. *Noland Co. v. Poovey*, 695.

§ 2. Account Stated

The trial court properly instructed on an account stated where the jury could find that defendant impliedly agreed to the account stated by failing to object to the bills and invoices he received from plaintiff within a reasonable time. *Noland Co. v. Poovey*, 695.

ACTIONS

§ 10. Method of Commencement

Plaintiff's original action was never commenced by the issuance of summons and an order extending time for filing complaint where the summons was not signed by anyone. *Collins v. Edwards*, 180.

AGRICULTURE

§ 6. Distinction Between Tenant and Sharecropper

A farm lease (sharecropping) agreement is personal in nature and is thus nonassignable without the landlord's consent. *Greeson v. Byrd*, 681.

§ 7. Agricultural Tenancy; Breach of Contract

Plaintiff sharecropper who plowed defendant owner's land in preparation for planting but was unable to complete the farming of a crop due to illness could not recover the fair market value of the plowing from defendant under the theory of partial performance of the contract or under the theory of unjust enrichment. *Greeson v. Byrd*, 681.

§ 10. Seed Dealers; Liabilities

Evidence was insufficient to support a finding that defendant obtained a reduced yield from seed corn purchased from plaintiff because the seed corn was a smaller variety than that represented on the label. *Central Carolina Farmers v. Hilliard*, 418.

APPEAL AND ERROR

§ 6.2. Premature Appeals

Defendant's appeal from partial summary judgment entered for his wife on the issue of arrearages in support payments was premature. *Eubanks v. Eubanks*, 363.

The denial of a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted is not immediately appealable. *Teachey v. Coble Dairies, Inc.*, 688.

APPEAL AND ERROR — Continued

§ 6.3. Appeals Based on Jurisdiction

Trial court's order denying a motion to dismiss certain of plaintiff's claims for lack of subject matter jurisdiction was not immediately appealable. *Shaver v. Construction Co.*, 486.

§ 7. Parties Who May Appeal

Guilford County did not have the right to appeal from an order entered by the district court in a juvenile delinquency proceeding directing the county to pay a portion of the juvenile's counsel fees. *In re Wharton*, 447.

§ 39.1. Time for Docketing Appeal

Appeal is dismissed where the record on appeal was filed in the appellate court more than 150 days from the date notice of appeal was given. *Piguerra v. Piguerra*, 188.

ARREST AND BAIL

§ 3.5. Legality of Arrest for Burglary and Related Offenses

Officers had probable cause to arrest defendant when stolen guns were found in a waste basket only five or six feet from where defendant was standing in an apartment. *S. v. Guy*, 208.

§ 5.2. Right of Officer to Enter Dwellings

Where a law officer makes a lawful entry of a home with consent of the owner to apprehend and arrest a suspect, then other officers may enter the home to assist those officers who have been voluntarily admitted. *S. v. Rhodes*, 193.

ASSAULT AND BATTERY

§ 4. Criminal Assault in General

Asportation of the victim is not an inherent or inevitable feature of an assault. *S. v. Coffer*, 78.

§ 14.4. Assault with Deadly Weapon with Intent to Kill Where Weapon is Firearm; Sufficiency of Evidence

The State's evidence of serious injury was sufficient to support submission of an issue of defendant's guilt of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Rotenberry*, 504.

§ 14.6. Sufficiency of Evidence of Assault on Law Officer

In a prosecution for assaulting an officer in the performance of his duty, the evidence was sufficient to require submission of the case to the jury. *S. v. Rowland*, 458.

§ 15. Instructions Generally

An instruction on the defense of accident was not required in this prosecution for felonious assault. *S. v. Klutz*, 250.

§ 15.1. Instructions on Assault with Deadly Weapon; Discharge of Firearm

It was improper for the jury to consider the presumption that one intends the natural consequences of his unlawful act in a crime which involves specific intent. *S. v. Reece*, 400.

ASSAULT AND BATTERY — Continued

§ 15.2. Instructions on Assault with Deadly Weapon with Intent to Kill or Inflicting Serious Injury

In a prosecution for assault with a deadly weapon resulting in serious bodily injury, there was no error in the court's failure to submit the lesser offense of misdemeanor assault. *S. v. McKinnon*, 475.

Any error in submission to the jury of the element of intent to kill was rendered harmless by the jury's verdict finding defendant guilty of assault with a deadly weapon. *S. v. Rotenberry*, 504.

§ 15.6. Form of Instruction on Self-Defense

Defendant was not prejudiced by the trial court's erroneous instruction that, in determining whether defendant acted in self-defense, the jury should consider whether "defendant" rather than "the victim" had a weapon in his possession. *S. v. Joyner*, 129.

State's evidence in a felonious assault case warranted an instruction that self-defense is an excuse only if defendant himself was not the aggressor. *Ibid.*

Trial court's instructions on self-defense in a case involving assault with a deadly weapon were proper. *S. v. Klutz*, 250.

§ 15.7. Instruction Not Required on Self-Defense or Defense of Third Person

Trial court did not err in failing to instruct on self-defense in a prosecution for discharging a firearm into an occupied dwelling. *S. v. Musselwhite*, 68.

The evidence in a felonious assault case did not require an instruction on defense of a third person. *S. v. Joyner*, 129.

In a prosecution for assault with a deadly weapon resulting in serious bodily injury, where there was no evidence from which a jury might infer that defendant abandoned and withdrew from the confrontation which he unquestionably initiated, he was not entitled to a charge on self-defense. *S. v. McKinnon*, 475.

§ 16. Necessity of Submitting Lesser Degrees of Offense

Where defendant was charged and convicted of assaulting an officer in the performance of his duty, it was error for the trial court to fail to submit the lesser included offense of simple assault where there was conflicting evidence in the record whether the defendant knew the prosecuting witness was a law enforcement officer. *S. v. Rowland*, 458.

ATTORNEYS AT LAW

§ 7.1. Construction of Fee Agreements

A power company's agreement in an option to purchase land that it would pay all costs associated with legal proceedings necessary to clear title to the land did not include legal fees incurred in proceedings involving the distribution of the proceeds of the sale of the land. *Cheshire v. Power & Light Co.*, 467.

AUTOMOBILES

§ 46. Opinion Testimony as to Speed

A defendant who did not see plaintiff's vehicle until it was about three feet from her car could not testify that the speed of the vehicle was "fast." *Smith v. Stocks*, 393.

AUTOMOBILES — Continued

§ 50.2. Sufficiency of Evidence of Intoxication

Trial court in a wrongful death action erred in instructing the jury that there was insufficient evidence to indicate that drinking visibly or appreciably impaired defendant's driving ability at the time of the accident. *Rhyne v. O'Brien*, 621.

§ 57.1. Sufficiency of Evidence of Failing to Yield Right of Way

Plaintiff's evidence was sufficient for the jury to find that defendant was negligent in failing to stop at a stop sign and yield the right-of-way to plaintiff's automobile. *Young v. Denning*, 361.

Defendant's evidence in an action arising out of an intersection collision was sufficient for submission to the jury on the issue of plaintiff's negligence and did not disclose contributory negligence by defendant as a matter of law. *Smith v. Stocks*, 393.

§ 90.9. Failure to Give Instructions on Particular Issues

The trial court was correct in omitting an instruction on defendant's duty to reduce her speed as necessary to avoid an obstruction in the street as there was insufficient evidence presented to warrant that instruction. *Harris v. Guyton*, 434.

Once defendant was confronted with a sudden emergency, the doctrine overrode the mandatory standards of a statute and the violation of the statute was not what proximately caused plaintiff's injuries. *Ibid.*

§ 126.3. Breathalyzer Test; Qualification of Expert

It was not error to admit the testimony of a breathalyzer operator who met the requirements of *State v. Powell* and N.C.G.S. 20-139.1. *S. v. Luckey*, 178.

§ 127.3. Driving Under the Influence; Insufficiency of Evidence

Testimony that defendant was sitting in a vehicle at the scene of an accident "approximately half-way in the front seat, between the driver and passenger area in the front seat" was insufficient to show that defendant drove or operated a vehicle so as to support his conviction for driving under the influence of intoxicants. *S. v. Ray*, 473.

BAILMENT

§ 3.1. Liabilities of Bailee to Bailor; Actions Generally

In a negligence action involving a nongratutious bailment, it was error for the trial court to fail to instruct, upon request, that if plaintiff had a reasonable expectation that his property would be stored in defendant's main building, and defendant failed to so store, defendant would be liable for its loss irrespective of any negligence. *Smith v. McRary*, 635.

BURGLARY AND UNLAWFUL BREAKINGS

§ 2. Breaking and Entering Other than Burglariously

An unoccupied mobile home located on a dealer's lot is a building within the meaning of the statute prohibiting the breaking or entering of buildings. *S. v. Douglas*, 85.

§ 3. Indictment

The language that defendant "unlawfully and willfully did feloniously break and enter a building of Forsyth Technical Institute, belonging to the Board of

BURGLARY AND UNLAWFUL BREAKINGS — Continued

Trustees," was sufficient to imply that defendant's entry was without consent of the Board. *S. v. Pennell*, 252.

§ 4.1. Competency of Physical Evidence

In a prosecution for breaking and entering and larceny where the stolen money had been dusted with an ultraviolet powder, the State's failure to establish the probative value of testimony concerning the presence of fluorescent particles on defendant's body rendered it immaterial and its admission erroneous. *S. v. Mears*, 666.

§ 5.4. Sufficiency of Evidence; Presumption from Possession of Recently Stolen Property

State's evidence in a prosecution for breaking and entering and larceny was sufficient to be submitted to the jury under the theory of possession of recently stolen property. *S. v. Guy*, 208.

§ 5.5. Sufficiency of Evidence of Breaking and Entering

The evidence was sufficient for the jury to find defendant entered a building through an unlocked window, thereby forcibly breaking. *S. v. Pennell*, 252.

§ 5.8. Sufficiency of Evidence of Breaking and Entering and Larceny of Residences

In prosecutions for felonious breaking and entering and felonious larceny, the State's evidence was sufficient to withstand defendants' motions for nonsuit and judgment notwithstanding the verdict. *S. v. Hawley*, 293.

§ 5.9. Sufficiency of Evidence of Breaking and Entering and Larceny of Business Premises

Testimony of an accomplice was alone sufficient to withstand a motion to dismiss in a prosecution for felonious breaking and entering and larceny. *S. v. Conard*, 243.

§ 5.10. Sufficiency of Evidence of Breaking and Entering and Safecracking

The elements of the crimes of burglary with explosives and safecracking are not identical for offenses committed before 1 October 1977. *S. v. Pennell*, 252.

§ 6.5. Instructions on Possession of Recently Stolen Property

Trial court's instruction on possession of recently stolen property incorporated in substance defendant's requested instructions on constructive possession and proximity to stolen goods. *S. v. Guy*, 208.

Application of the doctrine of possession of recently stolen property in a prosecution for breaking and entering and larceny did not lessen the State's burden of proof and violate due process. *S. v. McNeill*, 675.

Trial court did not err in refusing to give defendant's requested instructions that the State must prove that the property possessed by defendant was "the identical property stolen." *Ibid.*

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 9.1. Competency of Evidence

Where plaintiff presented five witnesses who testified concerning plaintiff's lack of mental capacity to make a deed, trial court did not err in refusing to permit plaintiff to call thirteen additional witnesses who would have given similar testimony. *Ange v. Ange*, 686.

CONSPIRACY

§ 5.1. Admissibility of Statements of Coconspirators

Extrajudicial statements of a testifying codefendant made to officers once he was arrested and after the conspiracy was completed should not have been admitted into evidence as against the other defendants. *S. v. Mettrick*, 1.

A statement by one of the robbers that he was going to pick up defendant at the airport was competent as a statement of a coconspirator made in furtherance of the plan to commit the robbery even though defendant was not formally charged with criminal conspiracy. *S. v. Carr*, 309.

CONSTITUTIONAL LAW

§ 24.8. Service of Process by Publication

Service of process on defendant's insured by publication in an automobile accident case was not a violation of due process although plaintiff could have inquired of defendant insurer as to the whereabouts of its insured and could have given defendant formal notice of the action against its insured. *Love v. Moore*, 406.

§ 30. Access to Evidence

In a prosecution for the felonious larceny of six hogs, the failure of the police officer to retain the hogs in order that defendant be allowed to examine the corpus delicti did not deny defendant his due process right to investigate the evidence and to confront his accusers where the officer released the hogs in good faith. *S. v. White*, 451.

§ 31. Affording the Accused the Basic Essentials for Defense

Defendant's conviction was not obtained in violation of either the Jencks Act, 18 U.S.C. § 3500, or G.S. 14-221.1 when unidentifiable fingerprints lifted from the scene of the crime were thrown away as irrelevant. *S. v. Pennell*, 252.

§ 32. Right to Fair and Public Trial

Where the State's two principal witnesses transported the jury on bus trips to and from court which took approximately an hour and forty-five minutes, prejudice to the defendant was conclusively presumed. *S. v. Mettrick*, 1.

§ 45. Right to Appear Pro Se

Trial court was not required to advise defendant of his right to proceed without counsel upon denial of his motion to replace his court-appointed attorney. *S. v Hughes*, 117.

§ 46. Removal or Withdrawal of Appointed Counsel

Defendant was not denied a fair trial by the court's refusal to replace his court-appointed counsel because defendant disagreed with counsel on whether a witness should be subpoenaed. *S. v. Hughes*, 117.

§ 48. Effective Assistance of Counsel

Defendant was not denied the effective assistance of counsel because his attorney recalled three of the State's chief witnesses. *S. v. Hughes*, 117.

There was no merit to defendant's allegation he was denied effective assistance of counsel. *S. v. Pennell*, 252.

Defendant was not denied the effective assistance of counsel by the denial of his motion for continuance after his original counsel withdrew and his trial counsel was retained only four days before the trial began. *S. v. Maher*, 639.

COURTS — Continued

§ 2.4. Objections to Jurisdiction

Defendant waived its right to assert the defense of insufficiency of service of process by a stipulation in a proposed pretrial order that the court had jurisdiction of the parties and subject matter. *Thomas v. Poole*, 239.

CRIMINAL LAW

§ 9.2. Mutual Aiders and Abettors

Where defendant knew that his companion was going to rob a store, it did not matter that he did not know his companion was going to use a firearm. *S. v. Ferree*, 183.

§ 21.1. Preliminary Hearing

Trial court properly found that extraordinary cause existed to allow the State's motion to continue defendant's probable cause hearing, and defendant's right to due process was not violated when the probable cause hearing was continued until two days later. *S. v. Rotenberry*, 504.

§ 26.2. Attachment of Jeopardy

A voluntary dismissal taken by the State at a probable cause hearing did not preclude the State from instituting a subsequent prosecution for the same offense. *S. v. Coffer*, 78.

§ 33. Facts Relevant to Issues in General

Evidence concerning the color of defendant's girlfriend's stockings was irrelevant, but defendant failed to show the admission of such evidence affected his rights or the verdict. *S. v. Coffer*, 78.

Evidence of the street price of marijuana was relevant in an armed robbery case. *S. v. Young*, 366.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Trial court in a prosecution for procuring another to burn a building erred in permitting the prosecutor to cross-examine defendant and defendant's wife about a number of prior fires where there was no evidence that such fires were criminal in nature. *S. v. Alley*, 647.

§ 41. Circumstantial Evidence in General

Testimony that an officer on two occasions found two color televisions in the home of a person to whom defendant was to have sold a stolen television set was sufficiently probative to justify admission. *S. v. Conard*, 243.

§ 42.5. Admissibility of Articles Connected with Crime

Evidence that stolen guns were found in a waste basket only five feet from where defendant was standing provided a sufficient connection between defendant and the guns to permit admission of the guns into evidence against defendant. *S. v. Guy*, 208.

§ 44. Bloodhounds

Admission of testimony relating to bloodhounds was not error as a proper foundation was laid. *S. v. Hawley*, 293.

Testimony was sufficient to support a finding that a bloodhound had been properly trained, and it was sufficient to support a finding that the bloodhound was put on a scent and pursued it in such a manner to support a reasonable inference of identification. *S. v. Davis*, 596.

CRIMINAL LAW — Continued

§ 46. Flight of Defendant as Implied Admission

In a first degree rape case, evidence of defendant's flight was properly admitted and the trial judge was correct in instructing on evidence of flight. *S. v. Ashley*, 386.

§ 54. Poisons and Drugs

A medical doctor's opinion that the prosecuting witness suffered from arsenic poisoning was properly admitted even though his opinion was based upon records which had not been introduced into evidence. *S. v. Jones*, 482.

Trial court properly excluded testimony by a pathologist relating to drugs found in the body of deceased where the witness was never qualified as an expert in toxicology. *S. v. Puckett*, 576.

§ 66.6. Identification of Defendant; Suggestiveness of Lineup

The evidence supported the trial court's conclusion that an out-of-court lineup identification of defendant was not based on suggestive procedures likely to lead to misidentification and that the in-court identification of defendant was of independent origin. *S. v. Walker*, 652.

§ 66.14. Independent Origin of In-Court Identification as Curing Improper Pretrial Identification

Where a pretrial identification procedure was considered inherently suggestive, and there was no basis in the record to find the in-court identification was of independent origin, the trial court erred in so finding. *S. v. Mettrick*, 1.

§ 66.20. Admissibility of In-Court Identification; Findings of Court

In a breaking or entering and larceny case, the findings of fact were supported by the evidence and supported the trial court's conclusion that identification testimony was properly admissible. *S. v. Kinard*, 443.

§ 69. Telephone Conversations

Testimony as to a telephone conversation was admissible where there was ample circumstantial evidence that defendant was the caller. *S. v. Peele*, 247.

§ 71. Shorthand Statements of Fact

A witness's statement: "God help me, I can't forgive you for what you have done" was an "instantaneous conclusion of the mind" and was admissible. *S. v. Coffer*, 78.

A witness's testimony that the day after the robbery defendant had an unusual or large amount of money was admissible as a shorthand statement of fact. *S. v. Carr*, 309.

§ 73. Hearsay Testimony in General

It was not error to exclude a statement supporting one defendant's alibi as it was not a declaration against penal interest and did not fit within an exception to the hearsay rule. *S. v. Coffer*, 78.

An officer's testimony that defendant's wife told him that defendant told her that he had beat up deceased and chased him into an intersection and killed him constituted inadmissible hearsay. *S. v. Perry*, 479.

§ 73.2. Statements not within Hearsay Rule

It was not error to permit a witness to testify as to a statement she heard deceased tell defendant as she actually heard the deceased say the statement and it was offered to show the deceased's state of mind. *S. v. Locklear*, 235.

CRIMINAL LAW — Continued

§ 75.2. Confession; Effect of Promises, Threats or Other Statements of Officers

The trial court had statutory authority to deny defendant's objection and to admit an inculpatory statement of defendant's made while he was in custody without counsel where defendant did not move to suppress before or at trial and his general objection was not accompanied by any allegation of a legal basis for suppressing the evidence. *S. v. Conard*, 243.

§ 75.7. Confession; Requirement that Defendant Be Warned of Constitutional Rights

Testimony that defendant falsely identified himself to police officers following his arrest was admissible even though defendant had not been given the Miranda warnings. *S. v. Young*, 366.

§ 76.2. Confession; When Voir Dire Hearing Required

A motion to suppress was the proper procedure to challenge the admission of defendant's in-custody statement on constitutional grounds, and the trial court could properly overrule defendant's general objection to an officer's testimony concerning the statement. *S. v. Joyner*, 129.

Court was not required to conduct a voir dire hearing to determine the admissibility of defendant's in-custody statement which was not a confession or acknowledgment of guilt. *Ibid.*

§ 76.5. Confession; Findings of Fact on Voir Dire

Trial court erred in concluding that defendant's in-custody statement was admissible without making a specific finding upon conflicting evidence with respect to whether defendant had requested an attorney prior to the statement. *S. v. Dunn*, 656.

§ 76.7. Confession; Sufficiency of Evidence to Support Findings on Voir Dire

Where evidence on voir dire tended to show that defendant was advised of his rights, understood them, signed a waiver of them, was coherent during questioning and did not appear confused, the court's finding that defendant's inculpatory statement was voluntary was supported by the evidence. *S. v. Hawley*, 293.

§ 77.1. Admissions of Defendant

A letter from defendant to his girlfriend stating "it's all my fault" was competent as an admission by defendant. *S. v. Rotenberry*, 504.

§ 79. Declarations of Coconspirators

A statement by one of the robbers that he was going to pick up defendant at the airport was competent as a statement of a coconspirator made in furtherance of the plan to commit the robbery even though defendant was not formally charged with criminal conspiracy. *S. v. Carr*, 309.

§ 85.2. State's Character Evidence

It was error to allow the district attorney to inquire of defendant's character witness whether the witness knew that defendant was on parole for armed robbery as it related to a specific act of misconduct; however, the error was cured by subsequent testimony. *S. v. Walker*, 652.

§ 88.4. Cross-Examination of Defendant

By taking the stand and testifying on his own behalf, defendant was subject to impeachment by questions relating to specific acts of misconduct including questions related to charges pending against him in another state. *S. v. Ashley*, 386.

CRIMINAL LAW — Continued

§ 111.1. Particular Miscellaneous Instructions

G.S. 15A-1221(b) does not prevent the judge from making references to the bill of indictment during remarks or the charge to the jurors. *S. v. Carr*, 309.

Trial court's instruction that "there is a responsibility on each juror to participate in the verdict reached by the jury" could not have misled the jury into believing that a juror must conform his decision to that of the majority. *S. v. Hudson*, 437.

Where defendant requested that the trial judge read a paragraph of the N.C.P.I. which applied only to a lineup or show-up identification situation and was inapplicable to the photographic identification in the case, the trial court did not err in failing to give it. *S. v. Kinard*, 443.

§ 112.2. Particular Charges on Reasonable Doubt

When read in context with the entire charge, the court properly charged on "reasonable doubt." *S. v. Hines*, 529.

§ 112.4. Charge on Degree of Proof Required of Circumstantial Evidence

As the testimony of the victim alone, if believed, was sufficient to warrant defendant's conviction, it was not error for the court to fail to charge upon the law of circumstantial evidence in response to defendant's oral request. *S. v. Ashley*, 386.

§ 113.1. Recapitulation of Evidence

It was not necessary to recapitulate evidence of the close range of the shot killing the deceased for the jury to understand and decide upon defendant's plea of self-defense. *S. v. Harrelson*, 349.

§ 113.7. Charge on Acting in Concert

Through his instructions on acting in concert, the trial judge did not express a judicial opinion that one defendant was present on the scene at the time of the crime. *S. v. Coffer*, 78.

Trial court properly instructed the jury on the theory of acting in concert in a prosecution for discharging a firearm into an occupied dwelling. *S. v. Musselwhite*, 68.

The evidence in an armed robbery case was sufficient to support a charge on acting in concert, *S. v. Gilliam*, 617.

§ 114.2. No Expression of Opinion in Statement of Evidence

It was not reversible error for the trial court to have used the word "defendant" when recounting the testimony of a witness even though no witness had identified the defendant as the perpetrator of the robbery. *S. v. Davis*, 596.

§ 114.3. No Expression of Opinion in Other Instructions

Trial court did not express an opinion in instructing the jury on the responsibilities of the district attorney and defense counsel. *S. v. Hudson*, 437.

§ 115. Instructions on Lesser Degrees of Crime

Where the only evidence other than that tending to prove intentional homicide was defendant's testimony relating to her claim of self-defense, it was not error for the court to fail to instruct on involuntary manslaughter as the evidence did not support its submission. *S. v. Locklear*, 235.

CRIMINAL LAW – Continued

§ 115.1. Instructions on Lesser Degrees of Crime; Particular Cases

It was reversible error to fail to submit to the jury an instruction on the lesser included offense of unauthorized use of a motor vehicle where defendant was charged with felonious larceny of an automobile as defendant presented evidence that he did not intend to steal the victim's car. *S. v. Coward*, 488.

§ 117. Charge on Character Evidence

The trial court committed reversible error when it instructed the jury it could not consider the defendant's prior non-larceny related convictions as substantive evidence of his guilt, but failed to instruct the jury with respect to defendant's larceny-related convictions. *S. v. Wallace*, 278.

§ 117.2. Charge on Credibility of Interested Witness

Trial court should have instructed that a witness who testified that her child would receive deceased's estate if defendant was convicted of deceased's murder was an interested witness. *S. v. Puckett*, 576.

§ 118.1. Instructions; Disparity in Time or Stress Given to Contentions

Defendant was not prejudiced by the court's failure to state his contentions after summarizing the contentions of the State. *S. v. McNeill*, 454.

§ 122.1. Jury's Request for Additional Instructions

There was no prejudicial error in the reporter's reading a portion of testimony that had been stricken upon complying with a jury's request during their deliberation that a witness's testimony be reread. *S. v. Jones*, 482.

§ 138.7. Sentencing; Particular Matters Considered

Defendant's escape pending his trial was relevant information for the court to consider at defendant's sentencing hearing. *S. v. Rotenberry*, 504.

§ 140.3. Consecutive Sentences

Imposition of consecutive sentences upon defendant for various assaults and for discharging a firearm into an occupied building did not constitute cruel and unusual punishment. *S. v. Rotenberry*, 504.

§ 143.7. Violation of Conditions of Suspended Sentence; Willfulness

There was no abuse of discretion or arbitrariness in the trial court's conclusion that defendant willfully violated the conditions of his suspended sentence as the evidence supported the judge's conclusion. *S. v. Blevins*, 147.

§ 145.5. Parole

Where the court recommended that defendant be required to make restitution as a condition of work release or parole, the further statement in the judgment and commitment that "All monies are to be paid prior to the defendant's consideration for parole" did not usurp the power of the N.C. Parole Commission but was simply a part of the court's recommendation. *S. v. McNeill*, 454.

§ 148. Judgments Appealable

Appellate review of an order which denies a motion to suppress may be had only after a judgment of conviction. *S. v. Turner*, 631.

§ 149. Right of State to Appeal

Prosecutor's certificate stating that an appeal from a pretrial order allowing a motion to suppress evidence is not taken for the purpose of delay and that the

DEAD BODIES

§ 2. Contract to Inter and Interment

Entry of summary judgment for defendant was improper in an action by plaintiff to recover for mental anguish resulting from the manner in which their deceased son was buried by defendant. *Smith v. Funeral Home*, 124.

DIVORCE AND ALIMONY

§ 5. Recrimination

The amendment to G.S. 50-6 abolishing the defense of recrimination in a divorce action based on a year's separation does not deprive a party who was married before the amendment of a vested property right under the due process clause or as a tenant by the entirety. *Sawyer v. Sawyer*, 141.

§ 13.1. Absolute Divorce; Requirement that Parties Live Separate and Apart

A husband who has neither left the marital home nor withheld support cannot be found to have abandoned his wife merely by electing to sleep in a separate bedroom. *Oakley v. Oakley*, 161.

Trial court erred in failing to instruct the jury that isolated or casual acts of sexual intercourse between separated spouses will toll the statutory period required for a divorce based on a year's separation. *Pitts v. Pitts*, 163.

§ 14.3. Sufficiency of Evidence of Adultery

Evidence was not sufficient to support a jury verdict finding adultery. *Oakley v. Oakley*, 161.

§ 19.5. Effect of Separation Agreements

The trial court erred in concluding plaintiff's award pursuant to a consent judgment constituted "alimony" rather than a part of a complete property settlement. *Walter v. Walters*, 545.

§ 21.5. Enforcement of Alimony Award by Contempt

Trial court erred in ordering that defendant be imprisoned for contempt upon his failure to make payments required by a separation agreement and divorce decree within 30 days where the court found that defendant's failure to make the payments due was not willful as of the date of the hearing. *Cobb v. Cobb*, 230.

§ 21.6. Enforcement of Alimony Award; Effect of Separation Agreement

The property settlement provisions of a separation agreement incorporated by reference in a divorce decree are enforceable by contempt proceedings. *Cobb v. Cobb*, 230.

§ 23.4. Child Custody; Notice and Opportunity to Be Heard

A petition for a temporary restraining order and the temporary order which referred only to child visitation privileges and to restraining the movement of plaintiff and the child did not constitute proper notice of a hearing on change of custody of the child. *Clayton v. Clayton*, 612.

§ 24.4. Enforcement of Child Support Orders

Doctrine of laches did not apply to wife's action against husband's estate seeking enforcement of a child support order fourteen years after the order was entered. *Larsen v. Sedberry*, 166.

§ 25.1. Child Custody; Requirement that Person Be Fit and Proper

It was not error for the court to fail to conclude that defendant was "a fit and proper person to have custody" as the conclusion of law determinative of the

ESTOPPEL

§ 4.6. Equitable Estoppel; Conduct of Party Asserting Estoppel; Reliance

It was error to conclude the county and its insurance carrier were estopped from asserting the lack of an employment relationship between it and the plaintiff where plaintiff, a CETA employee, was paid and insured by the county but did work for and at the direction of the town. *Godley v. County of Pitt*, 324.

EVIDENCE

§ 4.2. Presumptions as to Receipt of Letters

Where plaintiff alleged it mailed its tax listing before the deadline and defendants alleged the listing was not received, resort must be had to the common law on the issue of receipt and that issue must be decided by a jury. *Joint Venture v. City of Winston-Salem*, 202.

§ 13. Communications Between Attorney and Client

Testimony by the attorney who prepared a deed that in his opinion plaintiff had the mental capacity to execute the deed did not violate the attorney-client privilege. *Ange v. Ange*, 686.

FALSE PRETENSE

§ 3. Evidence

The evidence was sufficient to support the inference that defendant intended to cheat or defraud when he obtained checks from the prosecuting witnesses. *S. v. Hines*, 529.

§ 3.2. Instructions

The trial court did not fail to instruct that to constitute false pretense the misrepresentation of a fact must not only intend to deceive but in fact deceive. *S. v. Hines*, 529.

FRAUD

§ 12. Sufficiency of Evidence

In an action against an attorney, his wife and his son to recover for fraud in the sale of property to plaintiffs by misrepresenting that the property was unencumbered, plaintiffs' evidence was sufficient for the jury on the issue of fraud by the attorney but was insufficient to show fraud by the wife or son. *Shreve v. Combs*, 18.

§ 13. Instructions

An issue as to fraud submitted to the jury was sufficient even though it failed to set forth all of the elements of fraud. *Shreve v. Combs*, 18.

In determining whether punitive damages should be awarded for fraud by defendant attorney in the sale of property to plaintiffs, the jury could consider evidence that the female plaintiff made weekly requests of defendant for a deed and that defendant laughed at her when she threatened legal action and on one occasion hung up the phone when she called. *Ibid.*

FRAUDS, STATUTE OF

§ 5.1. Original Promise

The Statute of Frauds, G.S. 22-1, did not apply where defendant's agent requested that plaintiff sell building materials to a contractor and promised that the contractor would be paid with checks made payable to plaintiff and the contractor jointly and that a lien waiver would be required before final payment would be made to the contractor by defendant. *Dealers Specialties v. Housing Services*, 46.

GARNISHMENT

§ 1. Nature of Remedy and Property Subject to Garnishment

Statutes enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing do not violate due process or equal protection rights of the taxpayer. *Town of Hudson v. Martin-Kahill Ford*, 272.

HIGHWAYS AND CARTWAYS

§ 8. Allocation of Funds

The statute providing for "cash flow" financing for highway construction and maintenance contracts is constitutional. *Boneno v. State*, 690.

HOMICIDE

§ 19.1. Evidence of Character or Reputation

Trial court in a homicide case properly excluded testimony concerning specific acts of violence of deceased. *S. v. Puckett*, 576.

§ 21.7. Sufficiency of Evidence; Second Degree Murder

Evidence was sufficient to support a second degree murder charge and all lesser included offenses. *S. v. Locklear*, 235.

State's evidence was sufficient for the jury on the issue of defendant's guilt of second degree murder by shooting the victim with a rifle. *S. v. Hudson*, 437.

§ 21.9. Sufficiency of Evidence; Manslaughter

State's evidence was sufficient for the jury on issues of defendant's guilt of three charges of involuntary manslaughter by chasing one victim into an intersection where all three victims were killed in an automobile accident. *S. v. Perry*, 479.

§ 30.3. Submission of Lesser Degrees of Crime; Involuntary Manslaughter

Trial court in a second degree murder case did not err in failing to instruct the jury on involuntary manslaughter. *S. v. Hudson*, 437.

In a prosecution for second degree murder, the court correctly included an instruction on involuntary manslaughter where defendant's evidence tended to show that he intended to discharge his pistol to empty so that it would not be used by his attackers. *S. v. Hall*, 672.

HOSPITALS

§ 3.3. Liability for Negligence of Physicians

Where a hospital denied that defendant physician was an employee of the hospital and supported the denial with affidavits, the hospital was entitled to summary judgment on the issue of liability based upon respondeat superior because

INSURANCE — Continued

§ 87.2. Liability Insurance: Proof of Permission to Use Vehicle

Permission to drive an insured automobile given under an innocent mistake as to the identity of the person to whom permission is given is effective so as to require coverage under the medical payments provision of an automobile insurance policy. *Douglas v. Nationwide Mutual Ins. Co.*, 334.

§ 141. Construction of Burglary and Theft Policies

Plaintiff insurer was entitled to recover from defendant insured under the theory of unjust enrichment the sum of $2500 which it paid to defendant under an insurance policy insuring defendant against loss of a cow by theft where the thief paid defendant restitution for the cow under the terms of a probation judgment. *Insurance Co. v. Greer*, 170.

§ 144. Actions on Property Damage Policies

Defendant insurer's liability under a homeowner's policy for damages to plaintiff insured's boat, motor and trailer caused by a windstorm was limited to $500. *Caldwell v. St. Paul Insurance Co.*, 346.

§ 149. General Liability Insurance

A policy issued by defendant which contained an "other insurance" or "escape" clause provided the primary professional liability coverage for a school superintendent and a school principal, and a policy issued by plaintiff which contained an "excess insurance" clause provided excess coverage only. *Insurance Co. v. Continental Casualty Co.*, 551.

When the primary insurance carrier denies coverage and refuses to defend insured, the excess insurance carrier may provide a defense and effect settlement and thereafter subrogate against the primary carrier to recover its expenses. *Ibid.*

INTEREST

§ 2. Time and Computation

The trial court did not err in permitting interest on plaintiff's judgment against defendant on an account stated from the date of judgment, rather than from the date of demand and refusal of payment. *Noland Co. v. Poovey*, 695.

JUDGMENTS

§ 55. Right to Interest

The trial court did not err in permitting interest on plaintiff's judgment against defendant on an account stated from the date of judgment, rather than from the date of demand and refusal of payment. *Noland Co. v. Poovey*, 695.

JURY

§ 6.2. Voir Dire Examination; Form of Questions

Any error in refusing to permit defense counsel to question prospective jurors by using the words "not fully satisfied or entirely convinced" to describe reasonable doubt was harmless. *S. v. Peele*, 247.

§ 9. Alternate Jurors

There was no abuse of discretion in replacing a juror with an alternate juror upon an explained absence of the original juror. *S. v. Carr*, 309.

KIDNAPPING

§ 1. Definitions; Elements of Offense

Asportation of the victim is not an inherent or inevitable feature of an assault. *S. v. Coffer*, 78.

LARCENY

§ 1.1. Definition; Elements of the Crime

Trial court properly instructed the jury that movement of a jewelry box a few feet from the top of a dresser to beneath a bed would satisfy the element of asportation. *S. v. Peele*, 247.

§ 4. Indictment

An indictment for common law robbery will support a conviction for larceny from the person. *S. v. Young*, 366.

§ 6.1. Evidence of Value of Stolen Property

Testimony by the owner of a stolen car that "if I had been planning to sell it, I wouldn't have sold it for less than two thousand dollars" was incompetent to show value, and the jury's verdict of guilty of felonious larceny must be treated as a verdict of guilty of misdemeanor larceny. *S. v. Rick*, 104.

§ 7.2. Sufficiency of Evidence; Identity of Property Stolen

State's evidence was sufficient for the jury to find defendant guilty of felonious larceny in the theft of manhole covers. *S. v Dunn*, 656.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

Application of the doctrine of possession of recently stolen property in a prosecution for breaking and entering and larceny did not lessen the State's burden of proof and violate due process. *S. v. McNeill*, 675.

§ 7.10. Felonious Breaking and Entering and Larceny; Sufficiency of Evidence of Possession of Stolen Property

Evidence of defendant's possession of stereo tapes 19 days after they were stolen and his possession of a rifle 30 days after it was stolen was insufficient to support defendant's conviction of larceny under the doctrine of possession of recently stolen property. *S. v. Parker*, 522.

§ 8.4. Instructions as to Possession of Recently Stolen Property

Trial court did not err in refusing to give defendant's requested instructions that the State must prove that the property possessed by defendant was "the identical property stolen." *S. v. McNeill*, 675.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

Statute purporting to bar personal injury, wrongful death and property damage claims arising out of an alleged product defect brought more than six years after the date of initial purchase of the product is unconstitutional. *Bolick v. American Barmag Corp.*, 589.

§ 4.6. Accrual of Cause of Action for Breach of Contract; Particular Contracts

Plaintiff's action to enforce a power company's agreement in an option to purchase land that it would pay legal costs associated with proceedings necessary to clear title to the land accrued when the commissioner's final account of the sale of the land was filed and approved. *Cheshire v. Power & Light Co.*, 467.

MASTER AND SERVANT

§ 10.2. Actions for Wrongful Discharge

Where plaintiff was discharged from employment in the Department of Transportation for improper use of state equipment, the superior court was without jurisdiction to hear his appeal as he was not a "contested case" and he had not been employed by the State for five years. *Dyer v. Bradshaw*, 136.

§ 50. Workers' Compensation; Independent Contractors

Plaintiff's injury was not compensable under the Workers' Compensation Act as the injury did not occur within the scope of his employment as a driver for defendant truck company. *Hoffman v. Truck Lines, Inc.*, 643.

§ 53. Workers' Compensation; Dual Employment

A CETA employee who was hired, paid and insured by a county but worked for a town was not an employee of the county for workers' compensation purposes. *Godley v. County of Pitt*, 324.

§ 59. Workers' Compensation; Wilful Act of Third Person

Injuries received by plaintiff at his place of employment when the boyfriend of a co-worker shot both plaintiff and the co-worker did not arise out of his employment. *Hemric v. Manufacturing Co.*, 314.

§ 66. Workers' Compensation; Mental Disorders

If an employee receives an injury which is compensable and the injury causes her to become so emotionally disturbed that she is unable to work, she is entitled to compensation for total incapacity. *Fayne v. Fieldcrest Mills, Inc.*, 144.

§ 68. Workers' Compensation; Occupational Diseases

Where claimant's evidence showed he had a diminution in earning capacity but failed to show that the diminution was due to an occupational disease, the denial of an award by the Industrial Commission was proper. *Hilliard v. Cabinet Co.*, 173.

Evidence was sufficient to support the Commission's conclusion that plaintiff was totally disabled from an occupational disease. *Anderson v. Smyre Manufacturing Company*, 337.

Plaintiff's time for filing her claim for an occupational disease began to run when she was "first informed by competent medical authority of the nature and work-related cause of the disease." *Poythress v. J. P. Stevens*, 376.

The time of disablement for purposes of deciding which version of the Workers' Compensation Act to apply runs from the date the claimant was incapable of working. *Ibid.*

In a worker's compensation case where the evidence showed that plaintiff's chronic bronchitis and byssinosis were related to plaintiff's exposure to cotton dust, it was of no consequence that the Commission failed to find that the plaintiff's chronic bronchitis was a contributing factor to his disability. *McKee v. Spinning Company*, 558.

The Workers' Compensation Act contemplates that two events must occur before a worker's compensation claim ripens and the notice provisions of G.S. 97-22 and G.S. 97-58 are triggered: (1) injury from an occupational disease; and (2) disability. *Ibid.*

The Commission was justified in finding that the claimant failed to prove disability resulting from an occupational disease where there was evidence that plaintiff's noncompensable heart disease in itself and absent any occupational

MASTER AND SERVANT — Continued

§ 96.1. Workers' Compensation; Scope of Appellate Court's Review

The appellate court's review in a workers' compensation proceeding is simply to determine whether the Industrial Commission's findings are supported by any competent evidence and whether its subsequent legal conclusions are justified by those findings. *Anderson v. Smyre Manufacturing Company,* 337.

§ 108.1. Unemployment Compensation; Effect of Misconduct

Defendant was not disqualified from receiving unemployment benefits where she was discharged after a series of ten absences, the tenth of which was caused by her inability to find child care. *Intercraft Industries Corp. v. Morrison,* 225.

MUNICIPAL CORPORATIONS

§ 37. Regulations Relating to Safety

Summary judgment should not have been granted in an action to recover damages from defendant city for the destruction of a residence on property held under a deed of trust to plaintiff. *Farmers Bank v. City of Elizabeth City,* 110.

NARCOTICS

§ 3.1. Competency and Relevancy of Evidence

Where defendant was charged with intent to sell or deliver drugs, it was not error for the court to admit into evidence a paper taken from defendant's wallet which had the words "345 decimal plus 1 gram" and "Coke" written on it as it tended to show defendant's disposition to deal in drugs. *S. v. Haynes,* 186.

§ 4. Sufficiency of Evidence

There was sufficient evidence to deny a motion for nonsuit on charges of felonious conspiracy to possess and sell marijuana and felonious possession and delivery of marijuana by a defendant who flew his airplane from South America loaded with marijuana to Ashe County. *S. v. Mettrick,* 1.

Testimony about codefendant's delivery of marijuana to an airport coupled with identification testimony that defendant was at the airplane when the marijuana was unloaded was sufficient to overrule defendant's motion for nonsuit on a drug conspiracy charge. *Ibid.*

The evidence was sufficient to convict defendants of manufacture of marijuana. *S. v. Rosser,* 660.

§ 5. Verdict

It was not error to fail to set aside as inconsistent verdicts of not guilty of possession of marijuana and guilty of felonious manufacture of marijuana as a jury is not required to be consistent. *S. v. Rosser,* 660.

NEGLIGENCE

§ 6. Res Ipsa Loquitur

Where plaintiff established circumstances by which a reasonable mind might infer an 8½ inch wire was left in plaintiff's body as a result of a cutdown procedure performed by defendant surgeon, she was entitled to a res ipsa loquitur instruction. *Hyder v. Weilbaecher,* 287.

NEGLIGENCE — Continued

§ 27. Competency and Relevancy of Evidence of Insurance

Testimony by an agent of defendant's liability insurer that defendant admitted to her that the accident in question was her fault was not inadmissible on the ground that defendant's cross-examination of the witness would necessarily disclose the existence of liability insurance. *Smith v. Stocks*, 393.

PARENT AND CHILD

§ 2.2. Child Abuse

In a prosecution for child abuse it was error to allow the introduction of testimony concerning a separate incident where defendant struck his child. *S. v. Armistead*, 358.

PARTITION

§ 2. Waiver of Right; Limitations and Agreements Affecting Right

Where the parties executed a separation agreement which provided: "The parties own a home as 'tenants by the entirety' in which husband will continue to live and make payments," they modified and limited their right to partition the property. *Winborne v. Winborne*, 189.

PHYSICIANS AND SURGEONS

§ 14. Burden of Proof in Actions for Malpractice

The trial court's instructions in a medical malpractice action were defective where they directed the jury to find against the plaintiffs if they failed to prove only one of three requirements defendant was obligated to comply with in rendering professional services. *Hyder v. Weilbaecher*, 287.

§ 16. Presumptions; Applicability of Doctrine of Res Ipsa Loquitur

When instructing on the doctrine of res ipsa loquitur the trial court erred as it omitted a reference to defendant's burden of explanation and the inference to be drawn therefrom. *Hyder v. Weilbaecher*, 287.

§ 18. Sufficiency of Evidence of Leaving Foreign Substance in Patient's Body

Where plaintiff established circumstances by which a reasonable mind might infer an 8½ inch wire was left in plaintiff's body as a result of a cutdown procedure performed by defendant surgeon, she was entitled to a res ipsa loquitur instruction. *Hyder v. Weilbaecher*, 287.

In a case where an 8½ inch wire was left in a patient, it was error to instruct the jury that they could find the standard of care for a physician through expert witnesses as expert testimony was not necessary to establish the standard of care on the facts presented. *Ibid.*

PRINCIPAL AND AGENT

§ 4.2. Proof of Agency; Evidence of Extrajudicial Statements of Agent

Evidence of statements by defendant's assistant director promising to pay for building materials sold by plaintiff to a contractor was admissible against defendant where the evidence established the existence of a principal-agent relationship between defendant and its assistant director and showed that the assistant director had apparent authority to bind defendant to such an agreement. *Dealers Specialties v. Housing Services*, 46.

PRINCIPAL AND AGENT — Continued

Testimony that defendant's employee told plaintiff that he was defendant's general manager and had authority to enter into an agreement for defendant to resell a grain dryer plaintiff had purchased from defendant was inadmissible to prove the position of the agent or that he was acting within the scope of his authority. *S. F. McCotter & Sons v. O.H.A. Industries*, 151.

§ 5.2. Scope of Authority in Particular Matters

Plaintiff's evidence was insufficient to show that defendant's agent was anything other than a sales agent who had no apparent authority to bind defendant to an agreement to resell a grain dryer which plaintiff had purchased from defendant and to give plaintiff the option of a return of his purchase price or application of the proceeds to a larger grain dryer. *S. F. McCotter & Sons v. O.H.A. Industries*, 151.

PRINCIPAL AND SURETY

§ 9.1. Actions on Public Construction Bonds

The surety on a plumbing contractor's payment bond for materials used in the construction of a county building was liable only for materials actually used by the contractor in constructing such building, and the trial court erred in refusing to submit separate issues as to the amount of the contractor's liability to plaintiff for materials delivered to him at the construction site of the county building and the amount of the surety's liability on the payment bond. *Noland Co. v. Poovey*, 695.

PROCESS

§ 5.1. Amendment to Correct Particular Defects

An amendment of the complaint to correct the middle name for the defendant related back to the filing of the original complaint. *Terry v. Lowrance Hospital*, 663.

§ 10. Service by Publication

Service of process on defendant's insured by publication in an automobile accident case was not a violation of due process although plaintiff could have inquired of defendant insurer as to the whereabouts of its insured and could have given defendant formal notice of the action against its insured. *Love v. Moore*, 406.

§ 10.4. Notice and Publication

Notice by publication to defendant's insured was not insufficient because it incorrectly listed insured's middle name as "William" rather than "Willard." *Love v. Moore*, 406.

PROFESSIONS AND OCCUPATIONS

§ 1. Generally

The requirement of G.S. 89C-22(b) that charges against a professional engineer shall be heard by the State Board within three months after the date on which they were "referred" means that the charges must be heard with three months after they were "preferred" as described in G.S. 89C-22(a), and such requirement is mandatory. *In re Trulove*, 218.

Notice to a professional engineer of charges against him was insufficient to support suspension of his license for misconduct in placing his seal on engineering work not prepared under his direction and for gross negligence in sealing the work of another when he knew that the plans did not conform to the State Building Code. *Ibid.*

QUASI CONTRACTS AND RESTITUTION

§ 5. Recovery of Payments; Particular Situations

Plaintiff insurer was entitled to recover from defendant insured under the theory of unjust enrichment the sum of $2500 which it paid to defendant under an insurance policy insuring defendant against loss of a cow by theft where the thief paid defendant restitution for the cow under the terms of a probation judgment. *Insurance Co. v. Greer,* 170.

RAILROADS

§ 5.7. Crossing Accidents; Sufficiency of Evidence of Railroad's Negligence

Plaintiff's evidence was sufficient for the jury to find that defendant's train engineer was negligent in failing to observe plaintiff's tractor-trailer on the railroad tracks and in exceeding the speed limit for the train imposed by defendant's own safety regulations. *Thomas Brothers Oil v. Southern Railway,* 423.

§ 5.8. Crossing Accidents; Sufficiency of Evidence of Contributory Negligence

The evidence did not disclose that plaintiff's tractor-trailer driver was contributorily negligent as a matter of law in being struck by defendant's train at a grade crossing. *Thomas Brothers Oil v. Southern Railway,* 423.

RAPE

§ 6. Instructions

Where the victim's testimony clearly established that she was sexually assaulted against her will, the instruction to the jury that "consent induced by fear is not consent as a matter of law" was proper. *S. v. Ashley,* 386.

§ 6.1. Lesser Degrees of Crime

Assault on a female is a lesser included offense of the charge of attempted first degree rape, and trial court's submission of an issue as to assault on a female was supported by the evidence. *S. v. Rick,* 104.

In light of the victim's unequivocal testimony supporting penetration and upon note that the absence of sperm and the absence of other physical symptoms would not be evidence of an attempted rape, there was no evidence to support an instruction on the lesser offense of attempt to commit second degree rape. *S. v. Ashley,* 386.

§ 7. Sentence and Punishment

The record did not support defendant's contention that the trial judge imposed the maximum sentence for second degree rape based upon his mistaken assumption that the defendant could have been charged with and convicted of first degree rape. *S. v. Ashley,* 386.

G.S. 14-27.2 is substantially different from its predecessor in that the legislature intended to include within the purview of that statute a child who was in her thirteenth year at the time of the rape. *Ibid.*

ROBBERY

§ 2. Indictment

A person who aids or abets another in the commission of armed robbery is guilty under the provisions of G.S. 14-87, and it is not necessary that the indictment charge the defendant with aiding and abetting. *S. v. Ferree,* 183.

ROBBERY — Continued

§ 3. Competency of Evidence

Evidence of the street price of marijuana was relevant in an armed robbery case. *S. v. Young*, 366.

§ 4.5. Sufficiency of Evidence; Cases Involving Aiders and Abetters in which Evidence Was Sufficient

The evidence was sufficient to take the issue of defendant's guilt of armed robbery to the jury. *S. v. Gilliam*, 617.

RULES OF CIVIL PROCEDURE

§ 15. Amended Pleadings

An amendment of the complaint to correct the middle name for the defendant related back to the filing of the original complaint. *Terry v. Lowrance Hospital*, 663.

§ 50. Motions for Judgments n.o.v.

Evidence was not sufficient to support a jury verdict finding adultery, and where the court deferred its ruling on the husband's motion for directed verdict at the end of the evidence, it was not necessary for the husband to move for judgment n.o.v. in order for the court to enter a directed verdict for the husband after the jury returned a verdict finding adultery. *Oakley v. Oakley*, 161.

§ 60. Relief from Judgment or Order

Plaintiff could properly move under Rule 60(b) to set aside a judgment in her favor. *Love v. Moore*, 406.

SAFECRACKING

§ 1. Elements of Offense

The elements of the crimes of burglary with explosives and safecracking are not identical for offenses committed before 1 October 1977. *S. v. Pennell*, 252.

SALES

§ 10.1. Actions to Recover Purchase Price

In an action to recover for goods allegedly sold and delivered to defendant, the trial court did not err in failing to give an instruction as to who was authorized to take delivery of goods for defendant. *Noland Co. v. Poovey*, 695.

§ 22. Actions Based on Defective Goods or Materials

Statute purporting to bar personal injury, wrongful death and property damage claims arising out of an alleged product defect brought more than six years after the date of initial purchase of the product is unconstitutional. *Bolick v. American Barmag Corp.*, 589.

SEARCHES AND SEIZURES

§ 8. Search and Seizure Incident to Warrantless Arrest

A search of defendant's person during which stolen silver certificates were discovered was lawful as an incident to his valid arrest. *S. v. Guy*, 208.

SEARCHES AND SEIZURES — Continued

§ 10. Search and Seizure on Probable Cause

Where the evidence failed to support a reasonable suspicion that codefendant and defendant were involved in any criminal activity and there were no exigent circumstances to justify the search of a suitcase without first obtaining a warrant, officers did not have probable cause to search defendant's suitcase without a warrant at an airport. *S. v. Cooke*, 33.

§ 12. "Stop and Frisk" Procedures

An officer who saw a washer and dryer in defendant's car at 12:34 a.m. had an articulable and reasonable suspicion that defendant was engaged in criminal activity so as to justify an investigatory stop of the car driven by defendant. *S. v. Douglas*, 85.

An officer had probable cause to detain defendant for questioning where two other officers saw one person carrying a television set and another carrying an armful of clothing late at night. *S. v. McNeill*, 454.

§ 13. Search and Seizure by Consent

Where defendant consented to the search of his aircraft and during the search contraband was found in plain view, seizure of the contraband was not unconstitutional. *S. v. Mettrick*, 1.

The trial court properly denied defendant's motion to suppress evidence of cocaine where the evidence showed that the detention of defendant was justifiable as defendant accompanied an officer "voluntarily in a spirit of apparent cooperation," and consent to search a suitcase was voluntarily given. *S. v. Grimmett*, 494.

§ 15. Standing to Challenge Lawfulness of Search

Defendant could not object to the admission of evidence taken as a result of searches conducted in and around an airplane where the record showed neither that defendant was present when the airplane was searched nor that he had any protected interest in the airplane. *S. v. Mettrick*, 1.

Where defendant entrusted the safekeeping of his suitcase with codefendant, defendant had not relinquished his expectations of privacy in the contents of the suitcase through his lack of actual possession, and defendant's disclaimer of ownership was not an abandonment of his Fourth Amendment rights to privacy in its contents. *S. v. Cooke*, 33.

§ 19. Validity of Warrant

Any error in the issuance of two search warrants was irrelevant where defendant's conviction was based upon evidence seized during a warrantless search to which consent was given. *S. v. Parker*, 522.

§ 23. Validity of Warrant; Sufficiency of Showing of Probable Cause

An affadavit was sufficient to support the issuance of a warrant to search a Cadillac and apartment for property stolen during a breaking and entering. *S. v. Guy*, 208.

§ 33. Plain View Rule

An officer lawfully seized a plastic bag containing drugs from the person of an automobile passenger where the officer saw the corner of the bag in plain view. *S. v. Peck*, 302.

SEARCHES AND SEIZURES — Continued

§ 39. Execution of Search Warrant

Officers had the right to detain defendant and another person who were in an apartment while the apartment was being searched pursuant to a warrant. *S. v. Guy*, 208.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

As the judge in a medical assistance case chose to proceed on the agency record under Article 2 of Chapter 108, the review procedure of the Administrative Procedure Act should be applied. *Lackey v. Dept. of Human Resources*, 57.

§ 2. Recovery of Amount Paid to Recipient

In Medicaid cases claimant has the initial burden of showing disability that would prevent him from engaging in his usual job; however, the burden then shifts to the agency to show that the claimant can work in other employment. *Lackey v. Dept. of Human Resources*, 57.

TAXATION

§ 25.1. Listing Property for Ad Valorem Taxes

Where plaintiff alleged it mailed its tax listing before the deadline and defendants alleged the listing was not received, resort must be had to the common law on the issue of receipt and that issue must be decided by a jury. *Joint Venture v. City of Winston-Salem*, 202.

§ 37. Collection

Statutes enabling a city to garnish defendant taxpayer's bank account for taxes due on a bulk sale without prior notice or hearing do not violate due process or equal protection rights of the taxpayer. *Town of Hudson v. Martin-Kahill Ford*, 272.

TRIAL

§ 6.1. Particular Stipulations

Defendant waived its right to assert the defense of insufficiency of service of process by a stipulation in a proposed pretrial order that the court had jurisdiction of the parties and subject matter. *Thomas v. Poole*, 239.

§ 6.2. Relief from Stipulation

Defendant's filing of a purported withdrawal of a stipulation of the trial court's jurisdiction was ineffective. *Thomas v. Poole*, 239.

§ 11. Argument and Conduct of Counsel

The trial court did not commit prejudicial error by allowing defense counsel to read portions of the final pleadings, which had not been introduced into evidence, in his argument to the jury. *Gillespie v. Draughn*, 413.

§ 15.3. Evidence Admissible for Specific Purpose

Where the record discloses no request by plaintiff for a limiting instruction concerning admission of evidence for impeachment purposes only and not as substantive evidence, there is no error in failing to so instruct. *Gillespie v. Draughn*, 413.

TRIAL — Continued

§ 34. Statement of Contentions

The trial court's failure to refer to defendant's exhibits when instructing the jury on his contentions was not error. *Noland Co. v. Poovey,* 695.

§ 40. Sufficiency of Issues

An issue as to fraud submitted to the jury was sufficient even though it failed to set forth all of the elements of fraud. *Shreve v. Combs,* 18.

§ 45. Acceptance of Verdict by Court

Trial court in an action for fraud did not abuse its discretion in refusing to reduce a verdict for plaintiffs on motion of plaintiffs' attorney. *Shreve v. Combs,* 18.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

The trial court did not err in concluding defendant was operating an illegal pyramid scheme in violation of G.S. 14-291.2 and in granting a preliminary injunction. *Edmisten, Attorney General v. Challenge, Inc.,* 513.

Under G.S. 14-291.2 and G.S. 75-14 it is not necessary for the State to show actual injury has resulted in order for a court to provide for injunctive relief from the continuation of illegal pyramid and chain schemes. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 8. Sales Contract; Statute of Frauds

The Statute of Frauds of G.S. 25-2-201 was inapplicable to defendant's oral promise to pay for building materials sold by plaintiff to a contractor where the contractor had already accepted the building materials. *Dealers Specialties v. Housing Services,* 46.

§ 18. Performance

In order for plaintiff to show that defendant was indebted to it for payment for certain goods, plaintiff did not have to show that defendant received these goods but had to show that it delivered these goods and defendant accepted delivery. *Noland Co. v. Poovey,* 695.

§ 20. Acceptance or Rejection of Goods by Buyer

In an action to recover payment for plumbing materials allegedly sold by plaintiff to defendant for use in a construction project, a jury question was presented as to whether plaintiff was entitled to recover for all materials shown on its exhibits, and the trial court properly refused to direct a verdict for defendant as to all invoices not actually signed by defendant. *Noland Co. v. Poovey,* 695.

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey and Options

A letter which set out in detail the conditions of a purchase and lease of property was an offer even though some of the terms could have been construed as consistent with an option. *Dixon v Kinser,* 94.

VENUE

§ 8. Removal for Convenience of Parties and Witnesses

Trial court did not abuse its discretion in denying defendants' motion for a change of venue of a contract action from Wilkes County to Buncombe County to promote the convenience of the witnesses and the parties. *Holland v. Gryder,* 490.

WEAPONS AND FIREARMS

§ 3. Discharging Weapon

Trial court did not err in failing to instruct on self-defense in a prosecution for discharging a firearm into an occupied dwelling. *S. v. Musselwhite,* 68.

WILLS

§ 44. Per Stirpes Distribution

Provision of a will that the corpus of a trust should be paid "in equal shares" to testator's nieces and nephews "per stirpes" required a per stirpes rather than a per capita distribution of the trust corpus. *Wachovia Bank v. Livengood,* 198.

WITNESSES

§ 1. Competency of Witness

Where plaintiff presented five witnesses who testified concerning plaintiff's lack of mental capacity to make a deed, trial court did not err in refusing to permit plaintiff to call thirteen additional witnesses who would have given similar testimony. *Ange v. Ange,* 686.

§ 6.1. Evidence Competent to Impeach or Discredit Witness; Inconsistent or Contradictory Statements

In a personal injury action it was not error to allow defense counsel to cross-examine plaintiff concerning his deposition taken in another pending, unrelated case as his prior inconsistent statements were used for purposes of impeachment. *Gillespie v. Draughn,* 413.

§ 9. Redirect Examination

New evidence relating to an issue not yet raised by either party is not a proper subject for redirect. *Poythress v. J. P. Stevens,* 376.

WORD AND PHRASE INDEX

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