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2. Appointed Judge 23 May 1983 to succeed Gary B. Tash who retired 30 April 1983.
3. Appointed Judge 12 April 1983 to succeed Walter H. Bennett, Jr. who resigned 20 February 1983.
4. Appointed Chief Judge 18 May 1983 to succeed Arnold Max Harris who died 1 May 1983.
5. Appointed Judge 27 May 1983.

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State v. Kistle	59 N.C. App. 724	Denied, 307 N.C. 471
State v. Leeper	59 N.C. App. 199	Denied, 307 N.C. 272
State v. McAlister	59 N.C. App. 58	Denied, 307 N.C. 471

Case	*Reported*	*Disposition in Supreme Court*
State v. McCann	59 N.C. App. 739	Denied, 307 N.C. 471
State v. Morris	59 N.C. App. 157	Denied, 307 N.C. 471 Appeal Dismissed
State v. Mosley	59 N.C. App. 238	Denied, 307 N.C. 700
State v. Nickerson	59 N.C. App. 236	Allowed, 307 N.C. 272
State v. Parker & Best	59 N.C. App. 362	Denied, 307 N.C. 580 Appeal Dismissed
State v. Paschal	59 N.C. App. 239	Denied, 307 N.C. 701
State v. Pearson	59 N.C. App. 87	Denied, 307 N.C. 472
State v. Polk	59 N.C. App. 557	Denied, 307 N.C. 580
State v. Reekes	59 N.C. App. 672	Denied, 307 N.C. 472
State v. Seay	59 N.C. App. 667	Denied, 307 N.C. 701 Appeal Dismissed
State v. Smith	59 N.C. App. 739	Denied, 307 N.C. 581 Appeal Dismissed
State v. Stanley	59 N.C. App. 238	Denied, 307 N.C. 128
State v. Swink & Evans	59 N.C. App. 557	Denied, 307 N.C. 472 Appeal Dismissed
State v. Thomas	59 N.C. App. 739	Allowed, 307 N.C. 701
State v. Thompson & Tucker	59 N.C. App. 425	Denied, 307 N.C. 582 Appeal Dismissed
State v. Vaughan	59 N.C. App. 318	Denied, 307 N.C. 582
State v. Warren	59 N.C. App. 264	Allowed, 307 N.C. 582
State v. Wells	59 N.C. App. 682	Denied, 308 N.C. 194
State v. Wilhelm	59 N.C. App. 298	Denied, 307 N.C. 702
State v. Williams	59 N.C. App. 549	Denied, 307 N.C. 702
Thompson v. Burlington Industries	59 N.C. App. 539	Denied, 307 N.C. 582
Threatte v. Threatte	59 N.C. App. 292	Allowed, 307 N.C. 582
Wellman v. The Hideaway	59 N.C. App. 739	Denied, 307 N.C. 703
Whitesell v. Whitesell	59 N.C. App. 552	Denied, 307 N.C. 583
Wilkes Computer Services v. Aetna Casualty & Surety Co.	59 N.C. App. 26	Denied, 307 N.C. 473
Wright v. American General Life Ins. Co.	59 N.C. App. 591	Denied, 307 N.C. 583

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. LUTHER PRYOR, JR.

No. 826SC18

(Filed 5 October 1982)

1. Robbery § 4.5— aiding and abetting armed robbery—sufficiency of evidence

The State's evidence was sufficient to enable the jury to find that defendant aided and abetted an armed robbery of a service station in that he (1) intended to aid the actual perpetrators, (2) was constructively present at the crime scene, and (3) communicated to the perpetrators his intent to aid in the commission of the crime where it tended to show that defendant knew the robbery was planned; defendant drove the perpetrators to the area of the robbery, dropped them off at a point near the service station, waited in the vicinity, picked them up later at a restaurant near the service station, and drove them from the scene; and defendant shared in the proceeds of the robbery.

2. Criminal Law § 113.1— failure to summarize evidence favorable to defendant—prejudicial error

The trial court gave a prejudicially incomplete instruction on the law arising from the evidence and failed to give equal stress to the contentions of the State and the defendant where the court summarized the evidence presented by the State but failed to make any reference to evidence brought out on cross-examination which tended to exculpate the defendant or to evidence of the State itself which tended to raise inferences favorable to the defendant. G.S. 15A-1232.

3. Criminal Law § 117.2— insufficient instruction on interested witnesses

Where the trial court instructed the jury to scrutinize the testimony of defendant's accomplices with care and caution, and the accomplices gave testimony that was in some respects favorable to the defendant, it was prejudicial error for the court to fail to give a qualifying instruction to the effect that, if after such scrutiny, the jury believed the testimony of the accomplices, it should be given the same weight as any other credible evidence.

State v. Pryor

APPEAL by defendant from *Smith (Donald L.), Judge.* Judgment entered 31 May 1978 in Superior Court, HALIFAX County. Heard in the Court of Appeals 31 August 1982.

Defendant was charged in a proper bill of indictment with armed robbery. He was found guilty as charged. From judgment imposing an active sentence, defendant gave timely notice of appeal and counsel was appointed to perfect appeal. However, the appeal was never perfected. On 9 October 1981 the Superior Court appointed new appellate counsel. On 16 November 1981 this Court granted defendant's petition for writ of certiorari.

The issues on appeal dispositive of the case are whether the court should have granted defendant's motion to dismiss for insufficient evidence and whether the court erred in its instructions to the jury.

Attorney General Edmisten, by Associate Attorney David Ray Blackwell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

JOHNSON, Judge.

During the early evening hours of 6 February 1978, Terry Brown, operator of the Gates Service Station in Scotland Neck, and Curtis Washington, an employee, were robbed at gun point by Cecil Dickens and Richard Dickens. Cecil and Richard Dickens pled guilty to robbery with a firearm and testified on behalf of the State. The defendant, Luther Pryor, Jr., pled not guilty to the charge of robbery with a firearm. The State proceeded against the defendant on the theory that he aided and abetted Cecil and Richard Dickens, the actual perpetrators of the robbery. Both Cecil and Richard Dickens appeared as witnesses for the State pursuant to a plea agreement.

At trial, the State offered evidence tending to show that Curtis Washington, the Gates Service Station employee, planned the robbery and supplied the gun that was used. Cecil Dickens testified that on a Sunday evening previous to the robbery, he, Richard Dickens, defendant, and Curtis Washington were together at his aunt's house. Cecil Dickens stated that on this evening when plans for the robbery were made, defendant was

"inside of the house" when Washington gave him the gun on the outside, and that when Washington talked to Cecil about it first, "he (defendant) was there, but I don't think he heard that."

Terry Brown, the service station operator, testified that he saw the defendant, Cecil Dickens, and Richard Dickens drive past his service station in defendant's Volkswagen on the evening of 6 February 1978. Approximately 15 to 30 minutes later, the two Dickens men returned to the station on foot. Cecil Dickens then pulled a gun, pointed it at Brown, and demanded money from Brown and Washington. Cecil and Richard Dickens then ran from the station and across the parking lot of a nearby tire company. Brown did not see the two men again that evening.

Brown testified that he saw the defendant's Volkswagen pull out of a car wash about one and one half blocks from his station, in the vicinity of Hardee's, soon after the robbery. He did not see the driver of that car or see who else, if anyone, was in the car. Brown last saw the defendant some 15 to 30 minutes before the robbery.

Later in the evening of 6 February 1978, Halifax County law enforcement officers stopped the car driven by the defendant on Highway 903 headed in the direction of Littleton. Cecil Dickens, Richard Dickens, and two females were passengers in the car. Deputy Sheriff Cloyd did not observe where any of the passengers were sitting.

Sheriff Cloyd told the defendant that the car fit the description of one suspected of being involved in a Scotland Neck robbery and asked defendant to return to the sheriff's office for questioning. The defendant voluntarily accompanied the officers and subsequently gave them permission to search his car. During the search, a loaded .22 caliber pistol was found under the right front seat on the passenger's side of the car. No weapons or money were found on the defendant.

When questioned, the defendant voluntarily gave the police the following statement which the State introduced into evidence:

> "My name is Luther Pryor. I am sixteen years old. I live at Route 2, Box 121-A, Scotland Neck, North Carolina. On February 6, 1978 about 6:30 P.M. Richard and Cecil and I drove to the Gates Station lot and stopped. Cecil told Curtis

'We are going to rob you.' Curtis said 'No, man, don't do it tonight because the Bunch folks are watching and the man next door.' I told Curtis 'Don't worry about it, man.' I drove off back up Main Street and put them off at the Little Mint and drove up the street to the Zip Mart and I turned around and picked Richard and Cecil up in front of Hardee's. I took them home and picked up my old lady, Ann Dickens, and headed to Roanoke Rapids to the bus station and then we got stopped. When I took Richard and Cecil home, Cecil gave me ten dollars and told me they had robbed the Gates gas station. I knew Richard and Cecil had robbed the Gates station when they got into my car because they told me at that time. I gave my girl, Ann Dickens, nine dollars at Gene Harrell's store to keep for me and the money I gave her was money from the Gates station."

Cecil Dickens testified that the defendant drove him and Richard Dickens "uptown" and then went to the car wash about one and a half blocks away to clean out his car. The car wash was out of sight of the service station. Cecil stated that nobody was waiting for him after he left the service station, but that he could not remember what he did then because he'd had too much to drink that evening.

On cross-examination, Richard Dickens stated that prior to the robbery no one had any conversation in Luther Pryor's presence about robbing the service station or about the gun. Richard Dickens testified that he was drunk at the time of the robbery and could not remember what became of Luther after he dropped Cecil and Richard at the service station.

At the close of the State's evidence, defendant's motion to dismiss was denied. Defendant offered no evidence, and his renewed motion was also denied. The case was submitted to the jury on the theory that defendant aided and abetted the actual perpetrators, Richard and Cecil Dickens.

Defendant first assigns error to the failure of the trial court to grant defendant's motion to dismiss at the conclusion of the State's evidence.

The standard for the trial court and for this Court is whether the evidence is sufficient for a rational trier of fact to find proof beyond a reasonable doubt of every essential element of the crime charged. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979); *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980). Defendant argues the State presented insufficient evidence from which the jury could find that the defendant aided and abetted the perpetrators in the commission of the crime of armed robbery. For reasons set forth below, we disagree.

I

In ruling upon a motion to dismiss, the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *See State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). The State's evidence is sufficient if there is substantial evidence to establish each and every element of the crime charged. *See State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith, supra; Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

The State relied upon a theory of aiding and abetting to carry the armed robbery charge to the jury. The elements necessary for the State's case were set forth by our Supreme Court in *State v. Sanders*, 288 N.C. 285, 290-91, 218 S.E. 2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976).

> "The mere presence of the defendant at the scene of the crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. *State v. Rankin*, 284 N.C. 219, 200 S.E. 2d 182 (1973); *State v. Gaines*, 260 N.C. 288, 132 S.E. 2d 485 (1963). To support a conviction, the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or

intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators. *State v. Hargett*, 255 N.C. 412, 121 S.E. 2d 589 (1961); *State v. Holland*, 234 N.C. 354, 67 S.E. 2d 272 (1951)."

As noted below, the State's evidence is sufficient to prove each and every element.

A. Intent

[1] Defendant contends that the evidence fails to establish that he shared the felonious intent to rob the service station. Specifically, defendant argues that the State did not show that defendant was part of the plan to rob the service station or that he knew of such plan or intended to aid in its commission.

Defendant cites *State v. Kendrick*, 9 N.C. App. 688, 177 S.E. 2d 345 (1970), for the proposition that before defendant can be guilty as an aider or abetter of a felony, he must share the felonious intent of the actual perpetrators. Defendant argues that the testimony of the perpetrators negates any inferences that defendant had any prior knowledge of the robbery plan or that he was knowingly involved in its commission.

However, the intent to aid or the showing of a felonious purpose may be inferred from the defendant's actions and his relation to the perpetrators. There need be no express words communicating the intent to aid or indicating that defendant shared a felonious purpose, *State v. Sanders, supra.*

Defendant's own statement to Officer Gus Sherman indicates that one of the two perpetrators told Curtis Washington, an employee at the service station, in defendant's presence, that they were going to rob the service station. Defendant stated, "Don't worry about it, man," drove up the street and let the perpetrators out. The statement further indicates that he picked them up later in his vehicle, knew that they had robbed the service station and subsequently drove away with them.

Terry Brown, the robbery victim, testified that he saw the defendant and two males, later identified as the Dickens in the Volkswagen at the Gates Service Station 15 to 30 minutes before the robbery, and subsequent to the robbery saw the same

Vokswagen drive away from the vicinity of Hardee's, some one block from the Gates Service Station.

Defendant admitted in his statement that he profited from the robbery. Later that evening, the defendant and the two robbers were stopped in defendant's vehicle. The Volkswagen also contained a gun and money.

The State's evidence clearly supports the inference that defendant intended to aid the perpetrators. Defendant's own statement indicates that he knew the robbery was planned, he dropped the perpetrators off in the area, picked them up later and subsequently carried them from the scene. Finally, defendant shared in the proceeds of the robbery. Such evidence clearly supports an inference of felonious intent necessary to support an aiding and abetting charge. *See State v. Aycoth*, 272 N.C. 48, 157 S.E. 2d 655 (1967).

B. Constructive Presence

Defendant next contends that the State failed to establish that he was constructively present at the Gates Service Station during the armed robbery, accompanied the perpetrators to the vicinity of the offense, or remained in the vicinity for the purpose of rendering aid. Defendant argues the evidence is insufficient to establish his whereabouts during the armed robbery.

A person may be guilty as an aider and abettor if that person " . . . accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense." *State v. Price*, 280 N.C. 154, 158, 184 S.E. 2d 866, 869 (1971).

Thus, the State must prove that defendant Pryor remained in the vicinity of Gates Service Station for the purpose of aiding and abetting and was sufficiently close to render aid, if needed, or to provide a means of "get-away."

In his statement to Officer Sherman, defendant said, "I drove off back up Main Street and put them off at the Little Mint and

drove up the street to the Zip Mart. I turned around and picked Richard and Cecil up in front of Hardee's." On cross-examination Officer Sherman testified that, "Mary Ann Dickens told me that the money she was giving me came from Richard and I . . . she also told me that not Richard, but Luther, and she also told me that Luther said he waited at the car wash and picked the boys up and he said he knew they had robbed because he was waiting to pick them up."[1]

Cecil Dickens testified that defendant went to a car wash about one and a half blocks away to clean out his car after dropping him and Richard Dickens off.

Terry Brown testified that he saw the Volkswagen with Luther arriving and containing two other black males at the service station 15 to 30 minutes prior to the robbery. Subsequently, Mr. Brown testified that the two men he saw in the back of the Volkswagen committed the armed robbery, that he saw them running away across the parking lot of the tire company and then, upon running out to the road, saw the Volkswagen in the vicinity of Hardee's, about one block from the service station.

Officer Sherman testified that the Zip Mart is three miles from the Gates Service Station.

In his argument that the State failed to show that he was "constructively present," defendant relies upon *State v. Wiggins*, 16 N.C. App. 527, 192 S.E. 2d 680 (1972) and *State v. Davis*, 50 N.C. App. 674, 274 S.E. 2d 858 (1981). Both cases are distinguishable on their facts as the State has, in the case *sub judice*, brought forth far more circumstantial evidence of defendant's "presence" than either *Davis* or *Wiggins*. In *Davis*, there was *no* evidence linking the defendant to the perpetrators *prior* to the robbery to give rise to the inference that he was purposely present in the vicinity. In *Wiggins*, this Court made a similar finding where the evidence showed that the defendant was at a house some 10 or 15 blocks away from the scene of the robbery and no evidence demonstrated that the defendant was situated where he could give the perpetrator any advice or aid, if needed. While noting

1. Despite the hearsay nature of this testimony, it was properly admitted into evidence as no objection was taken at trial, apparently because defendant's own counsel elicited the statement during cross-examination of State's witness.

that the defendant in *Wiggins* was not actually present at the scene, this Court stated that "the actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present . . . A guard who has been posted to give warning or the driver of a 'get-away' car, may be constructively present at the scene of a crime although stationed a convenient distance away. *See* R. Perkins, Criminal Law, Ch. 6, § 8 (2nd ed. 1969), and cases collected there." *Wiggins, supra* at 530, 192 S.E. 2d at 682-83. *Accord State v. Gregory,* 37 N.C. App. 693, 247 S.E. 2d 19 (1978).

The State's evidence was sufficient for the jury to find that the defendant dropped the perpetrators off, waited in the vicinity, was in a position to aid them by providing the "get-away" car, and that this aid constituted "knowing encouragement" to the commission of the armed robbery.

C. Knowledge of the Principals

Defendant's next contention is that the State failed to prove that defendant communicated his intent to aid in the commission of the crime to the perpetrators. To support his contention, defendant relies on the testimony of Cecil and Richard Dickens to establish their lack of knowledge that defendant intended to aid them or that defendant was standing by for that purpose. However, as our Supreme Court noted in *State v. Sanders, supra,* "The communication or intent to aid, if needed, does not have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrators."

The jury had sufficient evidence from which it could find that defendant's acts communicated his intent to aid to the perpetrators. The two armed robbers were found in defendant Pryor's car with defendant driving a short time after the robbery. The vehicle contained a .22 caliber pistol. Subsequently, defendant made a statement to Officer Sherman, stating that he heard one of the robbers tell a Gates Service Station employee that "we are going to rob you." This statement was made shortly before the robbery while the robbers were in the back of defendant's vehicle. Defendant then admitted driving away from the station, letting the robbers out at the Little Mint, driving to the Zip Mart, turning

around, and picking the robbers up in front of Hardee's. Defendant acknowledged that he knew they had robbed the service station when they got in the car because they told him. Terry Brown's testimony as to the events subsequent to the robbery show the robbers running off and the defendant's car leaving the vicinity of where the robbers had run. Mr. Brown also testified that Cecil Dickens told Richard Dickens which direction to take as they ran off. Thus, from the evidence, the jury could easily conclude that the robbers ran to where they knew they would be picked up by the defendant, and where defendant was waiting to assist them in their escape.

The evidence, taken as a whole in the light most favorable to the State, was sufficient to enable the jury to find that defendant aided and abetted the armed robbery of the Gates Service Station.

Defendant's first assignment of error is without merit.

II

[2] Defendant's most serious contention is that the trial judge failed to state the evidence and apply the law to the facts as required by G.S. 15A-1232. The challenged portion of the charge is as follows:

> "Very simply in this case the State of North Carolina has offered some evidence which tends to show and the State contends does show that on the night in question Richard and Cecil Dickens were for a part of the evening in the presence of Mr. Pryor and that both Mr. Dickens consumed alcoholic beverages and as I remember, it was wine and possibly others and they were both under the influence and have no recollection of a portion of this night, that being February 6, 1978, but that on February 6, 1978, Mr. ~~Sherman~~ Brown, who operates the Gates Service Station was returning and saw the defendant, Mr. Pryor in his Volkswagen automobile leaving the station with two other persons; that—excuse me, strike that. I said Sherman and I meant to say 'Brown' and I am sorry, ladies and gentlemen. I remind you again that you are to take your recollection of the evidence.
>
> That he waved to the defendant and some fifteen to thirty minutes later he observed Cecil and Richard Dickens come up

behind the station and one of them went to the bathroom or to the area of the bathroom and the other went around the building and subsequently Cecil Dickens pulled a gun and demanded money and Mr. Brown reached for his pocket whereupon one of the Dickens said 'Pop him' or something to that effect and again take your own recollection and Mr. Brown gave the money to Mr. Dickens or either or both of them and they ran off across the road; that he saw a gold colored Volkswagen which was Luther's car and that no one—that Mr. Brown gave no one permission to take any money from him and that on the night in question he was scared partly at least for the reason a .22 caliber pistol was in the possession of the Dickens boys."

The trial judge must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law thereto, and refrain from expressing an opinion whether a fact has been proved. G.S. 15A-1232. Implicit in the duty imposed by general requirements of fairness to the parties is the requirement that the judge give equal stress to the State and the defendant in a criminal action. The statute creates a substantial legal right; its provisions are mandatory and failure to comply with them is prejudicial error for which a new trial must be ordered. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1976); *State v. Sanders*, 298 N.C. 512, 259 S.E. 2d 258 (1979).

In its summation, the court did not make any reference to evidence favorable to the defendant, including testimony elicited by the State on direct examination of Cecil and Richard Dickens, which tended to show defendant's lack of involvement in the robbery itself or its planning. The court also failed to summarize evidence, in defendant's out-of-court statement, which tended to show that he learned of the robbery after it had been committed.

On direct examination of State's witness, Cecil Dickens, the State elicited testimony showing that when Cecil and Richard Dickens were in the presence of defendant Pryor on the evening of the robbery, they "didn't talk nothing about it (the Gates Service Station);" that they did not discuss going back to the station for the purpose of robbing it; that no one was waiting for Cecil after the robbery; and that when Curtis Washington gave Cecil the gun with which to rob the station, defendant did not hear the conversation but was inside the house at the time.

Another State's witness, Richard Dickens, testified on cross-examination that prior to the robbery, he had no conversation with the defendant about either the robbery itself or the gun to be used. In response to a question propounded by the court, Richard Dickens testified that to his knowledge, no one had a conversation in defendant's presence about the service station that was robbed.

The gist of the Dickens' testimony on direct and cross-examination was that they, along with Curtis Washington (and not the defendant) planned the robbery. Both defendant's statement and the Dickens' testimony were substantive evidence which, if believed, raised inferences tending to exculpate the defendant as an aider and abettor to the robbery.

State v. Sanders, supra, is remarkably similar to the case under discussion. In *Sanders,* too, the defendant offered no evidence at the conclusion of the State's case, relying on certain evidence brought out on cross-examination which tended to exculpate the defendant and upon evidence of the State itself which tended to raise inferences favorable to the defendant. The Supreme Court stated:

> "[W]hen the court recapitulates fully the evidence of the State but fails to summarize, at all, evidence favorable to the defendant, he violates the clear mandate of the statute which requires the trial judge to state the evidence to the extent necessary to explain the application of the law thereto. In addition, he violates the requirement that equal stress be given to the State and to the defendant." [298 N.C. at 519, 259 S.E. 2d at 262.]

Thus, under the rule of *Sanders,* the trial judge gave both a prejudicially incomplete instruction on the law arising from the evidence, and failed to give equal stress to the contentions of the State and the defendant. Defendant is therefore entitled to a new trial.

[3] In a related assignment of error, the defendant asserts that the trial judge gave a prejudicially incomplete charge by instructing the jury to scrutinize the accomplices' testimony with care and caution, but failing to tell the jury to treat that evidence as they would any other evidence if they believed it, where the

testimony of the accomplices offered by the State was favorable to the defendant. We agree.

Once the trial judge undertakes to instruct on the credibility of an interested witness, he must do so accurately and completely. *State v. Eakins*, 292 N.C. 445, 447, 233 S.E. 2d 387, 388 (1977). When during jury instruction the trial court calls attention to a witness' status as interested and instructs the jury that such testimony must be scrutinized in light of that witness' interest, it is prejudicial error for the court to fail to give a qualifying instruction to the effect that, if after such scrutiny, the jury believed the testimony, it should be given the same weight as any other credible evidence. *State v. Kimmer*, 249 N.C. 290, 106 S.E. 2d 215 (1958); *State v. Davis*, 223 N.C. 57, 25 S.E. 2d 187 (1943); *State v. Holland*, 216 N.C. 610, 6 S.E. 2d 217 (1939).

The trial court gave the following instruction on accomplice testimony:

> "Now there was some evidence as I remember it, but you are to take our (sic) recollection of the evidence and not mine, but there was some evidence which tended to show that Cecil and Richard Dickens were possibly an accomplice in the commission of the crime charged in this case and I now instruct you ladies and gentlemen that an accomplice is an interested witness as a matter of law, therefore, you must with great care and caution scrutinize the testimony of Cecil or Richard Dickens, if you should find that they were accomplices in the trial."

It was error for the court to have omitted the qualifications immediately following, that if the jury believed such interested witnesses' testimony after regarding it with great care and caution, then they should give that testimony as much weight as they would a disinterested witness. *See State v. Holland, supra.*

Cecil and Richard Dickens, the alleged accomplices, gave testimony that was in some respects favorable to the defendant. The trial court's failure to give the qualifying instruction was prejudicial to the defendant and entitles defendant to a new trial.

The State argues that although the qualifying instruction was not given, the charge taken as a whole, conveyed the same meaning to the jury where the trial court followed the above

quoted instruction with a general instruction on witness credibility.

A similar argument was advanced in *State v. Davis, supra*, where the trial court gave the interested witness instruction as to both the defendant and the defendant's wife, but failed to give the qualifying instruction as to the wife's testimony.

The North Carolina Supreme Court rejected the State's contention that the qualifying words used in the charge as to the testimony of the defendant himself, likewise referred to the testimony of the defendant's wife.

> "The omission of any reference to the testimony of the defendant's witness (his wife) from the qualifying words applied to the testimony of the defendant himself may have been unintentional, an oversight, or even a 'lapsus linguae,' nevertheless, the omission is clearly apparent from the record . . . there must be a new trial."

State v. Davis, supra at 59, 25 S.E. 2d at 189.

Here too, the presence of the general instruction on witness credibility cannot be said to correct the potential prejudicial effect of the omission of the particular qualifying instruction that if the witnesses found to be interested are believed, then their evidence is to be treated as any disinterested witnesses' evidence. It is not to be left to the jury to determine this from the charge as a whole; rather, it is to be specifically stated by the trial judge in giving the interested witness instruction.

We have examined defendant's other assignments of error argued in defendant's brief and find them to be without merit.

New trial.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. LILA WILLIAMS

No. 8215SC1

(Filed 5 October 1982)

1. **Criminal Law § 75.14— motion to suppress incriminating custodial statements improperly denied—mental and physical impairment of defendant—failure to demonstrate knowing and intelligent waiver**

In a prosecution for murder where defendant was 57 years old, mildly to moderately mentally retarded, suffering from permanent brain damage, diabetes, high blood pressure and heart disease, the trial court erred in denying defendant's motion to suppress incriminating custodial statements made by defendant on the night of her arrest since the State failed to meet its burden of affirmatively demonstrating a knowing and intelligent waiver by defendant and since the court's conclusion that defendant "understandingly" waived her *Miranda* rights was not supported by findings of fact.

2. **Criminal Law § 75.12— error in admission of custodial statements—prejudicial**

It was prejudicial error to deny defendant's motion to suppress certain custodial statements since they were evidence that defendant was motivated to shoot the decedent by an argument and that defendant was not acting in self defense whereas the only untainted evidence against defendant consisted of her statements to a neighbor and to an officer from which a jury might reasonably infer that the shooting was not intentional.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 25 March 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 31 August 1982.

Defendant was indicted for the first degree murder of James Edward Johnson. Defendant is 57 years old, mildly to moderately mentally retarded, suffering from permanent brain damage, diabetes, high blood pressure and heart disease. Although defendant is marginally able to care for herself, defendant's impairments result in an inability to effectively communicate, periodic confusion, disorientation, and lapses in memory. Defendant moved to suppress incriminating custodial statements made the night of her arrest. Her motion was denied and she was tried for second degree murder, the State offering her custodial statements against her. The jury returned a verdict of guilty of voluntary manslaughter and judgment imposing a sentence of imprisonment was entered. Defendant appealed.

Attorney General Rufus L. 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.

WELLS, Judge.

Defendant contends that the trial court erred in refusing to suppress her custodial statements. The evidence presented at the hearing showed that on the night of 22 July 1980, defendant sought the aid of her neighbor, Sherry Jane Thaxton. Defendant awoke Thaxton and told her that she had shot her boyfriend, Johnson. Thaxton alerted the police and accompanied defendant to the house where defendant and Johnson lived. Officer Dale Allen arrived at the scene and found Johnson lying on his bed, shot in the chest. Allen asked defendant what had happened. She responded, "I shot him. There's the gun, take it."

Defendant, accompanied by Thaxton, was transported to the Burlington Police Department. Defendant was given her *Miranda* warnings, signed a waiver of rights form, and answered the questions of Detective J. V. Barbee. Ms. Thaxton was present at the interrogation and was allowed to answer some background questions for defendant. Detective Barbee conducted the interview. Barbee was gentle with defendant, leading her along, asking her questions which could be easily answered. When Barbee asked defendant if she understood her rights, twice she was unresponsive to his question. The third time, defendant said she "reckoned" that she understood everything. When Barbee asked defendant to sign the rights form indicating she had been given her rights, she started writing her initials, but when he told her that she could sign with a mark if she could not write, defendant scratched out her initials and put an "X" as her signature. When defendant signed the waiver form for Barbee she signed with her initials.

Defendant cooperated with Barbee. She repeatedly told him that she was nervous and that she neither knew nor could remember what had happened. Her statement, which was in evidence at the suppression hearing, contains the following dialogue:

. . .

BARBEE: Well, what we need to know, Mrs. Williams, is what happened over there tonight, and you are the only one here that can tell us.

WILLIAMS: I don't know, but I didn't look 'til I shot him. I'll say it like that.

BARBEE: Do you remember shooting him?

WILLIAMS: I shot him, but I didn't know, I said what happened. And he was laying there on the bed.

. . .

BARBEE: Was he setting up on the bed when you shot him?

WILLIAMS: He was on the bed when I shot him. I'd say it like that.

BARBEE: And he fell over?

WILLIAMS: Uh-hu. I said "Lorda mercy" and I went and got me a girl to call an ambulance.

BARBEE: That girl, you mean Sherry Thaxton?

WILLIAMS: That's right. And I said "I shot him". I said "I don't know what happened". Sure did.

. . .

BARBEE: Let me ask you this. Were you all arguing? Was there some?

WILLIAMS: No. I say, I went to the bathroom, come back, but I didn't see him and I went to lay down on the chair. And then I see him go to his room and that was it. And I don't know nothing else.

. . .

BARBEE: Okay. You were setting in the living room then when he came in to go to the bedroom, is that right?

WILLIAMS: Uh-hu.

BARBEE: Did he say anything to you, do you remember?

WILLIAMS: No. A little bit. Not too much. He wasn't arguing too much.

. . .

BARBEE: He must have said something to you to make you mad.

WILLIAMS: He was right quiet and nothing after I did that. Said something.

BARBEE: You remember shooting him, right?

WILLIAMS: Yeah, I sure did it.

BARBEE: You don't remember anything right before you shot him?

WILLIAMS: I said I'm sorry, I'm sorry. And then I went over and got the gun. Sure did.

BARBEE: Did he say anything to you after you shot him?

WILLIAMS: Now, you know, how people do in arguing.

. . .

BARBEE: So, well, really don't know what the argument was about.

WILLIAMS: I don't know. I said . . .

THAXTON: He wants to know what you all had to argue about.

WILLIAMS: I don't know. Like I said, I get ------- a minute and that was it. I get nervous and upset and . . .

BARBEE: Just got mad.

BROWNING: What did you get nervous and upset about?

WILLIAMS: I don't know. I don't like to argue. Say it like that.

BARBEE: What were you arguing about, that's what we need to know.

WILLIAMS: Well, I say it like this here, I don't know. I say it like that.

BARBEE: Well, let me ask you this . . .

WILLIAMS: I get hot and he gets hot too. But you know I'm just nothing but me. And he ain't never what he is.

BARBEE: Well, just before you shot him, was he going to hurt you or?

WILLIAMS: Hu-hu-hu.

BARBEE: He didn't try to hurt you?

WILLIAMS: Hu-hu. Hu-hu. Sure didn't. Everybody know I did it.

BARBEE: He didn't have a weapon or anything did he?

WILLIAMS: Hu-hu. Sure didn't. That was it.

BARBEE: Well. Did you think about shooting him before you went and got the gun and shot him?

WILLIAMS: Hu-hu. Sure didn't.

BARBEE: Didn't think about?

WILLIAMS: If I did . . . hu-hu, ain't going to think about nothing like that.

BARBEE: I know, but can you remember what you were thinking then? Can you remember whether or not you was thinking about going and getting the gun?

WILLIAMS: I don't know, I say it like that. I just, I don't know. I'm just nervous, like I said, I'm just, get hot and I'm just what I am, you know. When that happens, in a minute, that's it. Say it like me. I ain't never shot nobody before then.

. . .

BARBEE: Did he want to argue with you? Tonight?

WILLIAMS: He just, you know, he would start, and he put his pants on everything, pajamas, I say it like that. And I don't know, a thing like that, looked like I got worried and got crazy, I say it like that.

BARBEE: Did you really have a reason for shooting him?

WILLIAMS: No. Nope, sure didn't.

BARBEE: Did the idea just pop in your head?

WILLIAMS: I don't know what happened, sure don't.

BROWNING: Was the gun loaded?

WILLIAMS: I don't know either.

. . . .

Defendant's mental and physical condition was the subject of extensive testimony. Dr. Shelley Earp testified that she had been treating defendant since 1975 and knew defendant reasonably well. Dr. Earp's first contact with defendant was at a time when defendant was in intensive care due to kidney infection, complications with diabetes resulting in cardiac arrest, and severe pneumonia. After release from the hospital, defendant continued to see Dr. Earp for treatment of her diabetes. Dr. Earp testified that she knew that defendant already had permanent brain damage as a result of injuries sustained in an auto accident. She believed that defendant's mental capacity was further impaired by her 1975 cardiac arrest. Dr. Earp testified that although defendant can carry on a conversation, her brain damage is manifested by speech-related impairments and poor memory. In prescribing diabetic treatment for defendant, Dr. Earp relied on information from third persons because defendant was unable to give reliable information. Dr. Earp does not allow defendant to administer her own insulin but sends instructions to a neighbor of defendant's to assure that defendant receives her prescribed treatment. Having heard Detective Barbee testify as to his explaining to defendant her *Miranda* rights, Dr. Earp was of the opinion that defendant could only understand those rights if "extraordinary care" and "a tremendous amount of time" were given defendant in a supportive atmosphere. It was Dr. Earp's opinion that defendant did not understand her rights when she made the statement to Barbee.

Dr. Martha Wingfield, a neurologist, testified that she examined defendant at Dix Hospital following her arrest. Defendant was not able to tell Dr. Wingfield her medical history. Although defendant was generally oriented as to her physical environment,

she did not know why she was at Dix Hospital. Dr. Wingfield found that defendant had difficulty in performing in response to two-part commands, and she was of the opinion that defendant's brain damage resulted in impaired ability to make judgments and inability to handle pressure. It was Dr. Wingfield's opinion that defendant was not able to understand her *Miranda* rights as they were given to her.

Dr. Joseph Moylan, a neuropsychologist, gave defendant a battery of tests at Dr. Wingfield's request. Dr. Moylan testified that defendant had an I.Q. of 56, that her reading ability was below third grade level, that her memory was poor and that defendant was weak in ability to respond to questions. He was of the opinion that defendant could not comprehend her rights as they are explained in the *Miranda* form.

Dr. Billy Royal, a forensic psychiatrist, saw defendant periodically for six weeks for the purpose of evaluating her competence to stand trial. Dr. Royal found defendant to be suffering from hypertension and chronic brain syndrome, or permanent brain damage. He testified that defendant's chronic brain syndrome results in confusion, speech and comprehension impairment and stilted, repetitive responses to questions. He further testified that older people with chronic brain syndrome experience confusion, disorientation and lapses in memory at night. He found that defendant had little memory of the day of her arrest, and that she had no memory of the police interrogation or of any *Miranda*-type material, except that she remembered being fingerprinted. Dr. Royal explained that defendant's condition was a product of brain damage, not mental illness. He believed defendant to be "borderline" competent to stand trial if given the proper attention, care, and time. Dr. Royal was of the opinion that, although she could distinguish right from wrong at the times he interviewed her, defendant did not know right from wrong the night of the shooting.

Detective Barbee testified that defendant expressed concern about her medication during her interrogation, but that she could not remember when she had last received it. Barbee stated that he found some of defendant's answers to be unresponsive and that at times during his interview with defendant he became convinced that she was acting without understanding the consequences of her cooperation.

The trial judge made findings of fact which included the following:

> 6. Defendant is a fifty-seven (57) years (sic) old black female who, despite having a ninth-grade education, now has an intelligence quotient of fifty-six (56), and the ability to read at slightly below third-grade level.
>
> 7. Defendant suffers from diabetes, hypertension, and chronic brain syndrome. She is not and has not been mentally ill. In 1969 she was hospitalized when blood pressure reached 240 over 140. She was again hospitalized in 1971 following an auto accident, when she suffered subdural hematoma and her cranial arch was surgically opened to relieve pressure on her brain. She was again hospitalized in 1975 when she suffered cardiac arrest.
>
> 8. The left frontal lobe of Defendant's brain is damaged in consequence of the infirmities described in 7. above, and her ability to comprehend language, to remember, to reason, and to react appropriately are substantially limited. She requires some constant supervision, but is ordinarily oriented as to time and circumstances, and, when allowance is made for her limitations, is able to understand the nature and object of the criminal proceeding in this case, to understand her own involvement, and to assist counsel in her defense.
>
> 9. Defendant lacks the mental capacity fully to understand her Constitutional Rights as set forth in the form admitted as State's Exhibit No. 1, or fully to appreciate the consequences of a waiver of such rights. Her right to refuse to make a statement is within her capacity to comprehend. After being advised of her right to remain silent and the other rights shown in State's Exhibit No. 1, she understood that she had the right to remain silent, and she freely and voluntarily chose to make a statement. Viewed in their totality, the circumstances under which the Defendant was interrogated were not oppressive or coercive.

Based on its findings of fact, the court concluded that defendant's statement " . . . was made freely, voluntarily, and understandingly, and is admissible in evidence against her, and the motion to suppress should be denied."

[1] As a general rule, findings of fact on *voir dire* based on competent evidence are conclusive on appeal. *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976); *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972). Conclusions of law made by a trial court are always reviewable in the appellate courts. *State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511 (1968); *State v. Conyers*, 267 N.C. 618, 148 S.E. 2d 569 (1966). In the case at hand, the conclusion reached by the trial court that defendant "understandingly" waived her *Miranda* rights is not supported by findings of fact. In fact, the pertinent finding states that " . . . [d]efendant lacks the mental capacity . . . fully to appreciate the consequences of a waiver of such rights." The court's finding that " . . . she understood that she had a right to remain silent, and she freely and voluntarily chose to make a statement" establishes only that the court found that defendant's waiver was free and voluntary, not that it was a knowing one.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), the United States Supreme Court held that for a statement of a defendant which is the product of an uncounseled custodial interrogation to be offered as evidence against the defendant at trial the State must first meet a heavy burden of demonstrating that the defendant knowingly and intelligently waived his rights to remain silent and to have an attorney present. Our courts have consistently applied the rule that in relinquishing these Fifth and Sixth Amendment rights the defendant must do so voluntarily, with an understanding of the potential consequences of talking. *See State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State v. Pruitt*, 286 N.C. 442, 212 S.E. 2d 92 (1975).

In *Davis v. North Carolina*, 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895 (1966), decided one week after *Miranda*, the United States Supreme Court reiterated the rule that the question of voluntariness must be answered after an examination of a totality of the circumstances reflected in the record. *See also Blackburn v. Alabama*, 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242 (1960); *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed. 2d 246 (1957). In adherence to the *Davis* rule, we must consider the entire record in reviewing the trial court's decision concerning defendant's volition and understanding in waiving her constitutionally protected

rights. *See State v. Pruitt*, supra; *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970); *State v. Spence*, 36 N.C. App. 627, 244 S.E. 2d 442, *disc. rev. denied*, 295 N.C. 556, 248 S.E. 2d 734 (1978).

In *State v. Ross*, 297 N.C. 137, 254 S.E. 2d 10 (1979), the evidence showed that defendant had a history of mental illness and that he "looked" and acted strange around the time of his confession. The interrogating officer testified that defendant appeared to be comfortable and answered questions logically. Upon reviewing the entire record, our Supreme Court reversed defendant's conviction because "in all probability" defendant was mentally incompetent at the time of his confession.

State v. Spence, supra, involved facts similar to the present case. In *Spence*, defendant was mentally retarded, and his police interviewer concluded that defendant did not fully understand his *Miranda* rights in spite of the fact that he had signed the waiver of rights form. This Court granted defendant a new trial based on its holding that no knowing and intelligent waiver had been shown.

Upon reviewing the evidence before the court on the motion to suppress, we hold that the State failed to meet its heavy burden to affirmatively demonstrate a knowing and intelligent waiver by defendant. To deny defendant's motion to suppress was error.

[2] The State contends that if it was error to deny defendant's motion to suppress, such error was harmless because defendant made other voluntary statements describing the shooting. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). In *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969), the Supreme Court found admission of defendant's unconstitutionally obtained confession to be harmless error. In *Harrington*, the Court held that since the record contained "overwhelming" untainted evidence to support the conviction, the *Chapman* rule should not result in a new trial.

North Carolina courts followed the *Chapman* rule. *See State v. Cox*, *State v. Ward* and *State v. Gary*, 281 N.C. 275, 188 S.E. 2d

356 (1972) (harmless error beyond a reasonable doubt to admit tainted confession because of a mass of untainted evidence of guilt); *State v. Brinson*, 277 N.C. 286, 177 S.E. 2d 398 (1970) (harmless error to admit co-defendant's confession where other evidence against defendant was overwhelming). In 1977 the General Assembly codified the rule by enacting G.S. 15A-1443(b) as follows:

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

In the present case, the only untainted evidence against defendant consists of her statements to Ms. Thaxton and Officer Allen that she shot the decedent. Taken in light of the surrounding circumstances, a jury might reasonably infer from these statements that the shooting was not intentional. The custodial statement of defendant is evidence that defendant was motivated to shoot the decedent by an argument and that defendant was not acting in self defense. On the facts of this case, we cannot say that the error in admitting defendant's custodial statements as evidence of guilt was harmless beyond a reasonable doubt.

Additionally, we note that the trial court made no findings of fact concerning defendant's waiver of her right to counsel. The Supreme Court, in *State v. Biggs*, supra, held that where *voir dire* evidence regarding waiver of counsel is in conflict, the trial judge *must* resolve the dispute and make an express finding as to whether the defendant knowingly and intelligently waived his right to have counsel present during questioning. In the present case, it was error to fail to make such a finding.

For the court's error in admitting defendant's custodial statements, defendant must have a

New trial.

Judges HEDRICK and ARNOLD concur.

WILKES COMPUTER SERVICES, INC. v. AETNA CASUALTY & SURETY COMPANY

No. 8123SC1210

(Filed 5 October 1982)

1. Insurance § 136; Evidence § 33.1— action on fire policy—letter as hearsay—admission not prejudicial error

Even if a letter quoting prices for the replacement of computer equipment destroyed in a fire was hearsay, the admission of the letter was not prejudicial error in this nonjury trial where the trial court stated that the letter was being admitted only to show the source of the figures a witness placed on a proof of loss but not as evidence of the damaged equipment, and where the trial court's decision was supported by other competent evidence of the value of plaintiff's destroyed equipment.

2. Insurance § 136— action on fire policy—subsequent tax listing irrelevant

The contents of a tax listing of plaintiff's personal property over six months after a fire loss was not relevant to the value of plaintiff's property at the time of the fire.

3. Evidence § 48— qualification of expert

The trial court did not err in finding that a sales representative of a computer dealer was qualified to give his opinion as to the value of plaintiff's computer equipment which was destroyed in a fire, although the record did disclose some inconsistencies as to whether such values were related to new or used equipment.

4. Insurance § 136— action on fire policy—value of lost equipment—conversations with advertisers of used equipment—incompetency

In an action to recover the value of computer equipment destroyed in a fire in which the trial court permitted an expert witness to testify that he considered the values of specific used computer equipment advertised or offered to others in arriving at his estimate of the value of plaintiff's equipment, testimony by the witness attempting to establish the condition of the advertised equipment by relating conversations with the owners of the equipment was incompetent and was properly excluded.

5. Evidence § 29.1— letter not authenticated

The trial court properly excluded a letter which had not been properly authenticated.

6. Insurance § 136— action on fire policy—sufficiency of evidence

The evidence in plaintiff's action against defendant insurer to recover the value of computer equipment destroyed in a fire was sufficient to overcome defendant's motions to dismiss.

7. Insurance § 136— action on fire policy—value of lost equipment—findings by court—supporting evidence

In plaintiff's action against defendant insurer to recover the value of computer equipment destroyed in a fire, the testimony of two experts supported the trial court's findings as to the list price and actual cash value of the destroyed equipment.

8. Contracts § 29.5; Interest § 2— interest on recovery under insurance contract

The trial court properly allowed interest on plaintiff's recovery against defendant insurer for computer equipment destroyed in a fire from the date defendant breached its obligation to pay plaintiff's claim within sixty days after the filing of a proof of loss.

APPEAL by defendant from *Long, Judge.* Judgment entered 17 June 1981 in Superior Court, WILKES County. Heard in the Court of Appeals 2 September 1982.

Plaintiff brought this action to recover the value of computer equipment destroyed in a fire on 26 June 1979. The parties waived jury trial and the case was heard by Judge Long without a jury. Both plaintiff and defendant offered evidence as to the value of the property destroyed. At the close of the trial, Judge Long entered judgment for plaintiff, from which judgment defendant has appealed.

W. G. Mitchell, for plaintiff-appellee.

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

WELLS, Judge.

Defendant brings forward 32 assignments of error, grouped in 18 questions. Twelve of defendant's arguments relate to the admission or exclusion of evidence during the trial; one argument relates to the denial of defendant's motion to dismiss; four arguments relate to the trial court's findings of fact; and one argument relates to the trial court's award of interest on plaintiff's recovery of damages. We shall follow these groupings in our discussion.

I. The Rulings On Evidence.

Bobby J. Toliver testified for plaintiff. At the time of plaintiff's loss, Toliver was the treasurer and manager of plaintiff's

business. Following the fire, he filed plaintiff's proof of loss. He was allowed to testify as to his sources for the values (prices) he used in arriving at the specific claims entered on the proof of loss; that the prices used by him were furnished to him by Sun Data, Incorporated and that the prices were for equipment identical to that destroyed in the fire. Toliver testified that in addition to the Sun Data prices, he used prices furnished him by Mr. David Turner of Memorex Corporation. Plaintiff was allowed to introduce, over defendant's objections, exhibits consisting of letters from Mr. Dan Hendrix of Sun Data and Mr. Turner of Memorex, quoting prices for equipment to replace plaintiff's destroyed equipment. Plaintiff attempted to qualify Toliver to give opinion testimony as to the value of the destroyed equipment. While the trial court refused to recognize Toliver as an expert witness, it allowed him to testify as to the prices received from Sun Data and Memorex. The court stated that such evidence was being allowed only to show the sources relied on in preparing the proof of loss.

[1] Defendant argues that the trial court erred in restricting its *voir dire* examination of Toliver with respect to his expertise in valuation of computer equipment. Since the trial court refused to allow Toliver to give opinion evidence on valuation, plaintiff could not have been prejudiced by the trial court's ruling on *voir dire.* Defendant also argues that the Sun Data letter was hearsay and that it was error for the trial court to admit it into evidence and allow Toliver to refer to it. In a non-jury trial, in the absence of words or conduct indicating otherwise, the presumption is that the trial judge disregarded incompetent evidence in making his decision. *City of Statesville v. Bowles,* 278 N.C. 497, 180 S.E. 2d 111 (1971). In admitting the Sun Data letter, the trial court stated: " . . . I will admit it to show the source of the figures he may have placed on the proof of loss but not as evidence of the value of the damaged equipment". There was competent evidence in the trial—from David Turner—as to the value of plaintiff's destroyed equipment supporting the trial court's decision. Assuming *arguendo* that the Sun Data letter was hearsay and therefore not competent, its admission under these circumstances does not constitute error sufficient to award a new trial. These assignments are overruled.

[2] Defendant attempted to cross-examine Toliver as to the contents of a tax listing of plaintiff's personal property, completed by Toliver and filed in January, 1980. Over plaintiff's objection, the trial court refused to allow Toliver to respond to defendant's questions as to the contents of the listing. Before questioning Toliver as to the 1980 listing, defendant did not lay any foundation to show that plaintiff's property at the time of the fire loss in June, 1979 was the same as or similar to plaintiff's property listed for taxes in January, 1980. The value of plaintiff's property listed for taxes over six months after the fire loss lacked relevancy as to its value at the time of the loss, and such evidence was therefore properly excluded. *See generally,* 1 Stansbury's N.C. Evidence, §§ 81, 89 and 100 (Brandis 2d Revision 1982). This assignment is overruled.

[3] David Turner testified for plaintiff as to the value of plaintiff's computer equipment destroyed in the fire. Turner testified that he was a sales representative for Sun Data, a computer dealer which buys and re-sells IBM Computer equipment. Before being employed by Sun Data, Turner was employed as a sales representative for Memorex Corporation, a competitor of IBM in computer equipment. He testified that he was experienced and knowledgeable in sales of new and used computer equipment similar to plaintiff's destroyed equipment. Defendant argues that the trial court erred in ruling that Mr. Turner was qualified to give expert opinion testimony as to the value of plaintiff's equipment destroyed in the fire. Although the record discloses some confusing and inconsistent aspects of Turner's background, experience, information, and knowledge as to the value of plaintiff's destroyed equipment, especially in the context of whether such values were related to new or used equipment, we are persuaded that Turner's knowledge, gained from experience and information relevant to these matters sufficiently qualified him to give his opinion as to the value of plaintiff's equipment. *See generally* 1 Stansbury's, § 128. Defendant also contends that the trial court erred in "coaching" Turner as to Turner's definition of "fair market value" as that term related to plaintiff's loss. While the trial court did rather extensively examine Mr. Turner as to the question of value, it appears that such questions reflect only the trial court's efforts to clarify a hotly disputed aspect of the evidence. Taken as a whole, the court's questions do not suggest any lack of judicial impartiality. These assignments are overruled.

Defendant also contends that the trial court erred in allowing Turner to "testify" from a letter not prepared by him in that such testimony was hearsay evidence. Turner was asked on direct examination to refer to the letter and give his opinion as to the reasonable market value or actual cash value of various items of plaintiff's equipment listed in an attachment to the letter from Sun Data. In each instance, Turner stated his opinion of value to be the prices shown in the attachment to the letter. While the manner in which the questions were put may have constituted leading the witness, Turner made it clear in his responses to questions from the bench that his answers were his own opinion. This assignment is overruled.

Defendant called as a witness Mr. Gene Atwell Brookshire, the Assistant Tax Supervisor for Wilkes County. Through Mr. Brookshire, defendant attempted to introduce plaintiff's 1980 personal property tax listing. The trial court sustained plaintiff's objection to this evidence. Defendant contends this was error. We do not agree. Defendant laid no foundation to show that plaintiff's property tax listing for 1980 in any way reflected the identity or value of plaintiff's property destroyed in the fire the previous June. Since there was no showing that the evidence was relevant to the issues in this case it was properly excluded. This assignment is overruled.

[4] Defendant called as a witness Mr. S. Paul Blumenthal, the Senior Vice-President of American Computer Group, a company which specializes in valuation and appraisal of all kinds of computer equipment, on a nationwide basis. Mr. Blumenthal had extensive experience in valuing and appraising new and used computer equipment, and he was recognized as an expert witness in such matters. Mr. Blumenthal testified that in his opinion the fair market value of plaintiff's destroyed equipment was $41,800.00. Through Mr. Blumenthal, defendant then attempted to show values of specific pieces of used computer equipment advertised or offered to others. The trial court sustained plaintiff's objections to this evidence, but allowed Mr. Blumenthal to testify that he considered such information in arriving at his estimate of value of plaintiff's equipment. Defendant contends the trial court erred. The witness was asked to establish the condition of the advertised equipment by relating conversations with the owners of the the equipment. Such testimony was obviously not compe-

tent and was properly excluded. This assignment is without merit and is overruled.

[5] Defendant called as a witness Mr. George Clear, claims superintendent for defendant. Through Mr. Clear, defendant attempted to elicit testimony about a letter from Mr. Mark Wautlet, a marketing representative for Sun Data, listing certain items of computer equipment, for a price of $45,000.00. Defendant contends this was error. We do not agree. The letter was not authenticated and was therefore properly excluded. *See* 2 Stansbury's, §§ 195, 236. This assignment is overruled.

II. Defendant's Motion to Dismiss.

[6] Defendant's motion to dismiss made at the close of the plaintiff's evidence and renewed at the close of all the evidence was denied by the trial court. Defendant contends that there was no competent evidence to support plaintiff's allegations as to damages. We disagree. The testimony of Toliver and Turner was competent on this issue and it supported plaintiff's claim. This assignment is overruled.

III. The Trial Court's Findings Of Fact.

[7] Defendant contends that there was no evidence to support the trial court's findings of fact that plaintiff offered evidence tending to show that the actual cash value of its computer equipment destroyed in the fire was in excess of $100,000.00, that the list price of plaintiff's computer equipment as of August, 1979 was $217,073.00, and that the actual cash value of plaintiff's destroyed equipment was $75,000.00. Under cross-examination, Mr. Blumenthal testified that while his opinion of fair market value for plaintiff's destroyed equipment was $41,800.00, the list price was $127,073.00. The finding as to list price is an apparent numerical transposition and is harmless. The testimony of Blumenthal and Turner supports the trial court's finding that the actual cash value of plaintiff's destroyed equipment was in the amount of $75,000.00. These assignments are overruled.

IV. The Award Of Interest.

[8] Defendant contends that the trial court erred in awarding interest on plaintiff's recovery retroactive to 24 September 1979. The trial court concluded that plaintiff filed its proof of loss on 24

July 1979 and that the policy of insurance provided for payment within 60 days of the filing of proof of loss. These "conclusions" actually constitute findings of fact as to the dates involved and, taken together with the finding that defendant declined to pay the loss on 24 September 1979, amount to a conclusion that defendant breached its obligation to plaintiff 60 days after the filing of the proof of loss. The rule in such cases is that when recovery is had for breach of contract and the amount of the recovery is ascertained from the contract itself or from other relevant evidence, interest should be added to the recovery from the date of breach. *See Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E. 2d 599 (1977); *Rose v. Materials Co.*, 282 N.C. 643, 194 S.E. 2d 521 (1973); *General Metals v. Mfg. Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963); *Brown v. Scism*, 50 N.C. App. 619, 274 S.E. 2d 897, *rev. denied*, 302 N.C. 396, 276 S.E. 2d 919 (1981); *Noland Co. v. Poovey*, 58 N.C. App. 800, 295 S.E. 2d 238 (1982). The general rule of allowing interest from the time of breach has been followed in decisions resolving actions on insurance policies. *See Ingold v. Assurance Co.*, 230 N.C. 142, 52 S.E. 2d 366, 8 A.L.R. 2d 1439 (1949); *Bank v. Insurance Co.*, 209 N.C. 17, 182 S.E. 702 (1935); *see also* Annot. 8 A.L.R. 2d 1445, 5 A.L.R. 4th 126; Hightower's N.C. Law of Damages, § 8-2 (1981). The trial court properly allowed interest on plaintiff's recovery from the date defendant breached its obligation to pay plaintiff's claim. This assignment is overruled.

For the reasons stated, we find no error and the judgment of the trial court is

Affirmed.

Judges HEDRICK and ARNOLD concur.

In re Medlin

IN THE MATTER OF: MILDRED VOELCKER MEDLIN, RESPONDENT

No. 829DC50

(Filed 5 October 1982)

Insane Persons § 1.2— involuntary commitment of mentally ill—competent evidence supporting finding of dangerousness to self

There was competent evidence to support a finding that respondent was "dangerous to herself" as defined by G.S. § 122-58.2(1) where the records revealed that at the time of the commitment hearing the respondent was suffering from psychotic depression and paranoid schizophrenia; that she had been unemployed for almost one year, having left her job because she felt she was being harassed by a married man at work; that she had not attempted to seek other employment; that respondent had been living in her car for two weeks prior to the hearing and it appeared that the only sustenance which respondent received was that which her daughter brought to the car for her; and that her daughter feared that respondent would die of carbon monoxide poisoning if she were to continue to live in her car through the rest of the winter months.

APPEAL by respondent from *Senter, Judge.* Order entered 29 October 1981 in District Court, GRANVILLE County. Heard in the Court of Appeals 1 September 1982.

On 24 October 1981 Charlotte Medlin Kilpatrick initiated proceedings for the involuntary commitment of her mother, Mildred Voelcker Medlin, pursuant to Ch. 122, Article 5A, of the North Carolina General Statutes. She alleged respondent was a mentally ill person who was dangerous to herself. On the basis of this petition, a magistrate ordered that respondent be taken into custody in order that she might be examined by a qualified physician.

Respondent was then examined by Dr. Lillian Trexler in Chapel Hill, North Carolina. Dr. Trexler determined that respondent was mentally ill and potentially dangerous to herself or others.

Respondent was next transferred to John Umstead Hospital where she was examined by Dr. M. Chatterjee and Dr. Henry B. Burton. Both physicians found respondent to be mentally ill and potentially dangerous to herself or others. Dr. M. Chatterjee diagnosed respondent as suffering from psychotic depression, stating that she talked constantly, in a loose rambling style, was suspicious, and that she had not been eating well. Dr. Henry Burton diagnosed respondent as suffering from paranoid schizophrenia, observing that her speech was rapid, excessive and

often irrelevant, her affect was blunted and she described persecutory ideas. He also stated that she believed others are "harming" her.

The matter was heard at John Umstead Hospital, Granville County, on 29 October 1981, respondent being present and represented by counsel. At the hearing Charlotte Kilpatrick, respondent's daughter, testified that respondent had quit her job approximately one year ago and had not been employed since that time. She testified that respondent was living with her sister, but that for the last two weeks she had been living in her car, in spite of the cold weather. She also stated that respondent's explanations were irrational; that respondent said she moved from her sister's house to her own car because her sister would not allow her to smoke in the house. She testified that respondent felt people were harassing her and that, in her opinion, respondent was incapable of caring or providing for herself in her present state. She stated that respondent had refused to seek treatment on her own, but had been hospitalized at John Umstead Hospital for a period in 1967.

Respondent testified in her own behalf and denied the allegations. She felt her only problem was that she had neither money nor a job. She stated that the only reason she lived in her car was because she had nowhere else to go after she and her sister argued about smoking in the house. She stated that although the car was cold and uncomfortable, she was more comfortable in the car than in the house after her disagreement with her sister. Respondent testified that her sister had not invited her back into the house except occasionally for some coffee or food and that she had refused those invitations. Respondent felt her sister was trying to tell her that she did not want respondent in her home. Respondent acknowledged that there were problems between her daughters and herself, and that she was also having problems with a disc jockey who discussed respondent's problems on the air. She related that she had quit her job because a married man had been harassing her, and that her brother-in-law had also been sexually harassing her. She stated that people were trying to run and discipline her life and that she had recently been experiencing quite a bit of stress. She stated that she could take care of herself and was not dangerous to herself or to others. Respondent also expressed a willingness to seek counselling at a local mental

health center if released. She testified that she had been hospitalized previously for depression.

At the conclusion of the hearing, the court made the following findings of fact:

> The patient (is) (~~is not~~) (mentally ill) (~~inebriate~~) (~~mentally retarded with an accompanying behavior disorder~~), as defined in N.C.G.S. 122-36, suffering with a mental disorder, diagnosed as Psychotic Depression—Paranoid Schizophrenia.
>
> (x) The patient is dangerous to himself in that:
>
> (x) Within the recent past, the patient has acted in such a manner as to evidence 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, there is a reasonable probability of serious debilitation to the patient within the near future unless adequate treatment is afforded the patient in that in her present mental condition she is unable to provide for her basic needs of food, clothing and shelter. She is unemployed and she presently sleeps in her car. Without the proper basic needs her mental and physical health would deteriorate substantially.

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 John Umstead Hospital or Veterans Administration Hospital for a period of thirty days or until such time as she is discharged according to law. From this ruling, the respondent appealed.

Attorney General Edmisten by Associate Attorney Wilson Hayman for the State.

Special Counsel for the Mentally Ill Stephen D. Kaylor for the respondent.

MARTIN (Robert M.), Judge.

N.C. Gen. Stat. § 122-58.7(i) (1981) requires as a condition to a valid commitment order that the district court find two distinct

facts by clear, cogent, and convincing evidence. The court must first determine that the respondent is mentally ill or inebriate. Secondly, the court must find that the respondent is dangerous to herself or others.

The trier of fact alone must determine whether the evidence presented is clear, cogent and convincing. Our only function on appeal is 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).

Respondent does not argue that there is insufficient evidence to support the court's finding on the issue of mental illness. She does contend that there was no competent evidence supporting a finding of dangerousness to self, either in the facts recorded in the court's order or in the record.

The phrase "dangerous to herself" is defined by N.C. Gen. Stat. § 122-58.2(1) (1981) as follows:

1. The person has acted in such manner as to evidence:

   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 establishes a two prong test for dangerousness to self. The first prong deals with self-care ability regarding one's daily affairs. The second prong requires a specific finding of a probability of serious physical debilitation resulting

from the more general finding of lack of self-caring ability. The facts supporting this danger must be recorded by the trial court. *In re Caver*, 40 N.C. App. 264, 252 S.E. 2d 284 (1979).

We think it is clear from the facts presented in the record and those recorded in the court order that, because of her mental instability, the respondent was unable to tend to her basic daily needs and that as a result there was a probability of serious physical debilitation within the near future.

The record reveals that at the time of the commitment hearing the respondent had been unemployed for almost one year, having left her job because she felt she was being harassed by a married man at work. There was no evidence presented that she had thereafter attempted to seek other employment. The respondent had been living in her car for two weeks prior to the hearing and it appeared that the only sustenance which respondent received was that which her daughter brought to the car for her. The record also revealed the fear of respondent's daughter that respondent would die of carbon monoxide poisoning if she were to continue to live in her car through the rest of the winter months.

This court has previously recognized two purposes for our State's involuntary commitment statute. *In re Doty*, 38 N.C. App. 233, 247 S.E. 2d 628 (1978). Those two goals are 1) to allow temporary withdrawal from society of those who may be dangerous and 2) to provide treatment. We feel that the latter purpose was served by respondent's involuntary commitment.

While we agree that the State cannot commit to a mental hospital any unemployed person who has no home, we feel that such is not the case here. As the court pointed out in *In re Lee*, 35 N.C. App. 655, 242 S.E. 2d 211 (1978), "G.S. 122-58.2(1) provides that as used in Article 5A (Involuntary Commitment) '[t]he phrase 'dangerous to himself' includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter, ...' " 35 N.C. App. at 657, 242 S.E. 2d at 212-13. In that case the court upheld the commitment order on the basis that respondent could not be relied upon to take necessary medication and did not have enough income to "cover the costs of maintaining shelter for respondent and providing him with food, clothing, fuel and other basic needs." Id. The same reasoning can be applied to the case at

hand, since respondent cannot be relied upon to maintain the proper diet necessary to her welfare and she has no income to cover the expense of food, clothing, fuel or shelter. This court has previously indicated that failure of respondent to properly care for her medical needs, diet, grooming and general affairs would meet the required test of dangerousness to self in G.S. 122-58.7(i). See *In re Holt*, 54 N.C. App. 352, 353, 283 S.E. 2d 413, 414 (1981).

Without treatment respondent's death or injury was likely to occur by uneventful slow degrees or by misadventure. Since the statute does not require a showing that violent danger is threatened by respondent to herself, we feel that the evidence presented adequately supports a finding that there is reasonable probability of serious physical debilitation to respondent within the near future unless she receives adequate treatment.

The order appealed from is

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. RALPH CAMP

No. 8229SC34

(Filed 5 October 1982)

1. Telecommunications § 5— harassing telephone calls—sufficiency of warrant

A warrant charging that defendant did "on more than 500 times call the Polk County Jail and the Polk County Sheriff's Department and . . . misused the telephone to abuse, annoy, threaten, embarrass or harass employees at the above office by means of repeated calls to that number" sufficiently charged defendant with making harassing telephone calls to "another" in violation of G.S. 14-196(a)(3).

2. Constitutional Law § 18; Telecommunications § 5— repeated harassing telephone calls—constitutionality of statute prohibiting

The statute making it unlawful to telephone another repeatedly "for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number," G.S. 14-196(3), is not unconstitutionally overbroad or vague and did not prohibit constitutionally protected speech when applied to a defendant who made over 500 telephone calls to the sheriff's

department during a two-month period in which he cursed all of the deputies, said that if the deputies came to arrest him he was going to kill or shoot them, said he was going to shoot the blue lights off the patrol cars, and called the sheriff and deputies names.

3. **Telecommunications § 5— repeated annoying or harassing calls—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of making repeated annoying or harassing telephone calls in violation of G.S. 14-196(a)(3) where it tended to show that defendant made over 500 calls to the sheriff's department during a two-month period in which he cursed all the deputies, said that if the deputies came to arrest him he was going to kill or shoot them, said he was going to shoot the blue lights off the patrol cars, and called the sheriff and deputies names; defendant was told to stop calling because he was tying up the sheriff's department lines and that a warrant would be issued if he did not stop calling; and despite these warnings, defendant continued making the same type of telephone calls to the sheriff's department.

4. **Criminal Law § 143.6— revocation of suspended sentence—violation of condition without breach of law**

Where the State's evidence revealed that defendant violated a condition of his suspended sentence that he not "communicate with the Polk County Sheriff's Department by phone without justifiable reason," the court could revoke defendant's suspended sentence regardless of whether it was determined that defendant had made repeated annoying or harassing telephone calls to the sheriff's department in violation of G.S. 14-196(a)(3).

APPEAL by defendant from *Owens, Judge.* Judgment entered 13 August 1981 in Superior Court, POLK County. Heard in the Court of Appeals 1 September 1982.

On 8 January 1981, in case 81CR26, a warrant for arrest was issued in the Polk County District Court charging the defendant with misusing the telephone in violation of G.S. 14-196. The warrant for defendant's arrest was based upon defendant's having made over five hundred telephone calls to the Polk County Sheriff's Department from November 1980 to 8 January 1981. During these calls, defendant cursed all the deputies, said that if the deputies came to arrest him he was going to kill or shoot them, said he was going to shoot the blue lights off the car, called the deputies and sheriff names, and used curse words. One employee answering the phone asked defendant to stop calling and warned that if defendant did not stop calling, he would have a warrant issued and served on defendant. Defendant told the employee to go ahead and do it. Another employee told defendant

he needed to get off the line because someone might have an emergency and need to call in. The employee hung up but defendant called back immediately.

After pleading not guilty to the charge of misusing the telephone, defendant was convicted in the Polk County District Court on 18 February 1981 and appealed from that conviction to superior court. Also on 18 February 1981 in Polk County District Court, defendant's suspended sentence was revoked in case 80CR1200. In that case, defendant had been convicted on 23 July 1980 in the Polk County District Court of aiding and abetting the unlawful sale of beer and had received a suspended sentence for five years upon the following condition, among others: defendant was ordered "not to communicate with the Polk County Sheriff's Department by phone without justifiable reason." Because defendant had violated this condition, the suspended sentence was revoked, and defendant appealed this revocation to superior court.

Defendant was tried for misuse of the telephone at the August 1981 Session of Polk County Superior Court and moved at the close of the evidence that the charges against him be dismissed on the ground that G.S. 14-196 is unconstitutional. This motion was denied. Only the charge of violation of G.S. 14-196(a)(3) was submitted to the jury. The jury returned a verdict of guilty, and judgment was entered sentencing defendant to imprisonment for a minimum and maximum of twelve months. The court also revoked defendant's suspended sentence in case 80CR1200, because defendant had violated the condition that he telephone the Polk County Sheriff's Department for only a justifiable reason. Thus, defendant was sentenced to imprisonment for a minimum and maximum of twelve months to run at the expiration of the sentence in case 80CR1200. Defendant gave notice of appeal from both these judgments.

Attorney General Edmisten, by Assistant Attorney General Tiare B. Smiley, for the state.

Susan S. Craven for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant alleges in his first assignment of error that the warrant charged him with committing acts that did not violate G.S. 14-196(a)(3) which states:

> It shall be unlawful for any person to telephone another repeatedly, whether or not conversation ensues, for the purpose of abusing, annoying, threatening, terrifying or embarrassing any person at the called number.

G.S. 14-196(a)(3). Defendant contends that G.S. 14-196(a)(3) makes it illegal to telephone "another" and that "another" refers to "another person". Defendant argues he was charged with calling the Polk County Sheriff's Department which is not a person and, therefore, G.S. 14-196(a)(3) was not violated. We do not agree. The warrant specifically charged defendant with calling employees of the Polk County Sheriff's Department and Polk County jail. The warrant issued for defendant's arrest stated that "on or about the 8 day of January, 1981, in the county named above [Polk], the defendant named above [Ralph Camp] did unlawfully, willfully, and . . . for at least two months the defendant did, on more than five hundred times call the Polk County Jail and the Polk County Sheriff's Department and . . . misuse the telephone to abuse, annoy, threaten, embarrass or harass employees at the above office by means of repeated calls to that number." The fact that defendant called more than one employee does not make the statute inapplicable, because G.S. 12-3(1) provides that "Every word importing the singular number only shall extend and be applied to several persons or things, as well as to one person or thing; . . . " Therefore, defendant was charged with acts which, at the time they were committed, violated G.S. 14-196(a)(3).

Defendant further contends that the warrant failed to state every essential element of a G.S. 14-196(a)(3) violation as required by G.S. 15A-924(a)(5). The warrant must contain "a plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." G.S. 15A-924(a)(5). A warrant must also " 'allege lucidly and accurately all the essential elements of the offense endeavored to be charged' in order that

the defendant may be duly informed of the charges against him, protected from double jeopardy, and able to prepare for trial, and that the trial court may be able to pronounce an appropriate sentence upon a conviction or plea." *State v. Palmer*, 293 N.C. 633, 639, 239 S.E. 2d 406, 410 (1977).

The essential elements of a G.S. 14-196(a)(3) violation are (1) repeatedly telephoning another person, (2) with the intent or purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number. Both of these elements are set forth in the warrant with sufficient clarity and with supporting facts so that defendant was adequately informed of the charges against him. This assignment of error is overruled.

[2] Defendant next assigns error to the trial court's failure to dismiss the charges against him for the reason that G.S. 14-196 is unconstitutional. While the court in *Radford v. Webb*, 446 F. Supp. 608 (W.D.N.C. 1978), *aff'd.* 596 F. 2d 1205 (4th Cir. 1979), held the first two subdivisions of G.S. 14-196(a) unconstitutional because they prohibited speech that was constitutionally protected, it did not address the constitutionality of subdivisions (3), (4) or (5) of G.S. 14-196(a).

We believe that because G.S. 14-196(a)(3) prohibits conduct rather than speech, it survives constitutional challenge. The court in *Baker v. State*, 16 Ariz. App. 463, 494 P. 2d 68 (1972), reached the same conclusion: that statutes prohibiting annoying telephoning were directed at the conduct of using telephones to annoy, offend, terrify or harass others and not directed at prohibiting the communication of thoughts or ideas.

The court in *People v. Smith*, 89 Misc. 2d 789, 392 N.Y. 2d 968, *cert. den.* 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed. 2d 276 (1977), considered the constitutionality of an annoying telephoning statute similar to G.S. 14-196(a)(3). In *People v. Smith*, supra, defendant telephoned the police department concerning a complaint 27 times during a period of three hours and 20 minutes. Defendant continued calling even though he was informed the matter was civil and not criminal and even though he was told numerous times not to call again because he was tying up the police telephone lines. The court determined the impropriety was in defendant's repetitious telephoning, rather than defendant's complaint.

Defendant in this case was also told to stop calling because he was tying up the sheriff's department lines and, in addition, that a warrant would be issued if he didn't stop calling. Despite the warnings, defendant continued telephoning the sheriff's department, threatening to shoot the blue lights off patrol cars, calling the deputies and sheriff names, using curse words, etc. We disagree with defendant's contention that these calls are protected speech because they resulted from the exercise of his right as an American to criticize public men and measures. The content and number of telephone calls defendant placed support the conclusion that defendant intended to annoy, harass, and threaten employees of the Polk County Sheriff's Department. This conduct is not protected by the First Amendment and, therefore, G.S. 14-196(a)(3) which prohibits such unprotected conduct is not unconstitutionally overbroad.

Defendant's argument that G.S. 14-196(a)(3) is unconstitutionally vague is also without merit because the statute adequately warns of the activity it prohibits. Defendant's conduct clearly falls within the purview of the statute and thus, he may not successfully challenge it for vagueness. See: *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed. 2d 439 (1974); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973).

[3] By his fifth assignment of error defendant contends that the evidence was insufficient as a matter of law to convict him of a violation of G.S. 14-196(a)(3). When reviewing the sufficiency of the evidence upon appeal, we must consider the evidence in the light most favorable to the state. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581 (1975). The state presented sufficient evidence concerning the number and nature of the telephone calls made by defendant from which the jury could find defendant intended to abuse, annoy, threaten, harass or embarrass Polk County Sheriff's Department employees. There is, therefore, no merit to defendant's argument that the evidence was insufficient as a matter of law to convict him.

[4] Defendant argues in his sixth assignment of error that the revocation of his suspended sentence in case 80CR1200 was invalid in that his conviction of violating G.S. 14-196(a)(3) in case 81CR26 was invalid.

One of the conditions of defendant's suspended sentence in case 80CR1200 was that he not "communicate with the Polk County Sheriff's Department by phone without justifiable reason." The state's evidence revealed defendant violated this condition of his suspended sentence. Therefore, the court could revoke defendant's sentence regardless of whether it was determined that defendant had violated G.S. 14-196(a)(3). The only requirement for the revocation of a suspended sentence is that the evidence "reasonably satisfy the judge in the exercise of his sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *State v. Duncan*, 270 N.C. 241, 245, 154 S.E. 2d 53, 57 (1967). This assignment of error is also overruled.

Defendant received a fair trial free from prejudicial error.

No error.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. NEAL FRANCIS AHEARN

No. 821SC78

(Filed 5 October 1982)

1. Criminal Law § 138— fair sentencing act—"serious emotional problems"—aggravating as well as mitigating circumstance

Where defendant pled guilty to voluntary manslaughter and felonious child abuse, the trial court did not err in finding as an aggravating circumstance that: "the defendant fails to control his emotions. He sometimes reacts violently to frustrations he experiences, and the defendant is dangerous to himself and to others and confinement is needed to ensure his safety and the safety of others." The record supported the findings, and the court did not err in considering the aggravating aspect of defendant's inability to control himself as well as the mitigating aspect since a finding of dangerousness is a factor in aggravation in that it is "reasonably related to the purposes of sentencing," one of which is "to protect the public by restraining offenders." G.S. 15A-1340.4(a) and G.S. 15A-1340.3.

2. Criminal Law § 138— felonious child abuse and voluntary manslaughter—sentencing hearing—wrongful consideration of certain aggravating factors

In a felonious child abuse case, the court erred in considering the "heinous offense" factor in aggravation and in considering the "very young or infirmed victim" factor in aggravation, but the court did not err in considering the "dangerousness of defendant" factor in aggravation. In a voluntary manslaughter case, the court erred in considering the "heinous offense" factor in aggravation, but did not err in considering the "very young victim" and "dangerousness of defendant" factors in aggravation. Although some of the aggravating factors found by the court were erroneously considered since such factors were not supported by the evidence, defendant failed to carry his burden of showing grounds for reversal of the sentences imposed by showing he was prejudiced by the court's erroneous findings in aggravation. G.S. 15A-1442(6), G.S. 15A-1443(a), G.S. 15A-1340.4(b), G.S. 14-318.4, and G.S. 15A-1340.4(a)(1).

3. Criminal Law § 146.5— no right to appellate review of guilty plea

A defendant is not entitled to appellate review, as a matter of right, of the court's acceptance of his guilty pleas. G.S. 15A-1444(e).

Judge WELLS dissenting.

APPEAL by defendant from *Small, Judge.* Judgments entered 2 November 1981 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals on 2 September 1982.

Defendant was charged in proper bills of indictment with the second degree murder of Daniel Bright, and with felonious child abuse of the minor Daniel Bright, in violation of G.S. § 14-318.4. Defendant pleaded guilty to voluntary manslaughter and felonious child abuse. The court thereupon conducted a sentencing hearing, after which the court entered "Findings of Factors in Aggravation and Mitigation of Punishment." These findings contained the following "Aggravating Factors:"

6. The offense was especially heinous, atrocious and cruel.

. . .

10. The victim was very young or mentally or physically infirm.

. . .

16. Additional written findings of factors in aggravation.

> The defendant fails to control his emotions. He sometimes reacts violently to frustrations he experiences, and the defendant is dangerous to himself and to others and confinement is needed to ensure his safety and the safety of others.

The court's "Mitigating Factors" are as follows:

> 1. The defendant has no record of criminal convictions.
>
> . . .
>
> 4. The defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but reduced his culpability for the offense.
>
> 5. The defendant's immaturity or his limited mental capacity at the time of commission of the offense reduced his culpability for the offense.
>
> . . .
>
> 12. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrong-doing in connection with the offense to a law enforcement officer.
>
> 13. The defendant has been a person of good character or has had a good reputation in the community in which he lives.

"The Court, after considering evidence and arguments presented at the trial and sentencing hearing, [found] that [the] [f]actors in aggravation outweigh factors in mitigation and that the factors marked above were proven by a preponderance of the evidence." From judgments imposing prison sentences of sixteen years for voluntary manslaughter, and five years for felonious child abuse, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Christopher P. Brewer, for the State.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White, for defendant appellant.

HEDRICK, Judge.

The prison terms imposed by the trial court in the present case exceed the designated presumptive terms prescribed by G.S. § 15A-1340.4(f), and in imposing such terms the trial court was required by G.S. § 15A-1340.4(b) to list the factors he found in aggravation and mitigation. This appeal is pursuant to G.S. § 15A-1444(a1) which states:

> A defendant who has . . . entered a plea of guilty . . . to a felony, is entitled to appeal as a matter of right the issue of whether his sentence is supported by evidence introduced at the trial and sentencing hearing only if the prison term of the sentence exceeds the presumptive term set by G.S. 15A-1340.4, and if the judge was required to make findings as to aggravating or mitigating factors pursuant to this Article.

[1] The first assignment of error brought forward in defendant's brief is that

> [t]he Trial Judge committed prejudicial error in making [the] additional written findings of factors in aggravation that 'The defendant fails to control his emotions. He sometimes reacts violently to frustrations he experiences, and the defendant is dangerous to himself and to others and confinement is needed to ensure his safety and the safety of others.' In the context of this record such findings do not constitute in fact or in law factors in aggravation but to the contrary, such findings constitute in the context of this record factors [in] mitigation, and such findings by the Court and the Court's interpretation thereof are not supported by the evidence, and constitute prejudicial error as a matter of law.

First, the record reveals the following evidence which is sufficient to support the challenged finding: defendant has "serious emotional problems" and "is extremely disorganized" and thereby "literally loses control of his ability to reason and understand what he is doing;" there are episodes during which he is dangerous to himself and to others; he lacks internal controls and hence is capable of saying or doing things he does not mean, and even without his knowing to whom he was doing them; and he is capable of becoming so caught up in an act as to inflict damage on someone without knowing how much damage he was doing and without knowing when to stop.

Defendant also argues that this finding by the court cannot properly be considered as an aggravating factor in the balancing process involved in G.S. § 15A-1340.4 since the finding deals with his inability to control himself, a factor which was found to be a mitigating circumstance in the court's "Mitigating Factors" numbered 4 and 5, set out above. It is true that defendant's inability to control himself was considered as a mitigating factor when the court found he suffered from a culpability-reducing mental or physical condition and a culpability-reducing immaturing or limited mental capacity. Although there may be mitigating aspects about one's inability to control oneself, there may also be aggravating aspects of such a disorder, and the court did not err in also considering the aggravating aspect of defendant's inability to control himself, to wit, the fact that it rendered him "dangerous to himself and to others" and in need of "confinement . . . to ensure his safety and the safety of others." This finding of dangerousness is a factor in aggravation since it is "reasonably related to the purposes of sentencing," *see* G.S. § 15A-1340.4(a), one of which is "to protect the public by restraining offenders." G.S. § 15A-1340.3. This assignment of error is overruled.

[2] In his next three assignments of error, defendant argues (1) that the court erred in making the findings in aggravation that "[t]he offense was especially heinous, atrocious and cruel," and that "[t]he victim was very young or mentally or physically infirm," in that such findings were not supported by the evidence, and (2) that upon the elimination of these challenged findings of factors in aggravation, "as a matter of law the mitigating factors outweigh the factor or factors in aggravation that may be considered."

Evidence was presented at the sentencing hearing which tended to show that the victim of defendant's violence, Daniel Bright, was a two-year old child. This evidence, therefore, supports a finding that the victim was very young. Since the challenged finding is phrased in the disjunctive, evidence supporting a finding that the victim was very young necessarily supports the court's finding that he was very young or mentally or physically infirm. The consideration of such finding in the voluntary manslaughter case was, accordingly, proper. The youth of the victim, however, may not be considered an aggravating factor in the felony child abuse case, since the youth of the victim is a

necessary element of felonious child abuse under G.S. § 14-318.4, and "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." G.S. § 15A-1340.4(a)(1). The challenged factor in aggravation also cannot be made to apply in the felonious child abuse case on the basis of the "or mentally or physically infirm" clause, since there is no evidence to support that characterization of the victim. Although there was evidence that the victim, at the time he suffered violence at defendant's hands, was in a cast and recovering from a femoral shaft fracture, this evidence is not sufficient to support the aggravating factor of physical infirmity within the meaning of the statute.

With respect to defendant's challenge to the court's finding that "[t]he offense was especially heinous, atrocious and cruel," we will assume for the sake of argument that the finding is without evidentiary support in either the felonious child abuse case or the voluntary manslaughter case. This assumption is bolstered by our unawareness of anything that would distinguish defendant's act of felonious child abuse as being any more heinous, atrocious, and cruel than any other act of felonious child abuse; it is bolstered in the voluntary manslaughter case in that one item of evidence which does render this act of voluntary manslaughter especially heinous, i.e. the youth of the victim, may not be considered to show that the offense was especially heinous since it was already used to show that the victim was very young—"the same item of evidence may not be used to prove more than one factor in aggravation." G.S. § 15A-1340.4(a)(1).

Hence, in the felonious child abuse case, we assume the court erred in considering the "heinous offense" factor in aggravation and we hold that the court erred in considering the "very young or infirm victim" factor in aggravation, but the court did not err in considering the "dangerousness of defendant" factor in aggravation. In the voluntary manslaughter case, we assume the court erred in considering the "heinous offense" factor in aggravation, but did not err in considering the "very young victim" and "dangerousness of defendant" factors in aggravation. Defendant argues that the factors in aggravation which the court could legitimately consider could not, as a matter of law, have outweighed the five factors in mitigation found by the court, as they must under G.S. § 15A-1340.4(b) to justify the imposition of a

prison term in excess of the statutorily-prescribed presumptive terms. We disagree. It is not clear to us how the result to be determined by the court upon its weighing of aggravating and mitigating factors could ever be known as a matter of law.

> The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, *the weighing of which is a matter within their sound discretion.* . . .
>
> *The discretionary task of weighing* mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. (Citations omitted.)

State v. Davis, 58 N.C. App. 330, 293 S.E. 2d 658 (1982). (Emphasis added.) Hence defendant is incorrect in his contention that the court was required as a matter of law to find that the permissible aggravating factors did not outweigh the mitigating factors. The court could be well within its discretion in finding that the "dangerousness" factor in the felonious child abuse case, and the "dangerousness" and the "very young victim" factors in the voluntary manslaughter case outweighed the mitigating factors in each case. Although some of the aggravating factors found by the court were erroneously considered since such factors were not supported by evidence, defendant has failed to carry his burden of showing grounds for reversal of the sentences imposed by showing he was prejudiced by the court's erroneous findings in aggravation, *see* G.S. §§ 15A-1442(6), -1443(a); defendant has not shown that had the court not considered the erroneous findings in aggravation, a different result would have been reached in the court's balancing process. *Compare State v. Goodman*, 298 N.C. 1, 257 S.E. 2d 569 (1979). These assignments of error are overruled.

[3] Finally, defendant assigns error to the trial court's signing and entering the judgments in the felonious child abuse and voluntary manslaughter cases, on the grounds that there was no factual basis in either case for defendant's pleas of guilty. G.S. § 15A-1444(e) in pertinent part provides:

> Except as provided in subsection (a1) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

The issue raised by these assignments of error does not pertain to the validity of the court's departure from the statutory presumptive sentences, nor does it pertain to a denial of a motion to suppress evidence; furthermore, defendant made no motion to withdraw his plea of guilty, the denial of which could afford a basis for entitlement to appellate review. Defendant here seeks appellate review of the court's acceptance of his pleas of guilty, but defendant is not entitled to appellate review as a matter of right of the court's acceptance of his pleas, and defendant's petition for a writ of certiorari has been denied. These assignments of error, therefore, present no question for review. *See State v. Rivard and State v. Power*, 57 N.C. App. 672, 292 S.E. 2d 174 (1982).

The judgments appealed from are

Affirmed.

Judge ARNOLD concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The reasoning of the majority is to the effect that although we have found that some of the factors in aggravation found by the trial court were not supported by the evidence, defendant must affirmatively show that had the trial court not so erred, a different result would have been reached "in the court's balancing

process." I must respectfully disagree. I am persuaded that upon our finding that the trial court found even one factor in aggravation not supported by the evidence, the presumption must follow that such a finding by the trial court resulted in a sentence more severe than otherwise would have been entered. I am not persuaded that any sentence in excess of the presumptive sentence prescribed by the statute can be fair if it is founded in or motivated by an erroneous impression of aggravating factors. Correct balancing of mitigating factors and aggravating factors can only take place when the trial court has found the correct factors: i.e., those supported by the evidence.

In my opinion, this matter should be remanded for a new hearing to determine an appropriate sentence.

WALLACE L. BECKHAM, AVON, NORTH CAROLINA, AND OUTER BEACHES REALTY, INC. v. WALTER S. KLEIN, REAL ESTATE, LAUREL HILL FARM, STORMVILLE, NEW YORK

No. 811SC1299

(Filed 5 October 1982)

1. **Brokers and Factors § 6— real estate commission—brokers not procuring cause of sale**

Plaintiff real estate brokers were not entitled to a commission on the sale of property pursuant to their nonexclusive listing agreement where the trial court found upon supporting evidence that plaintiffs were not the procuring cause of the sale.

2. **Brokers and Factors § 6— real estate commission—express agreement—no recovery under quantum meruit**

A real estate broker who has not procured a sale under an express agreement may not become entitled to compensation for services rendered to the seller under principles of *quantum meruit.*

APPEAL by plaintiff from *Jolly, Judge.* Judgment entered 22 May 1981 in Superior Court, DARE County. Heard in the Court of Appeals 16 September 1982.

Plaintiffs brought this action to recover a share of a brokerage fee earned on the sale of a tract of land known as the Phipps tract in Avon, North Carolina. The parties waived a jury

trial. The trial court entered judgment in pertinent part, as follows:

FINDINGS OF FACT:

1. Plaintiff Wallace L. Beckham ("Beckham") is a citizen and resident of Avon, Dare County, North Carolina, and at all times relevant hereto was a duly licensed real estate salesman in the State of North Carolina with his office and principal place of business in Avon, North Carolina.

2. Plaintiff Outer Beaches Realty, Inc. ("Outer Beaches") is a corporation organized under the laws of the State of North Carolina, with its principal place of business in Avon, North Carolina. Outer Beaches employed Beckham in the Fall of 1977 and throughout 1978.

3. Defendant Walter Klein ("Klein") is a citizen and resident of Stormville, New York, and is licensed by the State of New York as a real estate broker.

4. On June 30, 1977, Klein contacted Beckham at his real estate office in Avon, Dare County, North Carolina, and conferred with Beckham as to whether Beckham was familiar with the location and boundaries of the "Phipps-Avon Tract," a parcel of real estate containing 580 acres, more or less, located in Kennekeet Township, Dare County, North Carolina. Beckham advised Klein that he was familiar with said tract of land and knew its location on the ground; and he gave his opinion that the property had a potential value of $7,000.00 per acre if divided into small parcels, and a potential value of $5,000.00 per acre if sold as a single tract.

5. Beckham thereafter showed Klein the property on the ground. Klein told Beckham that he had a brokerage listing on the property, and he agreed with Beckham to share the sales commission on the tract with Beckham if Beckham sold the property.

6. Beckham and Klein reached the following agreement, which was confirmed in writing, as to the commission for the potential sale of the Phipps Avon tract:

> Our commission will be 7½% which you (Beckham) and I (Klein) will split 50/50 if you sell it (the Phipps Avon tract).

7. Beckham and Klein did not modify their agreement at any time thereafter, except that the 7 1/4 commission was later raised to 10%.

8. Beckham asked Klein for an exclusive listing in writing for three months to sell the Phipps Avon tract in August, 1977, but Klein declined to give such an exclusive listing.

9. Beckham, thereafter, in the Fall of 1977 and Spring of 1978, had aerial photographs made of the tract, had a proposed subdivision plat prepared and did certain survey work on the property. He attempted to sell the property to certain individuals; and also made efforts to put together a limited partnership known as Driftwood Shores for the purpose of buying and subdividing said property. He made several trips to New York City to meet with Klein and representatives of Bessemer Trust Company, which was representing the Phipps heirs. In the course of these activities he made an offer to purchase the tract of land in behalf of the limited partnership. Due to various factors, the sale of the property to the limited partnership was not consummated. Beckham was to have an interest in the limited partnership; Klein was not.

10. Thereafter, in 1978, Beckham and Klein each made efforts to sell the property to various parties. They kept in contact by telephone calls and correspondence as to the progress being made by each. Although they kept in touch with each other, they were not working together as partners, *de facto* or otherwise.

11. In April, 1978, Klein contacted one C. C. Canada ("Canada"), a South Carolina real estate broker, to attempt to procure a sale of the Phipps Avon tract.

12. On May 16, 1978, Klein telephoned Beckham and told Beckham that Klein had some prospects in the textile business, who were also land developers, from Greenwood Mills, Inc., in South Carolina and that they were interested in buying the property.

13. In early May, 1978, Canada associated one David Lawrence, a licensed North Carolina real estate broker and surveyor, and then arranged to bring one Posey Davis

("Davis") of Greenwood Mills, Inc. to view the Phipps Avon tract and to meet with Lawrence.

14. On Sunday, May 21, 1978, Klein visited Beckham's home in Avon. He had dinner with Beckham and the two of them reviewed certain maps, aerial photographs and a proposed subdivision of the Phipps Avon tract, all of which had been prepared or caused to be prepared by the plaintiff.

15. On Monday, May 22, 1978, Davis and Canada met Klein and Beckham at Beckham's real estate office in Avon. Beckham, in his automobile, drove Klein and Canada around the area and thereafter carried them across part of the tract with the use of his four-wheel drive vehicle. Subsequently, Klein, Canada and Davis borrowed Beckham's maps and photographs to review and study overnight.

16. On Tuesday, May 23, 1978 Klein, Davis and Canada returned Beckham's maps and aerial photographs.

17. Thereafter, Klein told Beckham he thought Davis was interested. However, Klein encouraged Beckham to continue his efforts to sell the property himself, which Beckham did.

18. After several subsequent visits by Davis, in May and June, 1978, to examine the Phipps Avon tract and to confer with Lawrence, Greenwood Mills offered, in June, 1978, to purchase the Phipps Avon tract. The offer was accepted and the sale was closed in December, 1978. Beckham was not present at any of said subsequent visits to the site.

19. On or about July 20, 1978, Klein telephoned Beckham and told him the property had been sold and to discontinue his efforts. Klein refused to tell Beckham to whom the property had been sold, the terms and conditions of the sale or the sales price. Beckham subsequently learned that the tract had been sold to Greenwood Mills, Inc.

20. Klein and Canada accompanied Davis at all times during their visits to the site on May 22 and 23, 1978. Beckham did not have any contact, written or oral, with Davis between May 23, 1978, and the time the offer to purchase was made and later accepted. Beckham had no contact

at any time with any other representative of Greenwood Mills, Inc.

21. Beckham did not influence the decision of Greenwood Mills, Inc. to make an offer to purchase the Phipps Avon tract.

Based upon the foregoing FINDINGS OF FACT, the Court reaches the following CONCLUSIONS OF LAW:

WHEREFORE, the Court concludes as a matter of law that:

1. Beckham did not "sell" the Phipps Avon tract within the terms of his written agreement with Klein.

2. Beckham was not the procuring cause of the sale of the Phipps Avon tract, and is not entitled to any relief in *quantum merit* (sic).

3. There was no partnership between Klein and Beckham, and no fiduciary duty owed by Klein to Beckham.

4. Beckham did not have an exclusive listing to sell the Phipps Avon tract.

5. Beckham is therefore not entitled to recover of Klein by way of this civil action.

6. There was no legal relationship between Outer Beaches Realty, Inc. and Klein, and no duty owed by Klein to Outer Beaches. Therefore, any rights of Outer Beaches to recover by way of this action would be derivative of the rights of Beckham. Since Beckham is not entitled to recover of Klein, neither is Outer Beaches.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that:

1. Plaintiffs have and recover nothing of defendant by way of this action.

2. Defendant have and recover nothing of Beckham by way of his counterclaim.

This the 22 day of May, 1981.

s/ J. R. JOLLY, JR.

From the foregoing judgment plaintiffs appealed.

Twiford, Derrick & Spence, by Russell E. Twiford, for plaintiff-appellants.

Sanford, Adams, McCullough & Beard, by J. Allen Adams and Charles C. Meeker, for defendant-appellee.

WELLS, Judge.

The principal question we address in this appeal is whether a real estate broker who has not procured a sale under an express agreement may nevertheless become entitled to compensation for services rendered the seller under principles of *quantum meruit.* We answer this question in the negative and affirm the judgment below.

By their first assignment of error, plaintiffs contend that the evidence before the court was insufficient to support the findings numbered 13, 20, and 21. A trial court's findings of fact in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary which would support different findings. *Henderson County v. Osteen,* 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.,* 288 N.C. 338, 218 S.E. 2d 368 (1975). We have carefully reviewed the record and find that each of the challenged findings of fact is supported by competent evidence. These assignments are therefore overruled.

[1] Plaintiffs contend that they were entitled to a recovery of defendant based on their contract. Generally, a broker becomes entitled to a commission only if he is the procuring cause of the sale. *Realty Agency, Inc. v. Duckworth & Shelton, Inc.,* 274 N.C. 243, 162 S.E. 2d 486 (1968); *Realty, Inc. v. Whisnant,* 41 N.C. App. 702, 255 S.E. 2d 647, *disc. rev. denied,* 298 N.C. 299, 259 S.E. 2d 912 (1979). Of course, the contract of the parties can vary this general rule. *Realty Agency, Inc.,* supra. For a broker to be the "procuring cause", the sale must be the direct and proximate result of his efforts or services. *Id.*

The facts found in the present case show that the parties had a contract which did not take this case out of the general rule stated above. These findings support the conclusion that plaintiffs

were not the procuring cause of the sale. The trial court's denial of recovery to plaintiffs based on the contract was correct.

[2] The trial court found that Beckham performed various services for defendant including preparing maps and aerial photographs and driving defendant, Canada and Davis around and over the subject property. Plaintiffs contend that even if they were entitled to no recovery on the express contract, the trial court erred in denying recovery in *quantum meruit* for services rendered. Recovery in *quantum meruit* may be had where the facts show that an implied contract exists. *Helicopter Corp. v. Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964). But it is well established that where an express contract concerning the same subject matter is found, no contract will be implied. *Supply Co. v. Clark*, 247 N.C. 762, 102 S.E. 2d 257 (1958); *Realty, Inc.*, supra; *Campbell v. Blount*, 24 N.C. App. 368, 210 S.E. 2d 513 (1975). Where parties expressly agree, they are presumed to have contemplated and assumed the risks normally attendant to their bargain. All the services Beckham rendered and upon which plaintiffs rely in their *quantum meruit* theory are services contemplated in the parties' express agreement and the express contract therefore controls. *Realty, Inc.*, supra.

The judgment of the trial court is

Affirmed.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. RUSSELL ELLIOTT McALISTER, JR.

No. 8225SC213

(Filed 5 October 1982)

1. Burglary and Unlawful Breakings § 5.3— attempted burglary—preparation to commit burglary—insufficiency of evidence

The evidence was insufficient to submit to the jury on the charges of attempted burglary and preparation to commit burglary where the evidence showed that defendant kicked the door of a person's home at night with a weapon in his possession after repeatedly ringing the doorbell, but there was no evidence of intent to commit a felony in the house if he gained entry. G.S. 14-51 and G.S. 14-55.

2. Trespass § 12— forcible trespass and trespass after being forbidden to do so—sufficiency of the evidence

Where defendant was on premises owned by another against the owner's will after being told not to come there less than two days before, and there was evidence from which it could be inferred that he was there to do harm to those inside the house, that he knew he was present against the owner's will, and that he acted with a show of force, the evidence was sufficient to charge the defendant with forcible trespass under G.S. 14-126 or trespass after being forbidden to do so under G.S. 14-134.

3. Burglary and Unlawful Breakings § 7; Trespass § 12— forcible trespass and trespass—not lesser offenses of attempted first-degree burglary

The trial judge was correct not to charge the jury on trespass or forcible trespass because they are not lesser included offenses of attempted first-degree burglary.

APPEAL by defendant from *Preston, Judge.* Judgment entered 20 October 1981. Heard in the Court of Appeals 22 September 1982.

Defendant was tried before a jury for attempted first degree burglary, preparation to commit burglary and assault.

The State's evidence tended to show that the defendant went to his former place of employment on 11 May 1981. While there, he hit and pulled the hair of Tom Long, an employee.

On 17 May 1981, the defendant went to Long's house and talked to his daughter, Carol. Tom Long, Jr., who was carrying a pistol in his belt, told the defendant twice to leave. Long, Jr. then physically escorted the defendant to his car. Long, Sr., who had a crowbar in his hand, was present during these events.

The defendant returned to the Long house on 19 May 1981 about 3:40 a.m. Members of the family observed a car that appeared to be the defendant's. After the doorbell rang repeatedly, Mrs. Long called the police.

Defendant left the front door and went to the side of the house. After looking at the upstairs window, he came back to the front door and rang the doorbell repeatedly. The sound of beating or kicking on the front door was heard. A crack across an oak panel, chipped paint, and mud on the door were observed the next day by the Longs.

When the police arrived, defendant was walking towards his car. The police saw that the defendant had a loaded and cocked

blue .45 caliber automatic in his holster. A loaded Nickel .22 Derringer was found in defendant's car, and he had two clips full of bullets in his back pocket.

Those who testified for defendant attested to his good character in the communities in which they lived. None of them knew anything about the events of May, 1981 except what was told them by the defendant's family. The defendant did not testify.

The jury returned guilty verdicts on all the charges. From the verdicts and a prison sentence, the defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr. and Associate Attorney G. Criston Windham, for the State.

John F. Cutchin for the defendant appellant.

ARNOLD, Judge.

While defendant makes eleven assignments of error, because of our disposition we only find it necessary to discuss two arguments in this opinion.

[1] First, defendant attacks the sufficiency of the evidence on the two burglary charges. He does not contest the assault conviction.

Burglary is defined in North Carolina by the common law and G.S. 14-51 as "the breaking and entering of the dwelling house of another in the nighttime with intent to commit a felony therein." *State v. Cooper*, 288 N.C. 496, 499, 219 S.E. 2d 45, 47 (1975). An attempt is generally defined as "an act done with intent to commit that crime, carried beyond mere preparation to commit it, but falling short of its actual commission." *See State v. Surles*, 230 N.C. 272, 275, 52 S.E. 2d 880, 882 (1949), and cases cited therein.

The facts of this case and the case law of our State lead to the conclusion that the elements of attempted burglary were not met here. Although the defendant did kick the front door with his foot to an extent that a panel was cracked, this evidence was insufficient to submit on the charge of attempted burglary. The evidence in *State v. Gibson*, 226 N.C. 194, 37 S.E. 2d 316 (1946), is similar to the evidence presented in the record before us.

In *Gibson*, the court found that the evidence of attempted burglary was insufficient to go to the jury based on the facts. Following a brawl between the defendants and a man named Lowndes, the defendants pursued Lowndes to his house and then to the house of his wife's employer. When they arrived there, the defendants called Lowndes to come outside, and he said that he would.

One of the defendants then went to the back door and began pushing it. Mrs. Lowndes pushed back against it, and the defendant did not come in. The defendant at the door had a shotgun. All witnesses heard a shot prior to the defendant coming to the door, and one witness heard a man say that if Lowndes did not come to the door they would shoot it down. The defendants left after a few minutes. In *Gibson*, the Supreme Court concluded that the evidence was insufficient on the attempted burglary charge but was sufficient on the charge of forcible trespass. We reach a similar conclusion in the case before us.

If the Supreme Court could not find attempted burglary based on the facts in *Gibson*, it is difficult to see how it could be present here. First, the pushing on the door in *Gibson* is equivalent to the kicking of the door here. Second, a gun was actually fired and threats were made to those inside the house in *Gibson*, unlike this case. Third, there had been an argument on the same night in *Gibson*, unlike this case. Thus, the facts of *Gibson* were even more compelling than in this case, but the court refused to find evidence of attempted burglary. The Supreme Court's succinct statement that "the evidence on the charge of attempted burglary is not sufficient to be submitted to the jury," *Gibson*, 226 N.C. at 199, 37 S.E. 2d at 319, is dispositive of defendant's argument here.

The *Surles* case that the State relies on can be distinguished on its facts. The court there found attempted burglary where a drunk, estranged husband who frequently beat his wife pursued her to her father's house. After being told to leave, he threatened to kill his wife and started cutting the window screen in an apparent attempt to get inside.

Surles is different in that the defendant clearly attempted to break and enter the dwelling. In addition, there was evidence of his intent to commit a felony, *i.e.*, murder, once he got inside. In

the case *sub judice*, the defendant only kicked the door after repeatedly ringing the doorbell, and no evidence of intent to commit a felony in the house if he gained entry was ever shown.

Preparation to commit burglary, the other felony with which defendant was charged, is defined by G.S. 14-55: "If any person shall be found armed with any dangerous or offensive weapon with the intent to break or enter a dwelling . . . and to commit any felony or larceny therein. . . ." Even though defendant did have a gun with him on 19 May 1981, the conclusion above that evidence of the necessary intent is missing mandates a reversal of the conviction for this offense.

[2] Although we reverse both burglary convictions, we see no obstacle to the District Attorney indicting the defendant for forcible trespass under G.S. 14-126, or trespass after being forbidden to do so under G.S. 14-134. Defendant was on premises owned by another against the owner's will after being told not to come there less than two days before. From the evidence it can be inferred that he was there to harm those inside the house, that he knew that he was present against the owner's will, and that he acted with a show of force. All of these factors are to be considered in establishing the offense of forcible trespass. *See, Gibson*, 226 N.C. at 200, 37 S.E. 2d at 319. 12 Strong's N.C. Index 3d *Trespass* § 12 (1978).

[3] Defendant's contention that forcible trespass and trespass are lesser included offenses of attempted first-degree burglary is unconvincing. An examination of the elements of these offenses shows the trespass offenses are not lesser included offenses.

For a crime to be a lesser included offense of another crime, the greater crime must contain all of the essential elements of the lesser crime. *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970). That is not the case here. Attempted first degree burglary does not require a commandment forbidding entry or an order to leave as does trespass under G.S. 14-134. It also does not require that the defendant enter the lands of another by force, threats of force or a show of strength by a multitude of people, as does forcible trespass under G.S. 14-126. Thus, the trial judge was correct not to charge the jury on trespass or forcible trespass because they are not lesser included offenses of attempted first-degree burglary. Moreover, because we find insufficient evidence on the

breaking and entering elements, we also hold that it was correct not to charge the jury on the offenses of attempted felonious and non-felonious breaking and entering.

Since we find that the evidence was insufficient on the burglary offenses, it is not necessary to discuss defendant's other assignments of error. We reverse the guilty verdicts on the two burglary offenses. The assault conviction stands.

As to the burglary and preparation to commit burglary convictions, reversed. As to the assault conviction, no error.

Judges MARTIN and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOSEPH McKINLEY DANIELS, JR.

No. 8214SC17

(Filed 5 October 1982)

1. **Assault and Battery § 15.3— felonious assault—instruction on serious injury—harmless error**

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial court erred in instructing the jury that if it believed the evidence in the case which tended to show that the victim was twice shot in the upper part of his body with a .32 caliber pistol, it will have found that a serious injury was inflicted. However, such error was not prejudicial where the evidence of the victim's injuries was uncontradicted and no reasonable trier of fact could have found that there was no serious injury.

2. **Assault and Battery § 15.6— instruction on issue of whether defendant was the aggressor**

The trial court in a prosecution for felonious assault did not err in including in the charge on self-defense the issue of whether defendant was the aggressor since (1) evidence tending to show that defendant, without provocation, assaulted his victim by shooting him in the chest was evidence that he was the aggressor, and (2) the trial court was required to instruct the jury on all the elements of self-defense, including whether defendant was the aggressor.

3. **Criminal Law § 89.3— corroboration of witnesses—prior consistent statements**

The trial court properly permitted an officer to testify as to prior consistent statements made by two State's witnesses for the purpose of corroborating the testimony of those witnesses.

State v. Daniels

APPEAL by defendant from *Godwin, Judge.* Judgment entered 30 July 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 31 August 1982.

Defendant was convicted of assault with a deadly weapon inflicting serious injury, in violation of G.S. 14-32(b). He was sentenced to seven years imprisonment.

The evidence tends to show the following. Defendant and the victim, Trice, were at a friend's house when an argument broke out. Defendant shot Trice two times in the upper part of his body with a .32 caliber pistol. Trice was hospitalized for twenty days and had an operation to remove one of the bullets. The other bullet is still in his body near his spine. State's evidence tended to show that Trice was unarmed when defendant shot him. Defendant's evidence tended to show that he acted in self-defense when he shot Trice.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Assistant Appellate Defender Nora B. Henry, for defendant appellant.

VAUGHN, Judge.

[1] Defendant presents three arguments on appeal. His first argument is that the trial judge erred when he instructed the jury on "serious injury." The trial judge explained serious injury in the context of the case by stating:

> Now, the intentional infliction of a pistol wound upon the body of a person which throws a .32 caliber bullet into the body of that person, or the intentional infliction of two pistol wounds upon the body of a person which projects two .32 caliber bullets into the body of a human being is a serious injury.

The trial judge continued:

> [I]f you believe the evidence in this case that tends to show that *Trice was twice shot in the upper part of his body with a .32 caliber pistol* . . . then I instruct you that you will have found, if you are satisfied of that beyond a reasonable

> doubt, I instruct you that you will have found that a serious injury was inflicted. (Emphasis added.)

This instruction is erroneous. The essential elements of assault with a deadly weapon inflicting serious injury are: an assault, the use of a deadly weapon, and the infliction of serious injury, not resulting in death. The jury must find the existence of each element. In *State v. Whitted*, 14 N.C. App. 62, 187 S.E. 2d 391 (1972), defendant was charged with assault with a firearm with intent to kill and inflicting serious injury. The trial court instructed the jury:

> "I charge you for you to find the defendant guilty of assault with a deadly weapon inflicting serious injury, and *you will find that there was serious injury*, if you believe the evidence as it all tends to show here, *no question about the serious injury*, the State must prove three things beyond a reasonable doubt: First, that the defendant acted intentionally—that is not in self-defense; Second, that the defendant shot the prosecuting witness with a 38 caliber pistol; and third, that the 38 caliber pistol was a deadly weapon." (Emphasis supplied.)

State v. Whitted, 14 N.C. App. at 63-64, 187 S.E. 2d at 392. The trial court failed to instruct the jury that they must find beyond a reasonable doubt that serious injury was inflicted by defendant. Instead, the court told the jury that there was a serious injury. This error required a new trial.

Defendant argues that the instruction in this case was similar to that in *State v. Whitted, supra*, and he is entitled to a new trial. We do not agree. An important difference between the two cases is that in *State v. Whitted, supra*, there was dispute over the injuries suffered by the victim, but in this case defendant offered no evidence as to Trice's injuries.

In *State v. Springs*, 33 N.C. App. 61, 234 S.E. 2d 193, *review denied*, 293 N.C. 163, 236 S.E. 2d 707 (1977), the evidence of the victim's injuries was uncontradicted. The trial judge instructed the jury:

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

that those would constitute serious injuries." (Emphasis supplied.)

State v. Springs, 33 N.C. App. at 63, 234 S.E. 2d at 195. Since the evidence was uncontradicted, and the injury to the victim was extremely serious, this Court held that the trial court may instruct the jury that if they believe the evidence as to injuries, they will find that there was serious injury.

This case is similar to *State v. Springs, supra*, in that the evidence of Trice's injuries was uncontradicted, and his injuries were obviously serious. Although the instructions were erroneous, there was no prejudicial error because no reasonable trier of fact could have found that there was no serious injury.

[2] Defendant's second argument is that the trial judge erred in his instruction on self-defense when he included in the charge the issue of whether defendant was the aggressor because, defendant argues, there was no evidence that defendant was the aggressor. In the first place, the State's evidence tends to show that defendant, without provocation, assaulted his victim by shooting him in the chest. This is, obviously, evidence that he was the aggressor. Moreover, according to the rule set forth in *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), the State must establish all elements of a criminal offense beyond a reasonable doubt, and presumptions which shift the burden to the defendant violate the Due Process Clause of the Fourteenth Amendment. Thus the State must prove, beyond a reasonable doubt, the absence of self-defense. The trial judge was required to instruct the jury on all the elements of self-defense, including whether defendant was the aggressor.

[3] Defendant's third argument is that the trial judge erred in allowing the prosecutor to use the prior inconsistent statement of a State's witness as substantive evidence and to impeach the State's witness. That is not what happened. The statements were prior consistent statements, and they were used for corroboration only. On direct examination, Mr. Floyd, a witness for the State, testified that he saw Trice take a butcher knife out of a drawer and hide it behind his back. Then Floyd told Trice to put it away, and Trice put the knife back in the drawer. Mr. Dukes, another witness for the State, testified on direct examination that he saw Trice take the knife out of the drawer, and put it away. Then the

State sought to corroborate the testimony of Floyd and Dukes by Officer Johnson's testimony. Johnson testified as to what Floyd and Dukes told him when he arrived at the scene. Before Johnson related what Floyd told him, the trial judge gave the jury this limiting instruction:

> You may consider the witness' testimony concerning what Mr. Floyd told him for one purpose and one alone. You may not consider it as bearing upon the question of guilt or innocence. It is not substantive evidence, you may consider it as corroborative of testimony already given to you by the witness Floyd if you find that it corroborates what Floyd has told you. If you find that it does not corroborate Floyd in any respect, then in that respect you may not consider it at all.

Prior consistent statements of a witness are admissible, as corroborative evidence, to strengthen the credibility of the witness. This is true even if the witness has not been impeached. *State v. Perry*, 298 N.C. 502, 259 S.E. 2d 496 (1979); 1 Brandis on North Carolina Evidence § 50 (1982). The prior consistent statements are admissible only when they are consistent with the testimony of the witness at trial, and the statements are admitted solely for the purpose of corroboration, not as substantive evidence. Since the trial judge instructed the jury that they were to consider it solely as corroborative evidence, there was no error. Furthermore, since defendant did not object to Johnson's testimony when Johnson first stated what Floyd told him or to the trial judge's instruction, he waived any objection that he might have. *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977).

Defendant also contends that since Johnson's testimony is slightly inconsistent with Floyd's and Dukes' testimony at trial, it is offered to impeach rather than corroborate. The "inconsistency" is that Floyd and Dukes did not tell Johnson anything about the butcher knife, but they testified about the knife at trial. This is not a direct contradiction, it is just a less complete statement. The fact that there are slight variations between the two statements goes only to the statement's corroborative weight, not its admissibility. *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980). Any possibility of prejudice because of the slight variance was reduced by the court's instruction on corroboration evidence. *State v. Bridwell*, 56 N.C. App. 572, 289 S.E. 2d 842 (1982).

We have carefully reviewed defendant's assignments of error and find no error.

No error.

Judges HILL and JOHNSON concur.

RALPH N. BRENNER, JR. v. THE LITTLE RED SCHOOL HOUSE, LIMITED

No. 8118DC1321

(Filed 5 October 1982)

1. **Contracts § 18.1— *nonrefundable* tuition—promise of refund—modification of contract—consideration**

In an action to recover tuition paid by plaintiff for the enrollment and teaching of plaintiff's child in defendant's school, an enforceable modification of the provision of the contract prohibiting a tuition refund was created when defendant's headmistress promised to refund to plaintiff the full tuition payment when plaintiff informed her that his former wife would not permit his child to attend the school, since the promise to refund was supported by consideration in that the record showed that plaintiff relinquished the opportunity to have his child educated by the defendant.

2. **Trial § 5— judge's conduct of trial—no prejudicial error**

Although some of the trial judge's actions and statements were ill-advised in the conduct of a trial involving a contract, there was no evidence that they were outcome determinative so as to constitute error.

3. **Trial § 33— instruction to take the law as judge gives it—no error**

It was not error for the trial judge to charge the jury that they must take the law as he gave it to them and to add that "what [both counsel] have told you is the law is not the law."

APPEAL by defendant from *Bencini, Judge.* Judgment entered 11 May 1981 in District Court, GUILFORD County. Heard in the Court of Appeals 21 September 1982.

Plaintiff seeks a refund of a $100 confirmation fee and $972 tuition that he paid the defendant on behalf of his son in advance of the 1978-79 school year. The son was in the plaintiff's former wife's custody, and she chose not to enroll him in the defendant school. When plaintiff sought a refund from the defendant, his request was denied and this suit resulted.

In his complaint of 17 July 1979, plaintiff alleged that the contract that he signed with the defendant for the 1978-79 school year was void because of a lack of consideration or for a failure of consideration. As a result, he sought refund of all payments to avoid unjust enrichment of the defendant. He further alleged that defendant's failure to return the money paid in advance amounted to an unlawful trade practice under G.S. 75-1.1, thus entitling him to treble damages.

The contract between the parties provided in pertinent part:

> We understand that the tuition is $1,080 per year, payable in advance of the first day of school, no portion refundable. We also understand that upon your approval we may elect to pay tuition in $100 per month installments with interest according to your published schedule, but that such an election does not in anywise modify the stipulation that tuition is payable in advance.

On 5 October 1979, summary judgment in favor of the plaintiff was granted. The Court of Appeals reversed the trial court on 3 June 1980 and remanded for entry of summary judgment in favor of defendant. *Brenner v. School House, Ltd.*, 47 N.C. App. 19, 266 S.E. 2d 728 (1980).

The Supreme Court remanded the case to the trial court for a new trial after reversing the Court of Appeals' holding for the defendant. *Brenner*, 302 N.C. 207, 274 S.E. 2d 206 (1981).

A jury trial on remand resulted in a verdict for the plaintiff in the amount of $972. Defendant gave timely notice of appeal to this Court.

Wyatt, Early, Harris, Wheeler & Hauser, by A. Doyle Early, Jr., for plaintiff appellee.

Max D. Ballinger for defendant appellant.

ARNOLD, Judge.

Defendant raises fourteen assignments of error on appeal. These alleged errors in essence attack four rulings of the trial court.

[1] Defendant's first argument, in essence, attacks the trial court's reliance on the 1981 Supreme Court opinion in this case.

That opinion found that when the defendant's headmistress agreed to refund the plaintiff's money, a contract modification occurred.

Before a contract modification is effective there must be consideration to support it. *Wheeler v. Wheeler*, 40 N.C. App. 54, 252 S.E. 2d 106 (1979), *rev'd on other grounds*, 299 N.C. 633, 263 S.E. 2d 763 (1980); 17A C.J.S. *Contracts* § 376 (1963). Consideration can be found in benefit to the promisor or detriment to the promisee.

> [T]here is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit or not.

Carolina Helicopter Corp. v. Cutter Realty Co., 263 N.C. 139, 147, 139 S.E. 2d 362, 368 (1964), and cases cited therein.

The defendant argues that there was no consideration given by the plaintiff because the plaintiff as promisee suffered no detriment. But as the Supreme Court observed,

> [i]n return for the defendant's promise to refund the tuition paid, plaintiff would relinquish his right to have his child educated in defendant school. . . . It is well established that any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee, is sufficient consideration to support a contract.

302 N.C. at 215, 274 S.E. 2d at 212.

The record shows that plaintiff was relinquishing the opportunity to have his child educated by the defendant when he testified "From the time . . . [the defendant] first told me that she would refund the tuition to me and from that point on, I did not expect the school to do anything else in regard to providing services or anything else on behalf of Russ Brenner." Although the plaintiff also stated that he never withdrew his son from the school, and that he was trying to get his former wife to send him to the school, the record as quoted above shows sufficient consideration to support the modification in this case. As a result, there is no error in the trial judge's instruction on the consideration issue or his reliance on the Supreme Court's holdings on this issue in its earlier opinion in this same case.

Defendant next attacks the charge by the trial judge on matters other than consideration. A careful reading of the charge as a whole shows that it is not so erroneous as to warrant a new trial. "A charge to a jury must be read and considered in its entirety . . . and not in detached fragments." *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E. 2d 488, 492 (1967).

[2] The third attack by defendant alleges that the trial judge's conduct of the trial portrayed the defendant in an unfavorable light in the jury's eyes. He also assaults an instruction that the jury should apply the law as the judge states it, and not as either counsel phrased it. From our examination of the record these arguments appear feckless.

The criterion for judging any improper comments by the trial judge is their effect upon the jury. *Worrell v. Hennis Credit Union*, 12 N.C. App. 275, 182 S.E. 2d 874 (1971). Although some of the trial judge's actions and statements were ill-advised here, there is no evidence that they were outcome determinative so as to constitute error. It should be remembered by defendant that a trial judge can control the course of a trial, including admonishing counsel not to pursue a prohibited line of questioning. *See Greer v. Whittington*, 251 N.C. 630, 111 S.E. 2d 912 (1960).

[3] It was not error for the trial judge to charge the jury that

> It is absolutely necessary that you take the law as I give it to you and not as you think it is or you might like it to be. What Mr. Early [plaintiff's counsel] and Mr. Ballinger [defendant's counsel] have told you is the law is not the law.

It is proper for the trial judge to tell the jury to take the law as the court states it. *Spivey v. Newman*, 232 N.C. 281, 59 S.E. 2d 844 (1950). The fact that the charge mentioned both counsel eliminates any prejudice to the defendant.

Finally, defendant attacks the restriction of his cross-examination of plaintiff and his former wife, and the grant of a motion in limine that denied defendant any chance to refer to a lawsuit by the plaintiff against his former wife for tuition that he had paid. But as plaintiff points out, defendant was not harmed because the court allowed him to ask plaintiff's former wife about the suit against her by the plaintiff. Defendant was allowed to read parts of the complaint into the record and to question plain-

tiff's former wife about her answer to the lawsuit. There is no error on this point.

No error.

Judges HEDRICK and HILL concur.

NADINE W. HOWELL, D. EDWARD HOWELL, AND CHARLOTTE JOSEY HOWELL v. ALGERNON L. BUTLER, JR., TRUSTEE, AND PERMELIA W. BLAKE

No. 818SC1277

(Filed 5 October 1982)

Cancellation and Rescission of Instruments § 10.2; Duress § 1— threat to institute legal proceedings—execution of note and deed of trust—no fraud, duress or undue influence

No genuine issue as to fraud, duress or undue influence in the procurement of a note and deed of trust was presented where the forecast of evidence on motion for summary judgment showed that plaintiffs executed the note and deed of trust in consideration of defendant's agreement not to press legal claims for the male plaintiff's alleged mismanagement of defendant's stock account, and the note was for the exact amount defendant claimed the male plaintiff had lost in mismanaging her stock account.

APPEAL by plaintiffs from *Bruce, Judge.* Judgment entered 24 August 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 16 September 1982.

This is a civil action instituted by plaintiffs against the trustee of a deed of trust and the payee of a promissory note signed by plaintiffs to enjoin foreclosure on the property in the deed of trust and to declare null and void the note and deed of trust. Defendants filed an answer and a 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted along with an answer admitting the execution of a deed of trust. The answer admitted that Permelia W. Blake had become a customer of Dean Whitter Reynolds during 1979 and the value of her stocks had become depressed. When the defendants' motion to dismiss came before the court, it considered affidavits by plaintiffs and defendants and converted the motion to dismiss to a motion for summary judgment under Rule 56.

The record before us discloses the following uncontroverted facts: In 1979, defendant Blake transferred her stock account from Merrill Lynch, Pierce, Fenner and Smith to Dean Whitter Reynolds. The plaintiff, D. Edward Howell, was her account representative. Blake transferred her account because of her displeasure with Merrill Lynch for trading her stocks using the "margin" method. To reduce the risk of trading in the stock market she instructed plaintiff, D. Edward Howell, not to purchase or sell stocks without her approval. In 1979, the value of Blake's stock holdings dropped. Blake became convinced that D. Edward Howell had mismanaged her account and consulted her attorney, defendant Algernon L. Butler, Jr. Butler spoke with D. Edward Howell and informed him that Mrs. Blake anticipated filing suit against him and reporting him to the Securities Exchange Commission. Blake agreed not to bring any legal action against Howell if he would execute a promissory note for $27,887.78 and secure the note with a deed of trust.

On 18 March 1980 D. Edward Howell, his wife, Charlotte Josey Howell and his mother, Nadine W. Howell executed a promissory note for $27,887.78 payable monthly with 14% per annum interest. Nadine W. Howell executed a deed of trust wherein certain property owned by her in Wayne County was conveyed to secure the payment of the promissory note. When plaintiffs defaulted on the note, defendants instituted foreclosure proceedings and plaintiffs brought the action described above.

Judge Bruce entered summary judgment for the defendants and plaintiffs appealed.

Duke & Brown by J. Thomas Brown, Jr. and John E. Duke for the plaintiffs, appellants.

Taylor, Warren, Kerr and Walker by David E. Hollowell and Robert D. Walker, Jr. for the defendants, appellees.

HEDRICK, Judge.

The only question presented by this appeal is whether the court erred in entering summary judgment for defendants. Plaintiffs argue the pleadings, affidavits and exhibits raise an issue of "fraud, duress or undue influence" in the defendants' execution of the promissory note and deed of trust. Plaintiffs contend that as a

result of harassment and threats they signed the promissory note and Nadine Howell executed the deed of trust securing same. Defendants denied these allegations. Defendants' motion for summary judgment was supported by pleadings and affidavits showing the execution and delivery of the promissory note and deed of trust. In opposition, plaintiffs filed an affidavit wherein they repeated their allegation of fraud, duress and undue influence; however, the plaintiffs offered no evidentiary matter in support of these bald allegations. Plaintiffs' own affidavit showed the plaintiffs executed the note and plaintiff, Nadine Howell, executed the deed of trust in consideration of the defendants' agreement not to press legal claims for D. Edward Howell's alleged mismanagement.

Plaintiffs cite *Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971), as providing the controlling rule of law in this case. In *Link*, the court held a jury question was raised on the issue of "fraud, duress or undue influence" when a husband obtained stocks and debentures by threatening his wife. However, the *Link* case is distinguishable on its facts and is not dispositive here. The *Link* case involved a wife who confessed her adultery to her husband, who then threatened to take the children away from her unless she transferred valuable stocks to him. Discussing the elements of duress, the court stated that it is ordinarily not wrongful to procure the transfer of property by announcing an intent to press legal proceedings. The court continued:

> [T]he threat to institute legal proceedings, criminal or civil, which might be justifiable, *per se*, becomes wrongful, within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and *not related to the subject of such proceedings.* (Citations omitted.)

278 N.C. at 194, 179 S.E. 2d at 705 (emphasis added). In *Link*, the threat to take the children was not related to any divorce proceeding, separation agreement or custody agreement but was intended solely to obtain the transfer of stocks. *Link* does not apply here because the defendants' threats to institute legal proceedings were directly connected to the alleged mismanagement of a stock account and the promissory note was to compensate the loss. The promissory note was for the exact amount of money

Blake claimed Howell had lost mismanaging her account, and the deed of trust was to secure that note. Therefore, all the "threats" and transactions objected to were related to the subject of the proceedings, that is, recovering the money lost trading Blake's stocks.

The case at bar is more closely analagous to *Helena Chemical Co. v. Rivenbark*, 45 N.C. App. 517, 263 S.E. 2d 305 (1980). There the defendant purchased insecticide from the plaintiff and signed a promissory note to forestall plaintiff's lawsuit to collect payment for the insecticide. The defendant alleged fraud, duress and lack of consideration, but the court granted plaintiff's motion for summary judgment because the defendant did not "suggest that plaintiff threatened an action that was 'not related to the subject of such proceedings' and does not raise a material issue of duress." 45 N.C. App. at 521, 263 S.E. 2d at 308. The Court found adequate consideration in that defendant had received a twenty month forbearance from plaintiff's instituting legal action. Likewise, in this case there is valid consideration for the promissory note and deed of trust for two reasons. First, the note and deed of trust signed under seal purport consideration on their face. *Barnes v. Barnes*, 30 N.C. App. 196, 226 S.E. 2d 549 (1976). Second, both parties assert the promissory note was signed to forestall a suit by the defendants against the plaintiffs, and the deed of trust securing the note was part of that negotiated settlement.

Finally, plaintiffs contend they raise a genuine issue of material fact as to the cause of defendant Blake's losses on the stock market. Rather than a result of mismanagement, plaintiffs assert that defendant Blake's losses were caused by depressed market conditions in 1979. We find these contentions are not relevant to this decision. They have no bearing on the enforceability of the promissory note or deed of trust.

Therefore, for all of the above reasons, plaintiffs have failed to raise a genuine issue of material fact and summary judgment was properly entered for defendants.

Affirmed.

Judges MARTIN (R. M.) and HILL concur.

CHARLES W. McCUISTON, JR., EMPLOYEE v. ADDRESSOGRAPH-MULTIGRAPH CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 8110IC1217

(Filed 5 October 1982)

Master and Servant § 67.1— workers' compensation—occupational loss of hearing—failure to show exposed to sound of at least 90 decibels

Under G.S. 97-53(28), 90 decibels, A scale, is a noise level that plaintiff has the burden of showing in order to recover for an "occupational loss of hearing."

Judge WELLS concurring.

APPEAL by plaintiff from North Carolina Industrial Commission. Opinion and award entered 15 July 1981 by the Full Commission. Heard in the Court of Appeals 2 September 1982.

Plaintiff seeks compensation under the North Carolina Workers' Compensation Act, G.S. 97-1 ff., for loss of hearing which allegedly occurred during his employment with defendant. Specifically, he claims that he suffered an "occupational loss of hearing" as defined in G.S. 97-53(28) that is compensable under the Act.

In his job with defendant, plaintiff travels to various plants and businesses to service printing machines, printing presses and copying machines. He was exposed to the noise of the machines during his work, even though he would turn them off to work on them, because most customers had more than one machine which they left running while he was there, and he had to turn on the repaired machine to test it.

Prior to going to work for the defendant on 1 April 1952, plaintiff worked at Carolina Steel for two and one-half years as a blacksmith. While there, he was exposed to noise from welding and steel fabrication.

Plaintiff was a member of the Headquarters Contingent of a National Guard field artillery unit as a mechanic from 1948 to 1959. He was occasionally close to guns when they were fired.

Although plaintiff and members of his family noticed some hearing loss in the 1970's, he did not seek help for the problem until 1978. After a visit on 25 September 1978 with Dr. Patrick

Kenan, an ear, nose and throat specialist at Duke University Medical Center, plaintiff began to wear ear plugs at work.

Plaintiff again saw Dr. Kenan on 9 May 1979 and 22 September 1980. Tests revealed a 47.9% binaural (in both ears) hearing loss. Kenan testified that the loss "in all probability" was permanent and that he was "strongly of the opinion that [plaintiff's employment with defendant] was probably a major contributor to his hearing loss." Kenan's opinion that plaintiff's job with defendant caused the hearing loss was based on what plaintiff told him about his working conditions and not objective tests about the noise levels.

After a hearing on this matter, Deputy Commissioner Ben E. Roney, Jr. concluded that plaintiff suffered a compensable hearing loss resulting from his employment with the defendant. In his 7 January 1981 order, Roney awarded plaintiff $168 per week for 74.55 weeks and awarded his attorney $4,000 for legal services to be deducted from the award.

The defendants made a timely appeal to the Industrial Commission. On 15 July 1981, the Full Commission set aside Roney's award on the ground that plaintiff failed to show that the sound to which he was exposed was at least 90 decibels, a minimum standard that the Commission read G.S. 97-53(28) as requiring. The plaintiff appealed to this Court.

Coggin, Hoyle, Workman & Blackwood, by James W. Workman, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Caroline Hudson, for defendant appellee.

John C. Brooks, Commissioner of Labor, amicus curiae.

ARNOLD, Judge.

Plaintiff showed a "loss of hearing" by his testimony, the testimony of Dr. Kenan and tests conducted on him. The question is whether plaintiff proved that his hearing loss was due to "harmful noise in employment."

This case turns on an interpretation of G.S. 97-53(28). That subsection lists one of the compensable occupational diseases under the Workers' Compensation Act as "[l]oss of hearing caused by harmful noise in the employment." Research by the Court and

both parties has revealed no reported court decisions on this subsection, which was added in 1971. See, 1971 N.C. Sess. Laws Ch. 1108.

In interpreting this statute, we are guided by our Supreme Court that the Act "should be liberally construed to the end that benefits may not be denied on narrow or technical grounds." *Hewett v. Garrett*, 274 N.C. 356, 360, 163 S.E. 2d 372, 375 (1968). But at the same time, we "may not legislate under the guise of construing a statute liberally." *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E. 2d 479, 485 (1965). We will construe with these admonitions in mind.

G.S. 97-53(28) states in part:

> (28) Loss of hearing caused by harmful noise in the employment. The following rules shall be applicable in determining eligibility for compensation and the period during which compensation shall be payable:
>
> > a. The term "harmful noise" means sound in employment capable of producing occupational loss of hearing as hereinafter defined. Sound of an intensity of less than 90 decibels, A scale, shall be deemed incapable of producing occupational loss of hearing as defined in this section.
> >
> > b. "Occupational loss of hearing" shall mean a permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in employment.

Part a of subsection (28) requires an employee to show that the noise to which he was exposed could produce occupational loss of hearing. It then says that noise of less than 90 decibels cannot produce an occupational loss of hearing. Part b then defines occupational loss of hearing as a permanent sensorineural loss of hearing in both ears. Plaintiff's evidence showed the permanent loss in both ears.

However, defendant contends, and the Industrial Commission agreed, that under the statute 90 decibels, A scale, is a noise level that plaintiff has the burden of showing in order to recover. We are constrained to agree and thus preclude plaintiff's argument that the 90 decibels measurement is an affirmative defense that defendant must prove.

A careful reading of the statute, and the placement of the 90 decibels requirement in the subpart that defines the elements of recovery, lead to the conclusion that a plaintiff-employee must show that he was exposed to that level of noise before he can recover. If 90 decibels were an affirmative defense the General Assembly clearly could have said that as it did in G.S. 97-12, where the party claiming the defense of employee intoxication on the job has the burden of showing it. It is the task of the General Assembly to define the elements of recovery under the Workers' Compensation Act, and this Court cannot by judicial declarations amend the Act.

Affirmed.

Judges HEDRICK and WELLS concur.

Judge WELLS concurring.

While I feel that the provisions of the statute put an almost insurmountable burden on a claimant in a hearing loss case, I am nevertheless persuaded that the majority opinion is correct.

STATE OF NORTH CAROLINA v. JAMES HOLMES

No. 8212SC12

(Filed 5 October 1982)

1. Constitutional Law § 51— speedy trial—ongoing drug investigation—pre-indictment delay

There was insufficient evidence of undue delay and prejudice to defendant to require the dismissal of narcotics charges against defendant for pre-indictment delay where defendant allegedly sold narcotics to an undercover agent on 6 August 1980; the State had evidence sufficient to charge defendant on 20 August 1980; the indictment was not issued until 11 May 1981 when an ongoing undercover drug investigation was completed; although the undercover agent to whom defendant allegedly sold drugs stopped buying drugs in October 1980, he maintained and reported on his contacts in the drug community throughout the investigation; defendant asserted merely that he was prejudiced because neither he nor his mother could remember what had occurred on 6 August 1980, but defendant failed to show that testimony lost because of faded memory would have been helpful, was significant and was lost because of the pre-indictment delay; and defendant failed to show that the

State intentionally delayed indictment in order to impair his defense or to gain tactical advantage.

2. **Constitutional Law § 51— speedy trial—ongoing drug investigation—pre-indictment delay**

Where an undercover agent remains actively involved in an ongoing drug investigation and arrests and indictments would jeopardize the investigation, indictment may be delayed until completion of the investigation, and the delay in issuance of an indictment will not, without more, prejudice the defendant's due process interest in a timely indictment.

APPEAL by the State of North Carolina from *Braswell, Judge.* Judgment entered 11 August 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 31 August 1982.

The defendant was indicted on charges of possession with intent to sell and deliver a controlled substance (hydromorphone) and sale and delivery of the controlled substance in violation of G.S. 90-95(a)(1). Defendant's pretrial motion to dismiss for pre-indictment delay was granted. Pursuant to G.S. 15A-1445(a)(1), the State appealed entry of judgment for defendant.

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

Appellate Defender Adam Stein for defendant-appellee.

HILL, Judge.

The defendant allegedly sold hydromorphone to Undercover Agent Jimmy Maynor on 6 August 1980. The State had evidence sufficient to charge defendant on 20 August 1980. The indictment was not issued, however, until 11 May 1981. Without making written findings of fact, the trial judge granted defendant's pretrial motion to dismiss for pre-indictment delay on 11 August 1981.

[1] The sole question for decision is whether there was sufficient evidence of undue delay and actual prejudice to defendant to support the trial judge's favorable ruling on defendant's pretrial motion to dismiss for pre-indictment delay. We find the judge's ruling is not supported by the evidence presented at hearing. We, therefore, reverse the judgment below and remand for a trial on the merits.

The State's evidence tended to show that from July, 1980, to May, 1981, the Cumberland County Bureau of Narcotics (CCBN) conducted an undercover drug campaign aimed at members of the drug community in Fayetteville, North Carolina. Working undercover, Deputy Sheriff Jimmy Maynor allegedly bought drugs from defendant on 6 August 1980 and continued making undercover purchases from others until October, 1980. Thereafter, although he ceased buying drugs, Maynor maintained and reported on contacts made in the field through 11 May 1981, when the indictment against defendant issued. Apparently, the State could have charged the defendant as early as 20 August 1980 but delayed indictment until the undercover operation ended.

The defendant's evidence tended to show that the 11 May 1981 indictment marked his earliest awareness of the charge against him. At the hearing on his motion, defendant testified that he could not remember what he was doing on 6 August 1980. Efforts by his friends, his mother and himself to recall independently or to trace his whereabouts on 6 August 1980 through a contemporaneous CETA application were fruitless.

This case falls squarely within the test adopted by this Court in *State v. Davis*, 46 N.C. App. 778, 782, 266 S.E. 2d 20, 23, *disc. rev. denied*, 301 N.C. 97, --- S.E. 2d --- (1980):

> . . . for defendant to carry the burden on his motion to dismiss for preindictment delay violating his due process rights pursuant to the Fifth and Fourteenth Amendments, he must show both [1] actual and substantial prejudice from the preindictment delay *and* [2] that the delay was intentional on the part of the state in order to impair defendant's ability to defend himself or to gain tactical advantage over the defendant.

We hold that defendant showed neither actual prejudice nor unwarranted delay.

In his motion, defendant baldly asserted that the State's delay in initiating prosecution "irreparably prejudiced defendant's ability to prepare an adequate defense." At hearing, defendant and his mother testified that, because of the delay, they could no longer remember what defendant was doing on 6 August 1980.

A general allegation of prejudice supported merely by claims of faded memory will not sustain the defendant's burden of proof on the issue of prejudice. The defendant must show that the evidence or testimony lost because of faded memory would have been helpful, was significant and was lost because of pre-indictment delay. *State v. Dietz*, 289 N.C. 488, 493, 223 S.E. 2d 357, 360 (1976). Nowhere in his testimony or written motion did defendant make the required showing. Hardly a criminal case exists where the defendant could not make general averments of impaired memory and lost witnesses. *State v. Dietz, supra*, at 493, 223 S.E. 2d at 361. As noted by the Court in *Dietz, id.*:

> ". . . A claim of faded memory, the veracity of which can rarely be satisfactorily tested, can be plausibly asserted in almost any criminal case in which the defendant is not charged within a few weeks, at most, after the crime. The possibility or likelihood of faded memory has not, however, in itself, been viewed as prejudice that requires dismissal of an indictment, despite delays of much longer than the four and one-half months shown here. . . ."

This defendant, in addition, failed to show that the State intentionally delayed indictment in order to impair his defense or to gain tactical advantage, a claim requiring inquiry into the nature of or reason for the delay. *State v. Davis, supra; United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2048-2049, 52 L.Ed. 2d 752, 759, *rehearing denied*, 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed. 2d 164 (1977). To prevail on this point, a defendant essentially must prove that the State *unnecessarily* delayed seeking indictment. This Court recognizes that where the State delays indictment in order to complete an investigation, the defendant's due process rights remain intact, "even if his defense might have been somewhat prejudiced by the lapse of time." *State v. Davis, supra*, at 781, 266 S.E. 2d at 22, *quoting United States v. Lovasco, supra*, at 796, 97 S.Ct. at 2052, 52 L.Ed. 2d at 763. This Court also excuses delay necessitated by the State's desire to protect the identity and continued effectiveness of an undercover agent. *State v. Davis, supra*, at 782, 266 S.E. 2d at 22-23. Indeed, the courts of this State have recognized that where it would prejudice an ongoing drug investigation by compromising the agent's "cover," indictment may be delayed until completion of the investigation.

State v. Dietz, supra; State v. Hackett, 26 N.C. App. 239, 215 S.E. 2d 832, *cert. denied,* 288 N.C. 246, 217 S.E. 2d 670 (1975).

The defendant contends that, heretofore, North Carolina courts excused pre-indictment delay involving an ongoing drug operation principally to preserve the agent's ability to make undercover purchases of drugs. The defendant reasons that because Deputy Maynor stopped buying drugs in October, 1980, the State had no need to delay indictment further. We are not persuaded.

In the case at hand, the State delayed defendant's indictment because the undercover purchase involving the defendant was part of a 10-month drug investigation. The State's evidence indicated that defendant was arrested and formally charged when this investigation ended. Furthermore, Undercover Agent Maynor, to whom defendant allegedly sold drugs on 6 August 1980, saw the operation to completion. Although Maynor stopped buying drugs in October, 1980, he maintained and reported on his contacts in the drug community throughout the investigation. His continued usefulness hinged on his anonymity. An earlier indictment may have frustrated the CCBN's ongoing investigation, drying up sources and preventing society from bringing other drug traffickers to justice.

[2] We find that, under the circumstances of this case, the defendant has shown neither actual and substantial prejudice nor unnecessary delay. In so doing, we extend this Court's prior rulings, holding that where there is, as here, an ongoing investigation that will be jeopardized by arrests and indictments resulting from the operation *and* where the undercover agent remains actively involved in the operation, indictment may be delayed until completion of the drug investigation. In such instances, delay in issuance will not, without more, prejudice the defendant's due process interest in a timely indictment.

Reversed and remanded.

Judges VAUGHN and JOHNSON concur.

STATE OF NORTH CAROLINA v. DONALD ABERNATHY FREEMAN

No. 8226SC90

(Filed 5 October 1982)

1. **Constitutional Law § 51— speedy trial—voluntary dismissal by State—subsequent indictment involving charges from same scheme or plan**

Where defendant was indicted in Lincoln County on 20 October 1980; the State took a voluntary dismissal on 23 December 1980 because the defendant was "to be tried in Mecklenburg County on related charges"; and where after the Lincoln County indictment was dismissed and on 23 March 1981, the defendant was indicted in Mecklenburg County on the charge for which he was convicted, the State failed to comply with the Speedy Trial Act, G.S. 15A-701(a1), since the false pretense for which the defendant was charged in Lincoln County and the aiding and abetting false pretense for which the defendant was convicted in Mecklenburg County were part of the same scheme or plan.

2. **False Pretense § 1; Indictment and Warrant § 8.4— one crime violating different statutes—ability of State to elect offense to prosecute**

Where, under the evidence, defendant could have been convicted of violating G.S. 14-106, obtaining property in return for worthless checks, G.S. 14-107, worthless checks, or G.S. 14-100, false pretense, it was not error for the State to elect to prosecute defendant under the false pretense statute since a single act or transaction may violate different statutes.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 1 July 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 3 September 1982.

The defendant was tried for aiding and abetting the obtaining of property by false pretense in violation of G.S. 14-100. The State's evidence showed that on 5 November 1979 the defendant opened a bank account in the name of Budget Merchandise and Financing. The defendant deposited $75.00 in the account. The defendant asked Harry Lee Gaston to cash some of the checks at which time he told Mr. Gaston that Budget Merchandise and Financing did not exist as a company. Gaston cashed checks drawn on the account at several different places from 9 November 1979 until 30 November 1979. In each instance, the defendant made a check payable to Gaston drawn on the Budget Merchandise and Financing account. The defendant would take Gaston to a store and wait outside while Gaston cashed the check. In each instance, the defendant would take 60% of the proceeds and Gaston would retain the balance.

The defendant was indicted on 20 October 1980 in Lincoln County for false pretense based on the passing of worthless checks on 28 and 30 November 1979. The defendant was indicted on 17 November 1980 in Mecklenburg County on three counts of conspiracy with Gaston and a third person to obtain money by false pretense on 9, 12, and 15 November 1979. On 23 December 1980 the Lincoln County charges were voluntarily dismissed because the defendant was "to be tried in Mecklenburg County on related charges." Defendant was indicted on 23 March 1981 in Mecklenburg County for three counts of aiding and abetting a false pretense and for conspiracy to commit false pretense. These indictments alleged that the first three offenses occurred on 9 November 1979 and the conspiracy began on 5 November 1979 and ended on 12 February 1981. The Mecklenburg County indictments of 17 November 1980 were voluntarily dismissed on 4 May 1981.

On 21 April 1981 the defendant filed a motion to dismiss all charges on the ground the State had violated the Speedy Trial Act. This motion was denied.

The defendant was convicted of aiding and abetting the obtaining of property by false pretense. He appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the overruling of his motion to dismiss for the State's failure to comply with the Speedy Trial Act. We believe this assignment of error has merit. G.S. 15A-701(a1) provides in part:

> "Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1983, shall begin within the time limits specified below:
>
> * * *

(3) When a charge is dismissed, other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge."

The defendant was indicted in Lincoln County on 20 October 1980. The State took a voluntary dismissal on 23 December 1980 because the defendant was "to be tried in Mecklenburg County on related charges." After the Lincoln County indictment was dismissed and on 23 March 1981, the defendant was indicted in Mecklenburg County on the charge for which he was convicted. We believe the false pretense for which the defendant was charged in Lincoln County and the aiding and abetting false pretense for which the defendant was convicted in Mecklenburg County were part of the same scheme or plan. *See State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981). The Lincoln County charges were not dismissed under G.S. 15A-703 or on a finding of no probable cause. The trial in Mecklenburg County was not held within 120 days of the indictment in Lincoln County which delay violated the provisions of G.S. 15A-701(a1). *See State v. Norwood*, 57 N.C. App. 584, 291 S.E. 2d 835 (1982); *State v. Walden*, 53 N.C. App. 196, 280 S.E. 2d 505 (1981); and *State v. Dunbar*, 47 N.C. App. 623, 267 S.E. 2d 577 (1980). We reverse and remand for a hearing in superior court as to whether the case should be dismissed with or without prejudice.

[2] We shall discuss the defendant's other assignment of error as the question it raises may recur if the defendant is again brought to trial. The defendant contends it was error to deny his motion to dismiss the charge of false pretense under G.S. 14-100. He argues that under the evidence he could have been convicted of violating G.S. 14-106 (obtaining property in return for worthless check, draft or order) or G.S. 14-107 (worthless check). The defendant argues that a person may not be prosecuted under the false pretense statute when other statutes more specifically fit

the alleged activities. We disagree. A single act or transaction may violate different statutes. *See State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975) and *State v. Byrd*, 50 N.C. App. 736, 275 S.E. 2d 522 (1981). We believe the evidence in this case is sufficient for the jury to convict the defendant of violating G.S. 14-100. *See State v. Cronin*, 299 N.C. 229, 262 S.E. 2d 277 (1980) for the elements necessary to convict under G.S. 14-100. The defendant relies on *State v. Bost*, 55 N.C. App. 612, 286 S.E. 2d 632 (1982); *State v. Douglas*, 54 N.C. App. 85, 282 S.E. 2d 832 (1981); and *State v. Douglas*, 51 N.C. App. 594, 277 S.E. 2d 467 (1981), *aff'd*, 304 N.C. 713, 285 S.E. 2d 802 (1982). Each of these cases involved the question of which section of a statute covered the offense charged. In this case we hold the offense is covered by more than one section.

Reversed and remanded.

Chief Judge MORRIS and Judge WHICHARD concur.

STATE OF NORTH CAROLINA v. EDDIE LARKE PEARSON

No. 8225SC29

(Filed 5 October 1982)

1. **Appeal and Error § 45; Criminal Law §§ 159.1, 166— filing stenographic transcript—failure to attach portions of transcript as appendix to brief**

Defendant's appeal is subject to dismissal where defendant filed the stenographic transcript of the evidence at trial in lieu of narrating the testimony but failed to reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions raised as required by App. Rule 9(c)(1) and App. Rule 28(b)(4).

2. **Criminal Law § 87.4— scope of redirect examination—discretion of court**

The trial court did not abuse its discretion in refusing to permit defendant to expand the scope of redirect examination to include matters not brought out on either direct or cross-examination.

3. **Criminal Law § 102.4— comment by prosecutor—mistrial not required**

The trial court did not err in the denial of defendant's motion for mistrial after the prosecutor, during questioning of an undercover agent, spilled some marijuana on the witness stand and said, "A little bit a marijuana won't hurt anything, will it?"

4. Criminal Law § 86.8— contradiction of State's witness on collateral matters

The trial court did not err in refusing to permit defense counsel to ask a defense witness questions which attempted to contradict a State's witness on collateral matters.

APPEAL by defendant from *Owens, Judge.* Judgments entered 19 June 1981 in Superior Court, BURKE County. Heard in the Court of Appeals 31 August 1982.

Defendant was convicted on eight counts of the sale or possession of controlled substances in violation of G.S. 90-95.

The State's evidence tended to show that defendant sold the drugs to an undercover narcotics agent named Woods.

Judgments were entered imposing seven concurrent sentences of three to five years and one consecutive sentence of three to five years which was suspended.

Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the State.

Byrd, Triggs, Mull and Ledford, by C. Gary Triggs and Wayne O. Clontz, for defendant appellant.

VAUGHN, Judge.

[1] We note at the outset that defendant's appeal is subject to dismissal for his failure to comply with the Rules of Appellate Procedure. As permitted by App. R. 9(c)(1), defendant elected to file the stenographic transcript of the evidence at trial in lieu of narrating the testimony. Many of his assignments of error require an examination of the trial record. Defendant did not reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions raised as is required by App. R. 9(c)(1) and App. R. 28(b)(4). In our discretion, nevertheless, we have considered the appeal on its merits.

[2] The defendant presents ten arguments on appeal. Defendant's first argument is that the trial court erred in restricting the examination of defendant's witness, Hawkins, as to the conduct of Woods, the narcotics agent. Technically, this objection is not reviewable since defendant failed to present for the record what the answer would have been. 1 Brandis on North Carolina Evidence § 26 (1982). Even so, we consider defendant's argument

and conclude that the court did not err. The defense, on redirect examination, attempted to examine Hawkins about several different times Hawkins visited Woods. This line of questioning would have been proper if attempted during direct examination. However, redirect examination is usually limited to clarifying the subject matter of the direct examination, and dealing with the subject matter brought out on cross-examination. 1 Brandis on North Carolina Evidence § 36 (1982). It is in the discretion of the trial court to permit the scope of the redirect to be expanded. *State v. Thompson*, 22 N.C. App. 178, 205 S.E. 2d 772 (1974). We see no abuse of discretion and no prejudice to the defendant.

[3] Defendant's second argument is that the trial court committed prejudicial error by denying defendant's motion for mistrial after the Assistant District Attorney made a "highly inflammatory and prejudicial" remark. This argument is without merit. The remark that the Assistant District Attorney made was neither inflammatory nor prejudicial. What actually happened was that when the Assistant District Attorney was questioning the undercover agent, he spilled some marijuana on the witness stand. He said, "A little bit of marijuana won't hurt anything, will it?" The court then instructed the jury to disregard that remark.

Defendant's third argument is that the trial court committed prejudicial error in refusing to allow testimony about Woods' assault on Hawkins. This argument is without merit. Defendant's question to Woods was objectionable because it was argumentative and a compound question. When defendant broke the question down into a series of shorter questions, it was permitted.

[4] Defendant's fourth argument is that the trial court committed prejudicial error in refusing to allow defendant to question Paulk, the defendant's witness, about Woods getting some money from Paulk. Defendant cross-examined Woods about the money he was given by the police department. Woods stated that he never used marked money. Woods also stated that he never tried to get back any money that he paid Paulk for work Paulk did on Woods' van. Paulk, on direct examination, twice stated that Woods came back to get some money he had given Paulk. He could not, however, recall what year it was. He testified that Woods paid him for some automobile repairs. He was asked if the money had any distinguishing characteristics but did not reply. He denied

that Woods had ever discussed being an undercover agent with him. The court sustained the State's objections to further questions along that line. Defendant's exceptions fail to disclose prejudicial error. In the first place, what the witness' answer would have been was not made a part of the record. Secondly, defendant was apparently trying to contradict Woods on collateral matters, and the judge properly sustained the State's objection. 1 Brandis on North Carolina Evidence § 47 (1982).

We have carefully considered defendant's remaining assignments of error and conclude that they fail to disclose prejudicial error.

No error.

Judges HILL and JOHNSON concur.

EXXON CHEMICAL AMERICAS, A DIVISION OF EXXON CHEMICAL COMPANY, A DIVISION OF EXXON CORPORATION, A NEW JERSEY CORPORATION v. JOHN KENNEDY

No. 8129SC1232

(Filed 5 October 1982)

1. **Guaranty § 1— allegation that sale not in reliance on guaranty—immaterial as to defendant's obligation to pay**

Where an agreement established an absolute promise by defendant as guarantor, independent of the obligation of the principal debtor, reliance by plaintiff upon the guaranty in selling to the principal debtor was immaterial to defendant's obligation to pay the account upon the failure of the principal debtor to pay.

2. **Guaranty § 1— guaranty agreement—principal debtor discharged in bankruptcy—no change in guarantor's obligation**

Where a guaranty agreement by its express terms created a "primary obligation" from defendant to plaintiff, the fact that the principal debtor had been discharged in bankruptcy from the obligation which the guarantee "stood behind" did not terminate any liability he might have had as guarantor.

3. **Guaranty § 2— principal debtor ordered by bankruptcy court to pay fifteen percent of claim—no change in obligation of guarantor**

An allegation that a bankruptcy court ordered the principal debtor, as a condition of discharge, to pay plaintiff fifteen percent of its claim did not enti-

tle defendant to a set-off in that amount since there was no evidence that fifteen percent of the claim had in fact been paid, and since defendant would be subrogated to plaintiff's rights in the fifteen percent of the claim should he pay the obligation.

APPEAL by defendant from *Freeman, Judge.* Order entered 16 July 1981 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 3 September 1982.

Defendant executed, in favor of plaintiff, a guaranty of payment of the account of Plastifax, Inc., with plaintiff. Plaintiff sued defendant on the guaranty, seeking recovery of a sum allegedly due it for the property sold and delivered to Plastifax.

Defendant appeals from entry of summary judgment for plaintiff.

Ladson F. Hart for plaintiff appellee.

Potts & Welch, by Paul B. Welch, III, for defendant appellant.

WHICHARD, Judge.

[1] Defendant first contends summary judgment was improper because his answer denied plaintiff's allegation that property was sold to Plastifax *in reliance on the guaranty,* thus presenting an issue of fact as to "whether . . . the sale and delivery of the merchandise would have occurred without the execution of the guarantee." The guaranty agreement provided:

> [Defendant] guarantee[s] to [plaintiff] the prompt payment in full when due and payable of any and all sums of money now due and which may hereafter become due to [plaintiff] for merchandise . . . sold . . . by [plaintiff] to [Plastifax]. . . .
>
> This instrument shall be construed as a general and continuing guaranty of payment . . . .
>
> . . . .
>
> This being a primary obligation, [plaintiff] shall not be required to exhaust its remedies against [Plastifax] prior to the exercising of its rights and remedies against [defendant].

This language created a guaranty of payment. *See Gillespie v. DeWitt*, 53 N.C. App. 252, 280 S.E. 2d 736, *disc. review denied*, 304 N.C. 390, 285 S.E. 2d 832 (1981).

> A guaranty of payment is an *absolute promise* by the guarantor to pay a debt at maturity if it is not paid by the principal debtor. This obligation *is independent of the obligation of the principal debtor*, 'and the creditor's cause of action against the guarantor ripens immediately upon the failure of the principal debtor to pay the debt at maturity.'

Gillespie, 53 N.C. App. at 258, 280 S.E. 2d at 741 (emphasis supplied).

Because the agreement established an absolute promise by defendant as guarantor, independent of the obligation of the principal debtor, reliance by plaintiff upon the guaranty in selling to Plastifax, the principal debtor, is immaterial to defendant's obligation to pay the account. Defendant's contention that his denial of plaintiff's allegation of reliance creates a material issue of fact, which precludes summary judgment, is thus without merit.

[2] Defendant alleged in his answer, as an "affirmative defense," that Plastifax, the principal debtor, had been discharged in bankruptcy from the obligation which the guaranty "stood behind"; and that this discharge destroyed the debt which the guaranty was executed to secure, thereby terminating any liability he might have as guarantor. He contends that this alleged "affirmative defense" entitles him to a dismissal.

As noted above, the guaranty agreement by its express terms created a "primary obligation" from defendant to plaintiff. It established an absolute promise to pay, independent of the obligation of the principal debtor. Further, with one exception not pertinent here, "discharge [in bankruptcy] of a debt of the debtor does not affect the liability of any other entity on . . . such debt." 11 U.S.C. § 524(e). *See also Luther v. Lemons*, 210 N.C. 278, 186 S.E. 369 (1936); *In re Harvey Cole Co., Inc.*, 2 B.R. 517 (1980). The contention is clearly without merit.

[3] Defendant also alleged in his answer, as an "affirmative defense," that the bankruptcy court ordered Plastifax, the principal debtor, as a condition of discharge, to pay plaintiff fifteen percent of its claim; and that defendant accordingly is entitled to

a set off in that amount if judgment is entered against him. He appears to contend that the alleged set off presents an issue of fact which precludes summary judgment.

Defendant neither alleges nor forecasts evidence tending to establish that fifteen percent of the claim has in fact been paid. Absent a forecast of such evidence, no issue of fact with regard to this sum is presented. Again, the agreement contained an absolute promise to pay. It created a "primary obligation" in defendant as guarantor, independent of the obligation of the principal debtor. "A guarantor's liability arises at the time of the default of the principal debtor on the obligation . . . which the guaranty covers." *Gillespie*, 53 N.C. App. at 258, 280 S.E. 2d at 741. Defendant's liability thus arose upon the principal debtor's default, which the record clearly establishes and defendant does not deny.

"Upon general principles of equity a surety, paying the debt of his principal, [is] entitled to be substituted to all the rights of the creditor . . . ." *Peebles v. Gay*, 115 N.C. 38, 40, 20 S.E. 173, 174 (1894) (emphasis omitted). *See also* G.S. 26-3.1. Should defendant pay the obligation, then, he will be subrogated to plaintiff's rights in the fifteen percent of the claim which Plastifax, the principal debtor, was ordered to pay. Defendant's contention that "plaintiff will very likely be overpaid," resulting in "injustice" to him, is thus without foundation; and no genuine issue of fact is presented by this alleged "affirmative defense."

Because plaintiff has carried its burden of establishing that no genuine issue as to any material fact exists, and because plaintiff is entitled to judgment as a matter of law, summary judgment in its favor was appropriate. G.S. 1A-1, Rule 56; *Kidd v. Early*, 289 N.C. 343, 370, 222 S.E. 2d 392, 408 (1976).

Affirmed.

Chief Judge MORRIS and Judge WEBB concur.

WILLARD SOUTHERLAND AND WIFE, BEULAH VANDETTA SOUTHERLAND v. ARTIS K. KAPP AND WIFE, BRENDA KAPP, INDIVIDUALLY AND D/B/A RIBBONS AND CURLS BEAUTY SALON

No. 8121SC1246

(Filed 5 October 1982)

Negligence § 57.7— fall on ice on sidewalk—invitee—summary judgment for defendant proper

In a negligence action where plaintiff's testimony showed that she knew the steps were covered with ice as she entered defendant's shop; that she knew rain and sleet had continued to fall while she was inside; and that she knew conditions were at least as bad if not worse when she emerged from the shop to leave, defendant committed no breach of duty of care owed to her since the fact that the steps and patio were icy was obvious to plaintiff.

APPEAL by plaintiffs from *Walker, Judge.* Judgment entered 8 September 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 September 1982.

Plaintiff Beulah Southerland sued to recover damages for personal injuries she sustained on 13 January 1978 when she slipped and fell on the steps at the entrance to defendants' business, a beauty shop, located at their home. Plaintiff Willard Southerland sued for loss of consortium. The defendants denied any negligence liability and pleaded contributory negligence on the part of both plaintiffs as a bar to any recovery.

Wade H. Leonard, Jr., for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice, by Daniel W. Donahue and Keith A. Clinard, for defendant appellees.

BECTON, Judge.

It is undisputed that the weather was inclement on the day of the mishap. Rain mixed with sleet and snow had been falling all during the morning prior to plaintiff's fall, continued to fall during her visit to the beauty shop, and was falling when she fell. The parties also agree that ice had accumulated at the entrance to the beauty shop; that ice was present on the steps and patio; and that plaintiff was aware of the ice when she arrived at defendants' beauty shop. The defendants argue that they are not liable for plaintiff's injury because she was aware of the dangerous conditions. For the reasons set forth below, we agree.

The purpose of the summary judgment rule is to provide an efficient method for determining whether a material issue of fact actually exists. *Durham v. Vine*, 40 N.C. App. 564, 253 S.E. 2d 316 (1979). In order to prevail, a movant must establish the absence of any material issue of fact. One way he can meet this burden is by showing the non-existence of an essential element of the plaintiff's claim for relief. *Id.*, at 566, 253 S.E. 2d at 318.

A *prima facie* case of negligence liability is alleged when a plaintiff shows that: defendant owed him a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury. *Coltraine v. Hospital*, 35 N.C. App. 755, 757-58, 242 S.E. 2d 538, 540 (1978). In the case *sub judice*, plaintiffs have failed to establish that the defendants breached any duty owed them, and that flaw subjects this case to disposition by summary judgment.

A landowner is not an insurer of his invitee's safety. Rather, the duty owed business invitees is described as the duty to warn of or make safe concealed, dangerous conditions, the presence of which the landowner has express or implied knowledge. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E. 2d 559, 562 (1981). A landowner is under no duty to warn invitees of obvious dangers of which they have equal or superior knowledge. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967); *Stansfield v. Mahowsky*, 46 N.C. App. 829, 266 S.E. 2d 28, *cert. denied* 301 N.C. 96 (1980).

Plaintiff Beulah Southerland's testimony shows that she knew the steps were covered with ice as she entered defendants' shop; that she knew rain and sleet had continued to fall while she was inside; and that she knew conditions were at least as bad if not worse when she emerged from the shop to leave. Since the fact that the steps and patio were icy was obvious to plaintiff Beulah Southerland, defendants committed no breach of duty of care owed to her.

Plaintiff Willard Southerland's consortium claim is derivative. *See* 41 Am. Jur. 2d *Husband and Wife* § 452 (1968). *See also Logullo v. Joannides*, 301 F. Supp. 722, 726 (D. Delaware 1969). (A claim for consortium is non-existent in the absence of a valid claim by the injured spouse.) Because we find no negligent con-

duct by defendants, we summarily reject Willard Southerland's argument.

Defendants bear no liability in tort for Mrs. Southerland's injuries, and there exists no material issue of fact to be determined as a matter of law. The order below allowing defendants' motion for summary judgment was proper.

Affirmed.

Chief Judge MORRIS and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. JOHNNIE BEST

No. 828SC150

(Filed 5 October 1982)

Homicide § 30.3— failure to instruct on involuntary manslaughter—prejudicial error

The trial court erred in failing to instruct on involuntary manslaughter where the evidence tended to show that the victim stabbed defendant and defendant produced a gun; that the gun went off when the victim jerked the barrel; and that he "didn't pull the trigger" and "didn't mean to hurt anybody." This was evidence from which the jury could find that defendant had no intent to kill or inflict serious bodily injury.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 8 October 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 15 September 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of voluntary manslaughter.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, for the State.

Barnes, Braswell & Haithcock, P.A., by R. Gene Braswell and Thomas Barwick, for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter.[1] We agree, and accordingly award a new trial.

There must be an instruction on a lesser included offense when there is evidence from which the jury could find the defendant guilty of the lesser offense. *E.g., State v. Ward*, 286 N.C. 304, 311, 210 S.E. 2d 407, 413 (1974), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1207, 96 S.Ct. 3206 (1976); *State v. Duboise*, 279 N.C. 73, 80, 181 S.E. 2d 393, 397 (1971); *State v. Redfern*, 291 N.C. 319, 321, 230 S.E. 2d 152, 153 (1976). "The *presence of such evidence* is the determinative factor." *State v. Fleming*, 296 N.C. 559, 562, 251 S.E. 2d 430, 432 (1979), *quoting State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). If "there is no evidence tending to show commission of a crime of less degree, the principle does not apply and the court correctly refuses to charge on the *unsupported lesser degree*." *State v. Wrenn*, 279 N.C. 676, 681, 185 S.E. 2d 129, 132 (1971).

The elements of voluntary manslaughter are: (1) unlawful killing of a human being, (2) without malice, and (3) without premeditation and deliberation. *E.g., State v. Fleming, supra*, 296 N.C. at 562, 251 S.E. 2d at 432. The elements of involuntary manslaughter are: (1) unlawful killing of a human being, (2) without malice, (3) without premeditation and deliberation, and (4) without intention to kill or inflict serious bodily injury. *Id.*

> It seems that, with few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon . . . and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter.

State v. Foust, 258 N.C. 453, 459, 128 S.E. 2d 889, 893 (1963).

The State's evidence tended to show the following:

1. The case was tried subsequent to 1 October 1981, the effective date of the amendment to Rule 10, Rules of Appellate Procedure, which makes objection at trial a prerequisite to assigning error to an omission from the charge. App. R. 10(b)(2). The record indicates that the requisite objection was lodged.

The victim and defendant were near each other in a bar speaking calmly when the victim, for no known reason, struck defendant on the head with a pool cue stick. Both men were restrained from fighting. As defendant was led from the bar, he threw a bottle at the victim which missed the victim and struck the piano player.

Defendant then got into the passenger seat of his car, and his son began to drive out of the bar parking lot. Defendant's car stopped before entering the street. The victim ran toward defendant's car, and a further brief scuffle ensued. Defendant and his son drove away, but returned a short while later. Again the victim rushed to defendant's car. The passenger door was opened, defendant produced a rifle, the victim grabbed and jerked the gun as if trying to take it away from defendant, and the gun fired, fatally wounding the victim. When police arrived, defendant was found to have a cut on his stomach and was sent for medical treatment.

Defendant testified as follows regarding his intent:

> I wanted to go back and find out what happened, the reason I had got hit over the head with a cue stick for no reason. I figured [the victim] would be gone by the time I got back. I did not go back with the intention of hurting anybody.
>
> . . . .
>
> When [the victim] stabbed me, I reached back into the back seat, and when I came around with the gun in front of me, he just grabbed a hold of the gun and was snatching and jerking and struggling with the gun. I was trying to get the man off of me; all I wanted to do was frighten him. He was right on top of me; he would have cut me to death.
>
> . . . When [the victim] grabbed the gun barrel and jerked it, the gun went off. I didn't pull the trigger. I didn't mean to hurt anybody.

In *State v. Wrenn, supra*, our Supreme Court said:

> Although the State's evidence tends to show an intentional killing with malice and with premeditation and deliberation, defendant's evidence is to the effect that he

only intended to scare his wife and had no intention of killing her; that in the scuffle between the parties the shotgun went off accidentally. In this setting, and with credibility a matter for the jury, the court should have submitted involuntary manslaughter with appropriate instructions.

279 N.C. at 683, 185 S.E. 2d at 133.

Defendant's testimony here that the gun went off when the victim jerked the barrel, and that he "didn't pull the trigger" and "didn't mean to hurt anybody," is evidence from which the jury could find that defendant had no intent to kill or inflict serious bodily injury. Under these circumstances, "and with credibility a matter for the jury, the court should have submitted involuntary manslaughter with appropriate instructions." *State v. Wrenn, supra. See also State v. Fleming, supra* (defendant's testimony that he did not intentionally cut victim sufficient to support involuntary manslaughter, despite State's evidence which uniformly showed malice).

Because the remaining errors assigned relate to matters which may not recur upon re-trial, we do not discuss them.

New trial.

Judges MARTIN and ARNOLD concur.

STATE OF NORTH CAROLINA v. THOMAS EDWARD CASEY

No. 8226SC83

(Filed 19 October 1982)

1. Searches and Seizures §§ 10, 18— detention of suspect justifiable—search and seizure of controlled substances pursuant to consent

Although defendant's behavior fit within "drug courier profile" in that he (1) arrived at an airport from a "source city," (2) was in a hurry and (3) exchanged packages with another person without verbally greeting him but by holding up a newspaper headline for him to read, two agents could not have reasonably suspected the defendant of criminal activity based on the observed circumstances since the conduct was "too slender a reed" to support a seizure. However, where defendant assented to a series of requests by the officers, was not coerced, threatened or arrested, agreed to accompany the officers to

the basement, and was specifically informed that he was not under arrest, the evidence was sufficient to support the court's finding that defendant voluntarily consented to go to an office. Therefore, the evidence obtained during a subsequent search was not tainted by an unlawful seizure, despite the lack of reasonable suspicion on the part of the officers.

2. **Searches and Seizures § 13— search of luggage—consent**

The evidence supported the trial court's finding that defendant voluntarily consented to the search of bags which he was carrying where it tended to show that (1) defendant denied ownership in the bags, (2) the alleged owner of the bags was asked for his consent and it was given, and (3) upon being advised that the alleged owner had consented and that defendant could still refuse to consent to a search, defendant agreed that the officers could search the bags in his possession.

3. **Narcotics § 4— possession of a controlled substance with intent to sell or deliver—sufficiency of evidence**

The evidence was sufficient to withstand defendant's motion to dismiss on the charge of possession of a controlled substance with intent to sell or deliver in violation of G.S. 90-95 where the evidence tended to show that defendant had at least actual physical possession of and dominion over a plastic bag in which a controlled substance was found and where defendant's knowledge of the controlled substance and defendant's intent to sell or distribute the controlled substance could easily be inferred from the circumstances.

Judge VAUGHN concurring.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 20 August 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 September 1982.

Defendant, Thomas Edward Casey was charged with possession of LSD, a controlled substance, with intent to sell or deliver in violation of the North Carolina Controlled Substance Act, G.S. 90-95. Prior to trial, defendant moved to suppress the evidence which he alleged was taken from a set of bags in his possession pursuant to an unlawful, warrantless search and seizure at Douglas Municipal Airport, Charlotte, N.C. A suppression hearing was held, and after hearing testimony presented by the State, the trial court denied defendant's motion to suppress. Defendant appeared for trial and moved to dismiss at the close of the State's evidence. The motion was denied and the jury found the defendant guilty of the offense of possession of LSD with intent to sell and deliver. From the denial of his motions, defendant appeals.

Defendant presents two questions for review. I. Whether there was sufficient evidence at the hearing on defendant's mo-

tion to suppress to support the findings of fact and conclusions of law that defendant had disclaimed ownership of the bags, had no reasonable expectation of privacy as to their contents, and that defendant freely and voluntarily consented to a search of the bags. II. Whether the trial court committed reversible error by denying defendant's motion to dismiss when there was insufficient evidence before the court that the bags searched were those of the defendant or that the defendant had knowledge of their contents.

Attorney General Edmisten, by Assistant Attorney W. Dale Talbert, for the State.

B. R. Batts, for defendant appellant.

JOHNSON, Judge.

I

Casey contends (1) that he was unlawfully seized in violation of his Fourth Amendment rights when he was taken to the officer's private office in the basement of the airport for an "investigatory detention" that was (a) not based upon probable cause and (b) neither brief nor based upon reasonable suspicion; (2) that his "voluntarily" accompanying the officer was not relevant; (3) that his consent to a search of the bags he carried was not voluntarily given but rather a result of the illegal stop and seizure and that; (4) the lack of probable cause to seize the bags and the implied threat that an illegal search would ensue regardless, precludes a finding that defendant's denial of ownership was a voluntary abandonment or that the disclaimer of ownership extinguished his reasonable expectation of privacy in the area searched. Hence, any evidence or consent obtained from defendant after his illegal detention was certainly the product of the "poison tree" (sic).

The trial court held a *voir dire* on the defendant's motion to suppress at the close of which it made findings of fact and conclusions of law. The findings of fact made by the court are conclusive on appeal if supported by competent evidence. *State v. Williams*, 303 N.C. 142, 277 S.E. 2d 434 (1981); *State v. Freeman*, 295 N.C. 210, 244 S.E. 2d 680 (1978).

The evidence presented by the State on *voir dire* tended to show that the defendant was observed meeting Donnie Joe Sport at the end of a concourse at Charlotte's Douglas Airport by Jack Davis, a SBI Agent and D. R. Harkey, a Charlotte Police Officer, who were on duty at Douglas Municipal Airport for the purpose of narcotics surveillance. Both officers had been trained by the Federal Drug Enforcement Administration in the art of intercepting domestic airline passengers suspected of acting as drug couriers smuggling narcotics into the Charlotte area from other "source cities" in this country.

Officer Harkey testified that they were "taught to be on the lookout for anything that strikes us as unusual among people that are deplaning flights, people that are in a hurry, people that exchange baggage or packages without a lot of conversation. That is one thing we look for on incoming flights. We were told to screen the flights from source cities, which we did, just to be on the lookout for suspicious behavior that would draw our attention to individuals."

The officers' attention was attracted to defendant Casey because he held a newspaper headline up for Sport to read rather than saying hello. The officers then observed Sport push a yellow plastic bag and briefcase into defendant's hand as they walked together towards the baggage claim area. Agent Davis heard Casey give directions to his car to Sport. No other conversation took place.

As Casey left the terminal, the officers approached him and asked if they could speak with him. Casey agreed. The officers then identified themselves as police officers conducting a narcotics investigation. According to Agent Davis, Casey became "visibly nervous" as he provided the officers with his identification. When asked if the bags were his, Casey stated, "No." Officer Harkey asked Casey first if he was carrying any contraband in the plastic bag or briefcase and then whose bags he was carrying. Casey stated they were Mr. Sport's bags. Officer Harkey then left to talk with Sport and Agent Davis asked defendant if he would accompany him to a basement office inside the terminal. Davis advised Casey he was not under arrest but they were asking that he cooperate. At the time, Davis and Harkey were in plain clothes. No weapons were displayed and Casey was never

physically touched. Casey agreed to accompany Davis to the basement office.

During this 8-10 minute interval, Officer Harkey was conducting an interview with Sport. Harkey testified during *voir dire* that Sport said, "You can search my bags" and that Harkey then asked, "Can we search your yellow bag and your briefcase." Sport responded, "Yes, you may search those if you want to." Whereupon Sport took off in a taxi, leaving his driver's license in Harkey's hand. Sport has not been heard from since.

Officer Harkey returned to the basement area. The defendant was advised by the officers that Sport had consented to a search of his luggage and of the briefcase and bag. Agent Davis then advised Casey that he could refuse to permit a search. Defendant allowed the search. Both officers testified that Casey kept the bags in his possession throughout the 8-10 minute encounter and never set them down until requested to do so by Davis. When the bags were opened, Agent Davis discovered contraband in the yellow plastic bag. The briefcase contained personal papers and items belonging to Sport. Defendant's name appeared once in an address book contained in the briefcase. Defendant was immediately arrested after the search. Neither officer claims to have known Mr. Sport or the defendant before the day of arrest.

The defendant presented no evidence during the *voir dire* and failed, during his cross-examination to elicit any conflicting evidence material or relevant to the trial court's findings of fact.

The trial court specifically found that defendant told the officers that the bags were not his, but belonged to Mr. Sport; that defendant was informed that he was not under arrest; that he assented to a request to go to the private office; that he was advised that he could refuse to permit a search of the briefcase and bag, and that he agreed to the search. In addition, the trial court made a separate finding that defendant was not coerced or threatened in any way, never placed under arrest and that no weapon was ever displayed by either of the officers.

The findings of fact by the trial court are supported by competent evidence and are therefore binding on this court. *State v. Williams, supra; State v. Freeman, supra.*

Based upon its findings of fact, the trial court concluded as a matter of law:

(1) the defendant, having specifically disclaimed ownership of the bags, had no reasonable expectation as to the privacy of their contents.

(2) the defendant freely and voluntarily consented to a search of the bags by the officers.

(3) the materials found in the bags by the officers are admissible in evidence.

The thrust of defendant's argument is that his consent to the search of the yellow plastic bag and briefcase was tainted by the law enforcement officers' warrantless "seizure" of his person in violation of his Fourth Amendment rights. Defendant equates the private office with a police station and maintains that the request that he accompany the officers was inherently coercive. No authority is cited in support of this proposition other than the ALI Model Code of Pre-arraignment Procedure Sec. 2.01 (3) and Commentary p. 91 (Tent. Draft No. 1, 1966). Defendant contends that he was subjected to an unreasonable seizure in that his detention in the basement office was not supported by probable cause and was neither brief nor based upon reasonable suspicion that he was engaged in narcotics trafficking.

The State maintains that the type of investigatory stop and detention involved in this case requires only that the officer has a reasonable suspicion, based upon objective facts, that the person is engaged in criminal activity. *Brown v. Texas*, 443 U.S. 47, 61 L.Ed. 2d 357, 99 S.Ct. 2637 (1979); *State v. Thompson*, 296 N.C. 703, 252 S.E. 2d 776 (1979).

The State argues that no seizure occurred; but if a seizure is found, that reasonable or founded suspicion existed in this case based on Casey's behavior consistent with the DEA Drug Courier Profile, an "informally compiled abstract of characteristics thought to be typical of persons carrying illicit drugs." In its brief, the State urges that this court approve use of the profile as a basis for investigatory stops.

A

The legality of searches and seizures based upon the "Drug Courier Profile" has been the subject of much judicial discussion since the inception of the Drug Enforcement Administration's (DEA) narcotics surveillance program in the nation's major airports.[1]

This Court analyzed a remarkably similar encounter between Agent Davis, Officer Harkey, and another domestic air passenger in *State v. Grimmett*, 54 N.C. App. 494, 284 S.E. 2d 144 (1981). The officers observed Grimmett and a companion near the baggage pickup area in the Charlotte Airport. They had been seen a few days earlier departing for Daytona Beach, Florida. The officers concluded that Grimmett's behavior pattern in the airport fell within the "drug courier profile." Harkey then approached Grimmett in a public area outside the terminal, identified himself, 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. On the basis of the following language from *Terry v. Ohio*, this Court found no seizure during the initial encounter:

> "Obviously, not all personal intercourse between policemen and citizens involves 'seizure' 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."

Id. at 501, 284 S.E. 2d at 149, *citing Terry v. Ohio*, 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968).

Casey's initial encounter with Harkey and Davis was virtually identical and cannot be considered a "seizure." Casey's main

1. For example, *see Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980) (per curiam); *State v. Grimmett*, 54 N.C. App. 494, 284 S.E. 2d 144 (1981); *State v. Cooke*, 54 N.C. App. 33, 282 S.E. 2d 800 (1981); *United States v. McCaleb*, 552 F. 2d 717 (6th Cir. 1977); *United States v. Westerbann-Martinez*, 435 F. Supp. 690 (E.D. N.Y. 1977); *United States v. Buenaventura-Ariza*, 615 F. 2d 29 (2nd Cir. 1980); *United States v. Berry*, 670 F. 2d 583 (5th Cir. 1982) (en banc).

contention is that his trip to the basement office was an illegal investigatory detention which tainted his subsequent consent to a search. Grimmett had also argued that his trip to the basement was a seizure tainting the evidence discovered there.

In analyzing the legality of the further intrusion in *Grimmett*, this Court noted that our constitution prohibits investigatory seizures. The following legal principles were found to control:

> "[E]ven 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 (1975); *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); and (b) that they be brief, *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed. 2d 824, 99 S.Ct. 2248 (1979)."

Id. at 499, 284 S.E. 2d at 148.

The officers in *Grimmett* were found to lack a reasonable and articulable suspicion that Grimmett was engaged in criminal activity based upon the "drug courier profile" behavior observed by the agents, including the "further, more critical facts" learned during the initial interview.[2]

[1] Casey does not seriously contend that his detention was not brief. Therefore, the first question is whether it was based upon a reasonable and articulable suspicion of criminal activity.

In the case *sub judice*, Officer Harkey's "profile" consisted of the following characteristics: 1) arrival from a "source city"; 2) people that are in a hurry; 3) people that exchange baggage or packages without a lot of conversation, and in general, any suspicious behavior that would draw the agent's attention to individuals.

The officers' observations consisted of the following: two individuals met without speaking to each other on a concourse near

2. These facts were Grimmett's extreme nervousness and inability to identify himself.

to where a flight from Atlanta had just landed. As Casey approached Sport, he immediately held a newspaper headline up to Sport's face. Sport then handed Casey a briefcase and yellow bag. They walked to a baggage claim area, had a slight conversation and Casey walked quickly out the terminal door. After the officers identified themselves, Casey became very nervous and shaking as he produced his driver's license. Asked if the bags he carried were his own, Casey responded that they belonged to Sport.

The standard of "reasonable" or "founded" suspicion to justify a limited investigatory seizure requires that the court examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of Casey and Sport, and the rational inferences which the officers were entitled to draw from those facts. *State v. Thompson, supra.*

Reid v. Georgia, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980) (per curiam) is controlling on the narrow issue of the existence of reasonable suspicion on the facts of this case. The petitioner in *Reid* appeared to the agent to fit the so-called "drug courier profile" and appeared nervous during the initial encounter. Specifically the court below had thought it relevant that (1) the petitioner arrived from Fort Lauderdale, a "source city"; (2) he arrived in the early morning when law enforcement activity is diminished; (3) he and his companion appeared to the agent to be trying to conceal the fact they were traveling together; and (4) they apparently had no luggage other than shoulder bags.

The United States Supreme Court concluded that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of the observed characteristics.

The Supreme Court dismissed three of the characteristics as describing "a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the court to conclude that as little foundation as there was in this case could justify a seizure." As to the other observation, the Supreme Court stated:

> "[O]nly the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded

> through the concourse relates to their particular conduct . . . [t]he agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together, a belief that was more an 'inchoate and unparticularized suspicion or 'hunch',' 392 U.S. at 27, than a fair inference in the light of his experience, is simply too slender a reed to support the seizure in this case."

448 U.S. at 441, 65 L.Ed. at 894, 100 S.Ct. at 2754.

At the time of their initial encounter with Casey, Harkey and Davis had no prior knowledge of either Casey or Sport nor did they know which city Sport was arriving from. What they did know was that Sport and Casey met without greeting one another, apparently making contact by reference to a newspaper headline, exchanged bags without conversing and walked quickly out of the terminal.

Two of the "profile" factors observed may be discounted immediately. The officers *assumed* that Sport arrived from a "source city" because he was observed coming down a concourse from the direction of the Atlanta arrival gate.[3] Agent Davis

3. A review of jurisdictions having ruled on the drug courier profile demonstrates a judicial consensus that the fact that a passenger arrived from or is departing for a city designated as a "narcotics distribution center" or "source city" by DEA Agents is entitled to little or no weight in analyzing the legality of a particular airport stop. *Reid v. Georgia*, 448 U.S. at 441, 65 L.Ed. 2d at 894, 100 S.Ct. at 2754 (arrival from Fort Lauderdale is a circumstance describing a very large category of presumably innocent travelers); *United States v. Scott*, 545 F. 2d 38, 40, n. 2 (8th Cir. 1976), *cert. denied* 429 U.S. 1066, 50 L.Ed. 2d 784, 97 S.Ct. 796 (1977) ("traveling from Los Angeles, [it being known 'that Los Angeles, California is a major distribution area for Mexican heroin,'] (has) little or no probative value"); *United States v. Andrews*, 600 F. 2d 563, 566-567 (6th Cir. 1979) ("Similarily, travel from Los Angeles cannot be regarded as in any way suspicious. Los Angeles may indeed be a major narcotics distribution center, but the probability that any given airplane passenger from that city is a drug courier is infinitesimally small. Such a flimsy factor should not be allowed to justify—or help justify—the stopping of travelers from the nation's third largest city. Moreover, our experience with DEA agent testimony in other cases makes us wonder whether there exists any city in the country which a DEA agent will not characterize as either a major narcotics distribution center or a city through which drug couriers pass on their way to a major narcotics distribution center."); *United States v. Pulvano*, 629 F. 2d 1151, 1155, n. 1 (5th Cir. 1980) ("A review of the cases in which this profile has been used, as well as the direct testimony of DEA Agent Mathewson, convinces us of the tragic fact that every major population center in this country has become a home for drug traffickers. It is difficult, therefore, to give that factor much weight."); *United States v.*

testified that they "*later* determined he had gotten off Eastern Airlines Flight 386 from Atlanta, originating in New Orleans." (Emphasis added.) The officers also found it significant that Casey walked in a rapid pace through the terminal doors.[4] We do not. Even assuming *arguendo*, the officers were justified in concluding that Sport had arrived from a "source city," this factor together with Casey's pace describes a "very large category of presumably innocent travelers" and does not justify an investigative seizure. No inference of involvement in narcotics trafficking may reasonably be drawn from those factors.

Officer Harkey stated that one profile characteristic he was trained to look for was "people that exchange baggage or packages without a lot of conversation."[5] This also falls under the category of characteristics wholly consistent with innocent behavior.

Buenaventura-Ariza, *supra* at 36 (arrival from Miami, a "source city," and apparent nervousness wholly insufficient to constitute "specific and articulable" facts supporting a reasonable suspicion of involvement in drug trafficking). *But see United States v. Post*, 607 F. 2d 847 (9th Cir. 1979); *United States v. Sullivan*, 625 F. 2d 9 (4th Cir. 1980), *cert. denied* 450 U.S. 923, 67 L.Ed. 2d 352, 101 S.Ct. 1374 (1981).

4. A number of drug courier profile stops have been based upon the manner in which a passenger walked through the airport terminal. In some cases, the fact that the passenger walked quickly was considered significant by the agents. *United States v. Rogers*, 436 F. Supp. 1 (E.D. Mich. 1976); *United States v. Jefferson*, 650 F. 2d 854 (6th Cir. 1981) (DEA Agent Markonni thought defendant walked faster than "normal"); *United States v. Garcia*, 450 F. Supp. 1020 (E.D. N.Y. 1978); *United States v. Williams*, 647 F. 2d 588 (5th Cir. 1981) (per curiam). In other cases, the fact that the passenger walked slowly was considered equally significant by the agents involved. *United States v. Mendenhall*, 446 U.S. 544, 564, 64 L.Ed. 2d 497, 516, 100 S.Ct. 1870, 1882 (1979) (*Powell, J.*, concurring) ("Once inside the terminal, respondent scanned the entire gate area and walked 'very, very slowly' toward the baggage area. Id., at 10 [testimony of Agent Anderson]"); *United States v. Bowles*, 625 F. 2d 526 (5th Cir. 1980); *United States v. Robinson*, 625 F. 2d 1211 (5th Cir. 1980).

5. The third characteristic listed by Officer Harkey is not contained in other reported drug courier profile cases. For a list of four complete and slightly varying profiles, *see United States v. Berry*, *supra*, 670 F. 2d at 598-599, n. 17. A number of courts have noted the lack of congruity between "profiles." *United States v. Elmore*, 595 F. 2d 1036, 1039 (5th Cir. 1979), *cert. denied* 447 U.S. 910, 64 L.Ed. 2d 861, 100 S.Ct. 2998 (1980). *United States v. Berry*, *supra*; *United States v. Rico*, 594 F. 2d 320, 326 (2nd Cir. 1979). Other courts having reviewed a number of drug courier profile stops have remarked upon the chameleon nature of the factors constituting the profile. *United States v. Chamblis*, 425 F. Supp. 1330, 1333 (E.D. Mich. 1977) ("One problem with determining the propriety of the stop solely on the basis

Of the particularized conduct observed by the officers, great weight was placed upon the fact that Casey, without verbally greeting Sport, held up a newspaper headline for him to read. The record indicates that the headline referred to some fugitives from Georgia who were captured in North Carolina.

While this conduct may be unusual, the belief that it was indicative of criminal activity afoot was more a "hunch" than a fair inference, and no more substantial a reed to support a seizure than that rejected by the Supreme Court in *Reid v. Georgia.*

The State suggests that this Court approve use of the "profile" as a basis for investigatory stops, asserting that the United States Supreme Court has already done so in *United States v. Mendenhall, supra.* However, in *Mendenhall,* the Supreme Court did not specifically approve use of the profile in the determination of the reasonableness of a seizure. *See State v. Grimmett,* 54 N.C. App. at 497, n. 3, 284 S.E. 2d at 147, n. 3 for discussion of the precedential value of *Mendenhall.* The most direct analysis of the use of the drug courier profile in airport stops by the United States Supreme Court was made in *Reid v. Georgia,* where the agents were held to lack a reasonable and articulate suspicion of criminal activity based on the observation of four profile characteristics. Yet, even in *Reid v. Georgia,* the proper use of the drug courier profile by a court in determining the existence of reasonable suspicion was not directly addressed.

The Fifth Circuit Court of Appeals after an exhaustive and scholarly review of the many Drug Courier Profile cases in that jurisdiction recently concluded that:

> "[T]he profile is nothing more than an administrative tool of the police. The presence or absence of a particular characteristic on any particular profile is of *no* legal significance in the determination of reasonable suspicion.

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of whether or not the defendant met the profile is that the factors present in the profile seem to vary from case to case. Special Agent Wankel himself testified that the profile in a particular case consists of anything that arouses his suspicions."); *United States v. Westerbann-Martinez, supra,* at 698 ("Giving the government the benefit of the doubt, this Court must conclude that either the "Drug Courier Profile" is too amorphous and unreliable to be of any help, or that there is a tremendous lack of communication within the Drug Enforcement Administration as to the factors in the profile.").

* * *

> A profile does not focus on the particular circumstances at issue. Nor does such a profile indicate in every case that a specific individual who happens to match some of the profile's vague characteristics is involved in actions sufficiently suspicious to justify a stop.
>
> * * *
>
> If an officer can demonstrate why some factor, interpreted with due regard for the officer's experience and not merely in light of its presence on the profile, was, in the particular circumstance of the facts at issue, of such import as to support a reasonable suspicion that an individual was involved in drug smuggling, we do not believe that a court should downgrade the importance of that factor merely because it happens to be a part of the profile. Our holding is only that we will assign no characteristic greater or lesser weight merely because the characteristic happens to be present on, or absent from, the profile."

[Emphasis original] *United States v. Berry*, 670 F. 2d 583, 600-601 (5th Cir. 1982) (en banc). In the case *sub judice*, the fact that certain characteristics were claimed to be part of a drug courier profile in no way enhances the "quantum of individualized suspicion" usually a prerequisite to a constitutional search and seizure. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560, 49 L.Ed. 2d 1116, 1130, 96 S.Ct. 3074, 3084 (1976). And, as stated above, what particularized conduct was observed by the officers was "too slender a reed" to support a seizure under *Reid v. Georgia*. The agents could not have reasonably suspected the defendant of criminal activity based on the observed circumstances.

B

The next question to be addressed is whether the further detention—the trip to the basement office—was justifiable. The officers learned little during the initial interview to warrant extending their intrusion upon Casey's privacy. Therefore, the existence of a seizure turns upon the voluntariness of Casey's consent to go to the office.

Again, the facts of this case are remarkably similar to those in both *State v. Grimmett* and *United States v. Mendenhall.* Defendant Mendenhall's alleged behavior pattern fit the "drug courier profile." DEA agents in the Detroit Airport stopped and asked her if she would talk with them. She agreed and was then taken to a DEA office and questioned. Later she consented to a search. In *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). A fragmented United States Supreme Court adopted this finding as binding on review and held that the trip to the DEA Office under these circumstances was not a violation of Ms. Mendenhall's Fourth Amendment rights.

So too, in *State v. Grimmett,* the trial court's findings that the officer made a series of requests, to each of which the defendant assented, were held to be competent evidence supporting the conclusion that Grimmett consented to accompany Officer Harkey to the basement. This court rejected Grimmett's argument that the trip constituted a seizure.

The same can be said for the case *sub judice.* The trial court specifically found that Casey assented to a series of requests by Agent Davis and Officer Harkey, was not coerced, threatened or arrested and agreed to accompany the officers to the basement. Casey was specifically informed that he was not under arrest. The trial court's finding that Casey voluntarily consented to go to the office is supported by competent evidence and is binding on review. Casey's argument that he was seized when taken to Harkey and Davis' private basement office must be rejected. Therefore, the evidence obtained during the subsequent search was not tainted by an unlawful seizure, despite the lack of reasonable suspicion on the part of the officers where Casey consented to accompany them to the basement.

C

[2] Casey's next two arguments are addressed to the legality of the search and seizure of the bags themselves.

Upon *voir dire* the trial court found that Casey replied, "No" when asked if the bags were his, and stated that they belonged to

Sport. Based upon this finding, the court concluded as a matter of law that Casey, having specifically disclaimed ownership of the bags, had no reasonable expectation as to the privacy of their contents.

Casey correctly argues that his denial of ownership was not a voluntary abandonment or disclaimer of ownership extinguishing his reasonable expectation of privacy in the area searched.

The test for determining whether a person has been aggrieved by a search and seizure through the introduction of damaging evidence secured by the search was set forth by the Supreme Court of the United States in *Rakas v. Illinois*, 439 U.S. 128, 143, 58 L.Ed. 2d 387, 401, 99 S.Ct. 421, 430 (1978), *reh. denied* 439 U.S. 1122, 59 L.Ed. 2d 83, 99 S.Ct. 1035 (1979). Stated broadly, the test is whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. Stated narrowly, standing to claim the protection of the Fourth Amendment is based upon the "legitimate expectation of privacy" of the individual asserting that right in the invaded place. *Rakas v. Illinois, supra, citing Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967). In *Rakas*, the Supreme Court shifted the focus of its inquiry away from a technical definition of "standing" and placed it on an expectation of privacy in the location searched which the law recognizes as legitimate. *Accord State v. Melvin*, 53 N.C. App. 421, 281 S.E. 2d 97 (1981); *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979).

The Supreme Court went on to discuss "legitimate" expectations of privacy as follows:

> "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, see W. Blackstone, Commentaries, Book 2, ch. 1, and one who *owns or lawfully possesses or controls property* will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. [Emphasis added]

Rakas v. Illinois, 439 U.S. at 143-144, n. 12, 58 L.Ed. 2d at 401, n. 12, 99 S.Ct. at 430-431, n. 12.

The State argues that the defendant did not assert any ownership or possessory interest in the items searched, but rather denied ownership. The State cites *State v. Melvin* for the proposition that a simple showing that defendant was physically holding the bags from which the law enforcement officers seized the incriminating evidence is not a sufficient demonstration that he possessed any legitimate expectation of privacy in them.

State v. Melvin is distinguishable on its facts from the case *sub judice*. In *Melvin*, the defendant was not in possession of the items seized during the search. The defendant was neither the owner nor the driver of the car searched, but merely a passenger and he claimed no property rights in the items seized. By contrast, Casey was in actual physical possession of the yellow plastic bag for the entire duration of the encounter with Harkey and Davis. The officers testified that Casey never set the bags down or made any effort to let go of them until requested to do so by the officers themselves. Nor was Casey in wrongful possession of the bags and therefore unable to claim standing to object to the search. *See State v. Greenwood*, 301 N.C. 705, 273 S.E. 2d 438 (1981); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979). During the encounter Casey had the right to exclude all others from the bags by virtue of his right of possession and control. This right in turn gave rise to a legitimate expectation of privacy in the contents of the bags. That expectation was not lost by virtue of Casey's informing the officers, at their request, that the owner of the bags was Mr. Sport. *See State v. Cooke, supra.* Therefore, the defendant had a Fourth Amendment interest of privacy in the area searched and the next question we must determine is whether he voluntarily consented to the search of that area.[6]

In addition to its finding that Casey consented to accompany Davis to the basement office, the trial court found that Casey consented to the search of the briefcase and bag containing contraband. The following facts specifically found by the trial court are supported by competent evidence:

6. Indeed, the State's argument addressed to the sufficiency of the evidence against Casey at trial to support the conviction for possession of LSD with intent to sell or deliver is premised on the sufficiency of Casey's "possessory" interest—his power and intent to control—the contents of the bags.

> In an office in the airport the defendant was advised by the officers that Sport had consented to a search of his luggage and of the briefcase and bag. He agreed that the officers could search the bags. They were searched, and alleged contraband was found in the plastic bag.

Although there was some conflict, the evidence presented by the State also tends to show that Casey was advised that he could refuse to consent to a search by Agent Davis. The trial court made findings that the defendant was not coerced or threatened in any way. Upon *voir dire* to determine the voluntariness of Casey's consent to a search of his property, the weight to be given the evidence is peculiarly a determination for the trial court, and the findings are conclusive when supported by competent evidence. *State v. Grimmett, supra; 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).

Although Casey correctly assigned error to the trial court's conclusion of law that he had no reasonable expectation of privacy in the bags, we find no violation of his Fourth Amendment rights. As stated above, there was no illegal seizure to taint the subsequently discovered evidence and the defendant voluntarily consented to the search of the briefcase and plastic bag. Therefore, Casey's motion to suppress was properly denied and his assignment of error as to consent is without merit.

[3] Defendant next assigns error to the trial court's denial of his motion to dismiss at the close of the State's evidence. Casey argues that his motion to dismiss should have been granted because the State failed to present sufficient evidence that he knew the bags he carried contained a controlled substance and because the State failed to present sufficient evidence that he intended to sell or deliver a controlled substance. We disagree.

The North Carolina Supreme Court recently summarized the test by which sufficiency of the State's evidence is to be judged upon a criminal defendant's motion to dismiss.

> "The test of the sufficiency of the evidence in a criminal action is the same whether the motion raising that issue is one for dismissal, directed verdict or judgment of nonsuit. *See,* e.g., *State v. Powell,* 299 N.C. 95, 98, 261 S.E. 2d 114, 117

(1980); *State v. Hunt*, 289 N.C. 403, 407, 222 S.E. 2d 234, *death sentence vacated*, 429 U.S. 809 (1976). That test has been articulated by the United States Supreme Court as whether, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). (Emphasis original.) This Court has held that its traditional formulation of the test is the same in substance as that given in *Jackson*. *State v. Jones*, 303 N.C. 500, 504-505, 279 S.E. 2d 835, 838 (1981). Although our cases may have occasionally employed different language in substance our test is that 'there must be substantial evidence of all material elements of the offense' in order to create a jury question on defendant's guilt or innocence. *Id.* In ruling on this question, '[t]he evidence is to be considered in light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.' *State v. Powell, supra*, 299 N.C. at 99, 261 S.E. 2d at 117."

State v. Locklear, 304 N.C. 534, 537-538, 284 S.E. 2d 500, 502 (1981).

The offense with which Casey is charged has three elements. One, there must be possession of a substance. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974). Two, the substance must be a controlled substance. Three, there must be intent to distribute or sell the controlled substance. G.S. 90-95(a).

In *State v. Davis*, 20 N.C. App. 191, 192, 201 S.E. 2d 61, 62 (1974), *cert. denied* 284 N.C. 618, 202 S.E. 2d 274 (1974), this Court held:

"In the leading case of *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972), the Supreme Court held that an accused had possession of a controlled substance within the meaning of the law 'when he has both the power and intent to control its disposition or use.' *Id.* at 12, 187 S.E. 2d at 714. The re-

quirements of power and intent necessarily imply that a defendant must be aware of the presence of an illegal drug if he is to be convicted of possessing it."

The uncontradicted evidence before the jury was that the defendant had at least actual physical possession of and dominion over the plastic bag in which the controlled substance was found. Both law enforcement officers testified that Mr. Sport either "pushed" or "handed" the bags to Casey and that Casey continued to hold onto the bags throughout the encounter with the officers. This evidence is more than sufficient to infer the defendant's power and intent to control the disposition or use of the bags and their contents.

The State must also present some evidence that Casey was aware of the presence of the controlled substance. *State v. Davis, supra.* However, the defendant's knowledge can be inferred from the circumstances.

> "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of *knowledge and possession* which may be sufficient to carry the case to the jury on a charge of unlawful possession." (Emphasis added.)

State v. Harvey, supra, 281 N.C. at 12, 187 S.E. 2d at 714.

Defendant strenuously contends that at most, he was mere bailee of containers belonging to Mr. Sport. However, upon motion for judgment as of nonsuit, evidence must be considered in the light most favorable to the State and every reasonable inference arising therefrom must be given to the State. Contradictions and discrepancies do not warrant dismissal. *State v. Locklear, supra.* Therefore, the fact that the controlled substance was found within a bag under the control of the defendant, together with his unusual actions within the airport and his nervousness when questioned by the law enforcement officers as to whether there was contraband in the bag, when viewed in the light most favorable to the State, raises an inference of knowledge of the controlled substance's presence sufficient to carry the case to the jury.[7]

7. We do not hereby endorse the use of the "drug courier profile" to establish reasonable suspicion justifying an investigatory seizure; but merely note that the

Casey also argues that there was insufficient evidence that he intended to sell or distribute the controlled substance.

Although the State has the burden of proving that the defendant intended to sell or deliver the controlled substance, it may rely upon ordinary circumstantial evidence such as the amount of the controlled substance possessed and the nature of its packaging and labeling to carry the burden. *State v. Roseboro*, 55 N.C. App. 205, 284 S.E. 2d 725 (1981), *disc. rev. denied*, 305 N.C. 155, 289 S.E. 2d 566 (1982); *State v. Cloninger*, 37 N.C. App. 22, 245 S.E. 2d 192 (1978); *State v. Mitchell*, 27 N.C. App. 313, 219 S.E. 2d 295 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976).

In this case, there was evidence that Casey possessed in excess of 25,000 individually wrapped dosage units of LSD which appeared to be commercially packaged.

This evidence was sufficient to infer the defendant's intent to sell or distribute the controlled substance and to overcome his motion to dismiss.

This assignment of error is without merit.

Affirmed.

Judges VAUGHN and HILL concur.

Judge VAUGHN concurring.

I agree that there was ample evidence to support the court's findings of fact which, in turn, support his conclusion that defendant "freely and voluntarily consented to a search of the bags by the officer." The motion to suppress was, consequently, properly denied. I further agree that the evidence was sufficient to take the case to the jury. Our decisions on these two questions are dispositive of the appeal, and it is there that I would stop. If it were necessary to reach other matters discussed by the majority, I am not sure I would reach the same conclusions.

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characteristics observed by the officers in this case may be considered on the issue of defendant's awareness of the presence of contraband in the bags.

IN THE MATTER OF: THE APPEALS OF SOUTHERN RAILWAY COMPANY AND NORFOLK SOUTHERN RAILWAY COMPANY FROM THE VALUATION OF THEIR PROPERTY BY THE NORTH CAROLINA PROPERTY TAX COMMISSION FOR 1980

No. 8110PTC1223

(Filed 19 October 1982)

1. Taxation § 25.10— ad valorem taxation—appraisal of railroad property—review by Property Tax Commission

The Property Tax Commission did not merely review appraisals of the system properties of two railroads by the Ad Valorem Tax Division of the Department of Revenue for errors of law but properly complied with G.S. 105-342(d) by hearing evidence from both sides, making extensive findings of fact, and concluding that the appraisals of the railroads' system properties did not exceed the true value in money of the properties, that the railroads did not overcome the presumption of correctness given the appraisals, and that the appraisals were supported by substantial competent evidence.

2. Taxation § 25.7— ad valorem taxation—railroad property—capitalization of income—adding deferred income taxes to income

In appraising the property of two railroads for ad valorem tax purposes by capitalizing income, the Property Tax Commission could properly establish the income base to be capitalized by adding back to income the deferred income taxes which had been charged off as expenses.

3. Taxation § 25.7— ad valorem taxation—railroad property—capitalization of income—use of last year's income

In appraising the property of two railroads for ad valorem tax purposes by capitalizing income, the Property Tax Commission could properly use the last year's income as a starting point rather than an average of income for the past five years where income for the railroads had grown steadily in each of the past five years.

4. Taxation § 25.7— ad valorem taxation—railroad property—capitalization of income—use of actual interest rates on indebtedness

In appraising the property of two railroads for ad valorem tax purposes by capitalizing income, the Property Tax Commission could properly use the interest rate expressed on the face of a credit instrument in determining income rather than adjusting income to reflect the current market interest rates on such indebtedness.

5. Taxation § 25.7— ad valorem taxation—value of railroad property—capitalization of income—actual return on equity capital

In determining the value of a railroad's property by capitalizing income, the Property Tax Commission did not err in using a rate of return on equity capital calculated from the railroad's past earnings rather than an average rate of return for all railroads listed in *Standard and Poor's Index.*

6. Taxation § 25.7— ad valorem taxation—value of railroad property—deduction for non-system property—income influence factor

In determining the amount to be deducted for non-system property in determining the true value of a railroad's system property for ad valorem taxes, the Property Tax Commission did not err in eliminating undistributed earnings of the railroad's subsidiaries from both total income and non-operating income, adding deferred income taxes back to income in making an income influence computation of 29%, excluding deferred taxes from a second computation which produced an income influence factor of 32%, and averaging those two figures to give a 30% income influence factor. G.S. 105-336(a)(1).

7. Taxation § 25.8— ad valorem taxation—value of railroad property—consideration of cost and book value

In determining the true value of two railroads' system properties for ad valorem tax purposes, the Property Tax Commission considered the original cost and book value of the railroads' property in accordance with the requirements of G.S. 105-336(a)(2), although it gave little weight to such factors in its determination of true value.

APPEAL by petitioners from an Order of the North Carolina Property Tax Commission entered 19 May 1981. Heard in the Court of Appeals 2 September 1982.

Southern Railway Company ("Southern") and Norfolk Southern Railway Company ("Norfolk Southern"), hereinafter called "Railroads," operate in North Carolina. As "public service companies," their property is subject to ad valorem taxation as provided in Article 23, Chapter 105 of the North Carolina General Statutes. The Railroads appeal a decision by the Property Tax Commission adopting, in substance, the appraisals for ad valorem tax purposes made by the State Department of Revenue.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr. and Edward C. Winslow III; and William C. Antoine and James C. McBride; and Laughlin, Hale, Clark & Gibson, by Everett B. Gibson and Gregory G. Fletcher, for petitioner-appellants.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

HILL, Judge.

The petitioner Railroads appeal from the North Carolina Property Tax Commission's decision upholding a Department of Revenue appraisal of petitioners' property. Finding no error, we affirm.

North Carolina General Statutes § 105-283, entitled "Uniform Appraisal Standards," provides: "All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words 'true value' shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used . . . ."

Railroads are "public service companies." G.S. 105-333(14). Property used in "public service company" activities (i.e., system property) is not valued piece by piece, but rather as a system or unit. G.S. 105-335(a). The Department of Revenue must use special appraisal methods to determine the value of a system. These methods, as outlined in G.S. 105-336(a), include:

(1) The market value of the company's capital stock and debt, taking into account the influence of any non-system property.

(2) The book value of the company's system property as reflected in the books of account, kept under the regulations of the appropriate federal or State regulatory agency and what it would cost to replace or reproduce the system property, less a reasonable allowance for depreciation.

(3) The gross receipts and operating income of the company.

(4) Any other factor or information that in the judgment of the Department has a bearing on the true value of the company's system property.

A careful reading of the statute reveals that all four approaches are to be used in establishing the appraised value, but no guidelines are set out establishing the weight to be given any single system of valuation. Rather, based on the judgment of the Ad Valorem Tax Division, the Department may exercise its discretion on valuation. The appraisal must not be arbitrary, must be based on substantial evidence, and must be based on lawful methods of valuation.

Recognizing the obvious futility of allowing a taxpayer to fix the final value of his property for purposes of ad valorem taxation, the State legislature has created a system of appraisal designed to establish true value and give the taxpayer and the taxing unit an opportunity to dispute the Department's valuation.

The Department of Revenue is responsible for appraising the property of public service companies. G.S. 105-335(a). Appraisals of the system are made annually by the Department's Ad Valorem Tax Division. G.S. 105-335(a). Such appraisals are deemed tentative since the appraisal is made without notice to the taxpayer or opportunity for hearing. G.S. 105-342(b). If a timely request for a hearing is not made, the tentative figures become final and conclusive twenty days after the valuation notice is mailed. If the taxpayer makes a timely request, the Property Tax Commission fixes a date and place for hearing and gives the taxpayer at least 20 days' notice.

Although the appraisal is called "tentative," it nevertheless remains in effect unless the Property Tax Commission overturns or otherwise disposes of it. The appraisals are presumed to be correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). This presumption applies, as well, to the good faith of the tax assessors and the validity of their actions. *In re Appeal of Amp, Inc., supra. See also Electric Membership Corp. v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811 (1972), in which the supreme court held that the presumption of correctness applied to official acts of the State Board of Assessment, a predecessor of the Property Tax Commission.

In structuring the Property Tax Commission under State Government Reorganization in 1973, the legislature created a quasi-judicial body, novel in its structure, to serve a specific need. The act of creation provides: "There is hereby created the Property Tax Commission with the authority to hear and decide *appeals* concerning the appraisal of property of public service companies (as defined in G.S. 105-333 . . . ." G.S. 143B-222 (emphasis added). The act of creation is implemented by G.S. 105-288(b)(2) which sets out the functions of the Commission:

> The Commission shall hear *appeals* from the *appraisal* and assessment of the property of public service companies as defined by G.S. 105-333. (Emphasis added.)

Since the appraisal, although tentative, remains in existence and is presumed to be correct, any action to set aside or modify it is an appeal which the Commission was created to hear. The legislature recognized that such appeal presented the first opportunity for a public service company to challenge an appraisal made by the Ad Valorem Tax Division. It broadened the scope of the hearing of the appeal in G.S. 105-342(d):

> *Hearing and Appeal.* — At any hearing under this section, the Property Tax Commission shall hear all evidence and affidavits offered by the taxpayer and may exercise the authority granted by G.S. 105-290(d) to obtain information pertinent to decision of the issue. The Commission shall make findings of fact and conclusions of law and issue an order embodying its decision . . . .

Our Supreme Court has said the function of the Property Tax Commission is "[t]o determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts and to appraise conflicting and circumstantial evidence." *In re McElwee,* 304 N.C. 68, 87, 283 S.E. 2d 115, 126 (1981).

By letter dated 4 September 1980 the Department of Revenue informed Southern that its 1980 tentative appraisal value of Southern's system property was $1,025,000,000 and apportioned $185,000,000 to North Carolina. The Department notified Norfolk Southern that its total appraisal value for the entire system was $59,500,000 and allotted $50,000,000 to North Carolina. Both railroads filed objections to the tentative appraisals. A hearing was held before the Property Tax Commission in October, 1980. The Commission heard evidence, made findings of fact, and concluded that the appraisals made by the Ad Valorem Tax Division of the Department of Revenue did not exceed the true value of the property. Railroads appeal. Specifically, Railroads divide the alleged errors into two categories discussed below: (I) errors of administrative procedure, and (II) illegal appraisal methods. We find no prejudicial error in the Commission's appraisals in either category.

I. Questions Of Administrative Procedure

[1] Railroads argue the Property Tax Commission erred in concluding that its role was to provide appellate review of the ap-

praisals made by the Ad Valorem Tax Division. Rather, Railroads contend the Commission must impartially hear evidence from both sides and reach its own conclusions about true value, not merely review the Ad Valorem Tax Division figures for errors of law. Citing G.S. 105-342(d), Railroads argue the Commission must weigh the evidence before it and reach a decision based upon proof by its greater weight. We conclude the Commission did just that: It heard detailed testimony offered by the Railroads' experts and further evidence affecting the appraisals offered by the Department of Revenue Ad Valorem Tax Division. Thereafter, it made extensive findings of fact and entered its conclusions and final order, which states, in part, as follows:

> [F]rom our review of the applicable law, the evidence and our findings of fact, we conclude as a matter of law that the Department's appraisals of the system properties of the subject railroads do not exceed the true value in money of the properties.
>
> It is our opinion that the appellants have not overcome the presumption of correctness given such appraisals by our Court in the *Albemarle Electric Membership Corp. v. Alexander*, 284 N.C. 402 (1972), and *Appeal of Amp, Inc.*, 287 N.C. 547 (1975) decisions and that the Department's appraisals are supported by substantial competent evidence of record . . . .
>
> . . . .
>
> . . . as a general statement, we find nothing about the Department's treatment of these items to be unreasonable or arbitrary . . . .

With the foregoing in mind, we now review the evidence before the Property Tax Commission to determine if that body's findings and conclusions are supported by competent, material, and substantial evidence in view of the whole record. We note initially that the primary data used for the appraisals by the Department and Railroads are virtually the same: Southern Railway's *1979 Annual Report to the Interstate Commerce Commission;* Southern Railway's *1979 Securities and Exchange Commission Form 10-K* (Southern Railway's *1979 Annual Report to the Shareholders* is an attachment to this form); Southern Railway's *1979 Statistical Report*, which is a supplement to its an-

nual report. The final decision of the Property Tax Commission made full and complete findings of fact. Its conclusions were couched in the language of appeal, i.e.,

> [I]t is our opinion the appellants have not overcome the presumption of correctness . . . .
>
> * * * * * *
>
> Department's appraisals are supported by substantial competent evidence of record . . . .
>
> * * * * * *
>
> [W]e find nothing about the Department's treatment of these items to be unreasonable or arbitrary . . . .

Nevertheless, a reading of the decision as a whole clearly indicates it follows the requirements of G.S. 105-342(d). We conclude the findings of fact sufficiently support the conclusions, and the conclusions support the final disposition of the case.

We are not impressed with Railroads' argument that the Property Tax Commission erred in concluding that Railroads failed to rebut the "presumption of correctness" accorded the Department of Revenue appraisal. G.S. 105-273 provides:

> (2) "Appraisal" means both the true value of the property and the process by which true value is ascertained.
>
> (3) "Assessment" means both the tax value of the property and the process by which the assessment is determined.

For public service companies, the true value of property is its tax value, and "appraisal" and "assessment" are synonymous. The "presumption of correctness," although rebuttable, was not rebutted in this case. To rebut the presumption, the taxpayer must produce:

> . . . 'competent, material, and substantial evidence' that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property.

In re Appeal of Amp, Inc., supra at 563, 215 S.E. 2d at 762.

Railroads contend the Department of Revenue's appraisal methods were illegal and resulted in substantial overstatements of value. We note that witnesses for the Railroads arrived at a variant appraisal because their methods of valuation differed from those used by the Department of Revenue. The Commission, however, simply chose to believe the testimony of the witness for the Ad Valorem Tax Division as it was entitled to do under G.S. 105-342(d). The evidence before the Commission was competent and substantial and supports that body's findings, conclusions, and judgment and is sufficient to support adequately the presumption of correctness.

We do not find it necessary to review in detail evidence supporting the findings of fact, since the same basic material was used by all parties, and only in the application of valuation formulas do material differences arise. We shall discuss further the Railroads' contentions concerning appraisal methods in the remaining sections of the opinion. As to errors of administrative procedure, we find no error in the decision of the Tax Commission.

II. QUESTIONS CONCERNING THE METHOD OF APPRAISAL

Railroads contend the Ad Valorem Tax Division of the Department of Revenue used illegal appraisal methods in arriving at "true value" or "market value." Any method of appraisal which does not tend to establish market value is an illegal method of valuation for property tax purposes. *See In re Appeal of Amp, Inc., supra.* Since the base figures used by both parties are virtually the same, we examine the application of the appraisal methods set out in the statute to these base figures to determine if errors of law exist.

GROSS RECEIPTS AND OPERATING INCOME APPROACH

The appraisers for both the Railroads and the Department agreed that the income approach to appraisals of railroad property is the most reliable. This method determines market value by capitalizing income. The appraiser makes two basic inquiries about the system of property being assessed. First, he or she determines the normal income that the property is capable of earning on the appraisal date. Second, the appraiser determines the rate of return capital investors would demand as an induce-

ment to investment, taking into account the risks associated with that particular business as compared with competing investment opportunities. Assuming income and rate of return for a given date are known, the capital value of the business on that date is determined by capitalizing the income stream at the required rate of return. To determine the *normal* earning power of the assets, special or extraordinary items may need to be eliminated before capitalization. Likewise, the appraiser must compare the yield on investment associated with other business opportunities.

[2] The Commission adjusted the Railroads' income records by adding to income deferred income taxes which had been charged off as expenses prior to capitalization. Railroads objected, citing *Pacific Power and Light Co. v. Oregon*, 596 P. 2d 912 (Ore. 1979), as authority. This case appears to be the sole precedent at this time.

In addressing this question, we note with interest that although the net income for Southern had increased from $65,509,000 to $117,787,000 between 1975 and 1979, Southern paid income taxes in only one year during this period.

Deferred income taxes typically result from accelerated depreciation which permits larger portions of the cost of a capital asset to be depreciated during the early life of the asset, and at a smaller rate thereafter. The decision to use an accelerated method of depreciation is entirely optional with the taxpayer. The straight line method charges off the asset at a fixed annual rate over the life of the asset. Under the accelerated method, the taxpayer's taxable income is reduced during the early years in which the asset is used and increased in the later years when depreciation of the asset decreases, all other income and expenses remaining constant. To equalize the anticipated tax liability arising during the later years as income-producing property is depreciated, Railroads established a reserve for the anticipated tax and charged off income by the amount of the reserve before capitalization. This sum was added back to income by the Department in establishing the income base to be capitalized.

Railroads argue that accepted railroad accounting procedures and business practices follow the rule utilized by them; that taxes deferred by a seller have no value, and that proper analysis of income recognizes tax liability during the period in which it is ac-

crued rather than when it is paid. They contend that a potential buyer/seller would not regard deferred tax expense as income to be capitalized; that the company receives income from the cash kept in reserve, and, in effect, capitalization of the deferred tax and the income earned thereon results in an overstatement of value. Railroads further argue that, in the future, they will not have a deferred tax expense.

We find language in *Broadwell Realty Corporation v. Coble, Sec. of Revenue*, 291 N.C. 608, 615, 231 S.E. 2d 656, 660 (1977), to be persuasive:

> "[F]uture Federal Income Taxes are not an outstanding indebtedness—they are a mere contingency. The fact that a tax is certain to accrue in years to come does not make it a present debt . . . ." (Citation omitted.)

Since current income is charged to establish the reserve for deferred income taxes and simply anticipates a tax that may never become due, we conclude the Department correctly added to the income to be capitalized the deferred income tax expense.

[3] Both the Department and Railroads concede that a realistic base value must be established as the initial starting point in establishing true value under the income approach. Southern contends an average of the past five years' income should be the base value, while the Department contends only the last year's income should be used. Inasmuch as Southern's income has grown steadily from $65,509,000 to $117,787,000 [without adding the reserve for deferred income taxes] between 1975 and 1979, with no year in which the income has declined, we conclude the starting point should be the previous year's income, adjusted by adding back the reserve for deferred taxes. Our Supreme Court is aware of this problem:

> [C]onsideration of past income and probable future income clearly requires that attention be given an established declining trend in income.

In re Valuation, 282 N.C. 71, 78, 191 S.E. 2d 692, 697 (1972). Had the Railroads' income not increased each year, had there been years of profit and years of loss, perhaps income averaging would have been used by the Department. Since income accelerated

year after year, however, we find no error in using the preceding year's income, as adjusted.

[4] Railroads further contend the company's income must be adjusted to reflect the current market interest rates on indebtedness. Much of Railroads' indebtedness arises from bonds, trust agreements, and the like, issued years ago when the cost of interest was substantially lower than the current rate. Hence, Railroads argue that if the high current interest rates are substituted, income will be substantially lower, and the true value of the Railroads will likewise be lower. They further argue that accepted accounting principles require that the debt be restated to establish true value; that an assumable debt at a low rate increases the seller's demands for a higher down payment.

We note that an expert witness for the Railroads testified he "had a feeling that fifty per cent of the taxing jurisdictions use the current cost of debt" and "the other fifty per cent use the embedded cost of debt." The Department uses the interest rate expressed on the face of the credit instrument, i.e., the "embedded" cost of debt. To adopt Railroads' position would invite further questions, *e.g.*, What is the *current* cost of interest for *this* railroad under all the circumstances? We adopt the position that the "other fifty percent" of the taxing jurisdictions using the embedded cost of debt are correct.

[5] Railroads next assert that the Property Tax Commission erred in using, as did the Department, the actual return on equity capital rather than the current market cost for capitalization in determining value under the income approach. The appraiser's object is to determine the rate of return a potential investor would demand for the commitment of capital to purchase a railroad with the earnings of the appraised company. Railroads utilized equity rates of return for all companies listed in *Standard and Poor's Index* and calculated mean and median rates for both diversified railroads and nondiversified railroads. Railroads also considered Southern's past rate of return on equity. The Railroads' appraiser arrived at 18 percent as the cost of equity as the basis for his appraisal under this guideline. The Department used a hypothetical rate calculated from Southern's past earnings only.

Railroads argue the Department's technique will vary from year to year, based on income; that lower earnings result in lower

capitalization rates which produce a higher value. Moreover, Railroads contend that tying the base to earnings rather than market rates violates principles established by this Court in *In re Valuation, supra,* and *In re Pine Raleigh Corp.,* 258 N.C. 398, 128 S.E. 2d 855 (1963), in which the court held that market value of real estate based on rental income should be based on the fair rental value and not limited to the actual rent earned. Finally, the Railroads argue that to capitalize earnings at book rates of return simply results in book value, and that a method of appraisal which does no more than value business at book value is illegal. *In re Appeal of Amp, Inc., supra.*

The Department contends a capitalization rate of 12 percent for Southern was based upon the embedded cost of debt for its preferred stock and long term debt and a 15 percent return to common equity. Southern's capitalization rate of 15.25 percent was based upon the current cost of preferred stock and long term debt and an 18 percent return to common equity. The determination of the equity rate cannot be precisely defined. Our Supreme Court has held that calculation of an appropriate rate of return is a matter of judgment. *Electric Membership Corp. v. Alexander, supra,* at 408, 192 S.E. 2d at 815. Southern is a multimillion dollar company. Its shares of stock are traded widely on the New York Stock Exchange. The marketplace looks beyond the book value (equity) of its shares in the establishing of price. Nevertheless, book value has its place. Likewise, the marketplace values shares in other railroads with different earnings, different book values and different futures.

We conclude that the Department correctly established a value of the Southern Railroad based on the income that that particular railroad's property could generate, and not on the average rate of return for all railroads used in *Standard and Poor's Index.*

Since the calculation of an appropriate rate of return is not strictly a question of law, we deem that such appraisal was made in good faith and falls within a zone of reason. It is not arbitrary and was not arrived at illegally.

MARKET VALUE OF STOCK AND DEBT APPROACH

[6] G.S. 105-336(a)(1) provides the appraiser shall consider "[t]he market value of the company's capital stock and debt, taking into

account the *influence of any non-system property.*" (Emphasis added.) Both parties substantially agree on their initial approach to this method of valuation, but diverge on their determination of the deduction for non-operating or non-system property. This appraisal technique operates on the premise that the true property value of a company equals the total market value of all its outstanding debt and equity securities. However, all non-system property must be eliminated to arrive at the true value of the system operation. Under the "income influence approach," the appraiser determines the ratio of non-system income to total income before fixed charges (i.e., the income available to both bondholder and stockholder), and then multiplies that ratio by the total value of the company's stock and debt. The resulting figure is the "income influence" of the non-system property. This figure is deducted from the total stock and debt value. The final figure represents the true stock and debt value for the Railroads' system property.

Appraisers for the Railroads and the Department agreed on the total value of Southern's outstanding stock and debt, but they disagreed about the proper methods for calculating the income influence deduction. The disagreement involved the computation of the non-operating income and total income to be used in the computation of the non-operating income influence ratio.

The Department eliminated, both from non-operating income and from total income, $20,666,000 that represents undistributed earnings of subsidiaries included in Southern's income.

The Department made alternative computations. In one, it added deferred income taxes back to income. This was consistent with the appraiser's prior computation of income to be capitalized under the income approach. In its other computation, the Department excluded deferred taxes. These alternative computations produced income influence percentages of 29 percent and 32 percent, which the appraiser averaged at 30 percent.

The Department appraiser made a third computation in which he eliminated nothing from reported income. This produced an income influence percentage of 45 percent. The appraiser applied this percentage to the value of the stock only—not to stock and debt as required by the statute. The resulting figure was not substantially different from the value produced by applying 30

percent to gross stock and debt: $1,083,338,000 versus $1,040,-995,000. Railroads dispute the third computation, saying that the Department made an error in addition. The Department contends that the computation was made simply to check its figures using the 30 percent factor. Assuming the third computation was error, we find it to be harmless.

The Department argues that although dividends actually paid by subsidiaries to Southern enhance the value of Southern's common stock, the same cannot be said about retained earnings. This valuation method requires that possible "influence" of non-operating property be eliminated from the current value of the company's stock. We agree. Retained earnings of a subsidiary have little or no effect on the value of Southern's common stock.

It is apparent that the Department used the 30 percent influence factor in arriving at a value under this approach. We find no error.

THE COST APPROACH TO VALUE

[7] The Property Tax Commission concluded:

> Although both appraisers calculated a cost indicator of value for Southern, neither considered it a very reliable indicator of market value. Dr. Schoenwald [for Railroads] gave it no weight in his appraisal and the Department considered it but gave it very little weight. The Commission recognizes the difficulty in using book cost figures to determine the fair market value of a railroad company because of the heavy economic obsolescence. We believe, however, that the cost approach should not be disregarded. Southern invested $295,110,000 in new property during 1979 and $637,900,000 over the past three years. The latter figure is 92% of Dr. Schoenwald's appraisal of Southern of $690,166,000.

Appraisers for both the Department and petitioners testified that cost should be given virtually no weight in appraisal. It appears from the record that original cost may not be a measure of true value; that depreciation is not intended to reflect an actual decline in market value, and that no reliable method exists to evaluate obsolescence. Nevertheless, the Department did consider cost. The statute requires that it be considered. While we find little weight was given to the cost of assets, we must consider that

$637,900,000 had been spent over the past three years for new equipment and other assets, a figure equal to 92 percent of Railroads' appraisal of Southern. Over the past five years, Southern has invested $838,920,000, a figure far in excess of $690,000,000 which Southern says is its true value.

G.S. 105-336(a)(2) specifically requires that book value of system property and the cost of replacement be considered in valuation. The Department correctly considered it.

CONCLUSION

First, we conclude that the Property Tax Commission committed no prejudicial error in its final decision. It properly accorded a "presumption of correctness" to the Department's valuation of the Railroads, but heard all evidence and affidavits offered by the taxpayer. Thereafter, the Commission made extensive findings of fact, properly concluding that the Department's appraisal of the system properties did not exceed the true value in money of the properties; that Railroads did not overcome the presumption of correctness given the appraisal, and that the appraisals of the Department are supported by substantial competent evidence of record.

We have examined each assignment of error, including each argument made by the appellants in support of their contentions, and conclude that the Commission made no prejudicial error in its final order.

In reviewing this matter, this Court has applied the "whole record test." This test does not allow a reviewing court to replace the Commission's judgment as between two reasonably conflicting views, even though the Court could justifiably have reached a different result had the matter been before it "de novo."

The decision of the Property Tax Commission is

Affirmed.

Judges VAUGHN and JOHNSON concur.

BARRETT, ROBERT & WOODS, INC. v. CLEMENT EDSON ARMI

No. 8115SC1185

(Filed 19 October 1982)

1. **Contracts § 6.1; Rules of Civil Procedure § 56— unlicensed contractor—defense raised in summary judgment motion**

The trial court erred in rejecting defendant's defense that plaintiff was barred from recovering under a construction contract because plaintiff was not licensed as a general contractor during the majority of the construction period on the ground that the defense was not properly raised where the defense was raised for the first time in defendant's motion for summary judgment, since unpleaded affirmative defenses are deemed to be part of the pleadings when such defenses are raised in a hearing on a motion for summary judgment. G.S. 1A-1, Rules 8(c) and 56, G.S. 87-1 and G.S. 87-10.

2. **Contracts § 6.1— general contractor—substantial compliance with licensing requirements**

Plaintiff general contractor substantially complied with the licensing requirements of G.S. 87-10 so as to entitle plaintiff to recover under a contract to construct a house for defendant at a price exceeding $30,000 where plaintiff was duly licensed as a general contractor at the time the contract was executed in October 1977; plaintiff's general contractor's license expired on 31 January 1978 because plaintiff's secretary-treasurer inadvertently failed to file a renewal application; approximately 10% of the work required under the contract had been done at the time the license expired; plaintiff's license was renewed on 11 October 1978 immediately after plaintiff filed its renewal application, renewal fee and a late filing fee; plaintiff completed the job in early October 1978, and defendant moved in immediately thereafter; and plaintiff remained stable in terms of financial condition, managing officers, composition and nature of the business and all other matters relevant to its license during the entire period of construction under the contract.

3. **Contracts § 21.2— regular monthly statements—substantial compliance with contract's requirement**

Plaintiff general contractor substantially complied with a provision of a cost plus construction contract requiring it to provide defendant with regular monthly statements detailing expenditures to date where plaintiff provided statements to defendant in April, May, July, August and September 1978; the first statement was not provided until five months after execution of the contract because, due to severe and unusual weather and soil conditions which delayed construction, the expenditures to that date were minimal; although the July statement reflected only a 7% cost overrun and the final accounting revealed a cost overrun of over 30%, the July statement did reflect expenditures to date as required by the contract, and defendant was informed shortly thereafter of the outstanding invoices not disclosed in the statement; after being so informed, defendant continued his previous course of selecting the most expensive materials and construction methods; and in September plaintiff sent defendant a written statement of costs in anticipation of closing.

4. Contracts § 21.2— failure to complete construction within required time—unforeseen circumstances

The trial court did not err in determining that plaintiff's failure to complete construction of a house within 180 days as required by contract was caused by five months of unusually severe weather, defendant's numerous change orders and defendant's detailed involvement in the project which constituted "unforeseen circumstances beyond the builder's control" within the purview of an absolving provision in the contract.

5. Contracts § 21.2— cost plus contract—salary of supervisor removed from job

In an action to recover under a cost plus contract for the construction of a house, the trial court properly permitted plaintiff to include the salary of its construction supervisor as a charge to defendant until the end of the job, although the supervisor had been relieved of responsibility for dealing with defendant at defendant's request some six weeks before the house was completed, where the contract provided that plaintiff's costs would include the supervisor's salary "for the duration of construction as overseer," and the supervisor continued to oversee the job until the end of construction by consulting with the crew chief and subcontractors.

6. Contracts § 21.2— contract price for house—no offset for "callback" items

In an action to recover under a cost plus contract for the construction of a house, the trial court did not err in failing to allow defendant an offset for certain incomplete items disclosed by the evidence, such as light fixtures, cabinet work, sliding doors and screens, on the ground that they were normal "callback" items which plaintiff was not required to perform because defendant had breached the contract by refusing to pay plaintiff for its work.

7. Contracts § 21.2— construction price of house—offset for defective drainage system

In an action to recover under a cost plus contract for the construction of a house, the trial court's award to defendant of an offset of $300 for a defective drainage system was supported by the evidence and was therefore conclusive on appeal, although defendant presented evidence that the cost of remedying the problem caused by the system was between $12,000 and $18,000. Furthermore, the court's allowance of $150 for a leaking chimney and $150 for exposed wires and pipes was supported by defendant's own evidence.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 16 May 1981 in Superior Court, CHATHAM County. Heard in the Court of Appeals 31 August 1982.

Plaintiff commenced this action on 5 July 1979 by the filing of a complaint alleging defendant's breach of a construction contract entered into by the parties on 21 October 1977. The contract called for plaintiff to construct a customized residential dwelling for defendant and for defendant to pay plaintiff its costs associated with the project, estimated to be $65,000, plus 12.5 per-

cent. Plaintiff alleged that although it had completed the work which it contracted to do, defendant had failed to pay plaintiff the entire amount owing under the contract. Plaintiff prayed judgment in the amount of $35,163.89 plus interest.

In his answer, defendant admitted execution of the contract and his refusal to pay the amount demanded by plaintiff. As a defense and counterclaim, he alleged that plaintiff had breached the contract by, among other things, failing to provide him with monthly statements detailing expenditures to date and failing to complete the project within 180 days, as required by the contract. Defendant requested damages of $35,000 as a result of plaintiff's alleged breach of the contract.

In a reply to defendant's counterclaim and an amended complaint, plaintiff denied the allegations of the counterclaim and asserted that it had substantially complied with the provisions of the contract requiring monthly statements and completion of the project within 180 days and that defendant had waived any stricter compliance with the monthly statement requirement. Defendant denied these allegations in his answer to the amended complaint.

On 31 July 1980, after discovery by the parties, defendant filed a motion for summary judgment on the ground that plaintiff was not licensed as a general contractor during the majority of the construction period and was therefore barred from recovering under the contract. The motion was denied.

Following a trial without a jury, judgment was entered in plaintiff's favor in the amount of $31,105.95 plus interest, for a total of $36,055.41. This amount reflected a setoff of $600 for the costs of remedying defects in the work performed by plaintiff. Defendant appealed.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, by James C. Fuller, Jr., for plaintiff-appellee.

Powe, Porter and Alphin, by Charles R. Holton and Laura B. Luger, for defendant-appellant.

HILL, Judge.

[1] Defendant first assigns error to the trial court's rejection of his licensing defense, a defense raised for the first time in defend-

ant's motion for summary judgment and reasserted by defendant at trial in a motion to dismiss. The court rejected the defense on two bases: that it was not properly raised because defendant never asserted it in his pleadings or amended pleadings; and that, even if properly raised, it should be rejected because plaintiff was licensed at the time it entered into the contract with defendant and substantially complied with the licensing statute. Defendant assigns error to both of these conclusions by the court.

G.S. 87-1, prior to its amendment in 1981, defined "general contractor" as follows:

> For the purpose of this Article, a "general contractor" is defined as one who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct any building . . . or structure where the cost of the undertaking is thirty thousand dollars ($30,000) or more and anyone who shall bid upon or engage in constructing any undertakings . . . above mentioned in the State of North Carolina costing thirty thousand dollars ($30,000) or more shall be deemed and held to have engaged in the business of general contracting in the State of North Carolina.

There is no dispute in this case that plaintiff, by contracting with defendant and undertaking to construct a house for him at a price exceeding $30,000, was a "general contractor" and engaged in the business of general contracting in this State within the statutory definition. Plaintiff thereby became subject to the licensing provisions of G.S. 87-10. The rule is well established in North Carolina that unless a general contractor has substantially complied with the licensing requirements of G.S. 87-10, it may not recover against the owner either under its contract or in *quantum meruit*. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968); *Holland v. Walden*, 11 N.C. App. 281, 181 S.E. 2d 197, *cert. denied*, 279 N.C. 349, 182 S.E. 2d 581 (1971).

Failure to be properly licensed is an affirmative defense which ordinarily must be specifically pleaded. G.S. 1A-1, Rule 8(c); *Roberts v. Heffner*, 51 N.C. App. 646, 277 S.E. 2d 446 (1981). However, "the nature of summary judgment procedure (G.S. 1A-1, Rule 56), coupled with our generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses

are raised in a hearing on motion for summary judgment. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976)." *Cooke v. Cooke*, 34 N.C. App. 124, 125, 237 S.E. 2d 323, 324, *disc. rev. denied*, 293 N.C. 740, 241 S.E. 2d 513 (1977). *Accord Furniture Industries v. Griggs*, 47 N.C. App. 104, 266 S.E. 2d 702 (1980). The trial judge erred in rejecting the licensing defense as being improperly raised. The error was not prejudicial, however, because we conclude that based upon the evidence presented plaintiff substantially complied with the licensing provisions of G.S. 87-10.

[2] The evidence discloses that at the time the contract was executed on 21 October 1977, plaintiff was duly licensed as a general contractor. Plaintiff commenced work under the contract immediately thereafter by clearing and grading the site and the one-half mile roadway leading to the site, placing gravel on the roadway, consulting with defendant, preparing "working drawings" to expedite work by the subcontractors, negotiating with subcontractors and suppliers and purchasing materials. Due to unusually heavy rainfall in November and December 1977 and a severe ice storm in January 1978 requiring reclearing and retopping of the roadway, actual construction of the house did not commence until March 1978. Plaintiff left the job in early October 1978, and defendant moved in immediately thereafter. Plaintiff's general contractor's license expired on 31 January 1978, at which time approximately 10 percent of the work required under the contract had been done. David Robert, plaintiff's secretary-treasurer, inadvertently failed to file a renewal application until October 1978. Plaintiff's license was renewed on 11 October 1978, immediately after plaintiff filed its renewal application, renewal fee and a late filing fee. Plaintiff remained stable in terms of financial condition, managing officers, composition and nature of the business and all other matters relevant to its license during the entire period of construction under the contract. In particular, Runyon C. Woods, who passed the written examination for building contractors on 12 July 1975 with a score of 96 out of 100 (the minimum passing score being 70), thereby qualifying plaintiff for a general contractor's license, remained a full time employee and managing officer of plaintiff throughout the construction period.

The trial court made findings based upon this evidence in support of its conclusion that plaintiff substantially complied with

the licensing statute. Defendant disagrees with the findings regarding plaintiff's stability during the construction period, but they are clearly supported by the evidence.

"The purpose of Article I of Chapter 87 of the General Statutes . . . is to protect the public from incompetent builders." *Builders Supply v. Midyette, supra,* at 270, 162 S.E. 2d at 510-11. When a general contractor has substantially complied with the licensing provisions therein such that the protective policy has been realized, no purpose is served in denying that contractor the right to recover upon its contract. *See Holland v. Walden, supra.* The question thus becomes: What constitutes "substantial compliance" with the licensing provisions such that a contractor may maintain an action upon its contract?

Plaintiff maintains that possession of a valid license at the time of entering the contract alone constitutes "substantial compliance" and that a subsequent lapse of the license during the construction period is irrelevant. Plaintiff relies upon our decision in *Construction Co. v. Anderson,* 5 N.C. App. 12, 168 S.E. 2d 18 (1969), where we affirmed the trial court's dismissal of a contract action brought by a general contractor who was not licensed at the time of entering the construction contract. We stated in our opinion in *Construction Co. v. Anderson, supra,* that the time of entering the contract is of great significance since that is the time when the owner must decide whether the contractor is sufficiently competent to perform the work. Nevertheless, we decline to hold, and the facts of this case do not require that we decide, that mere possession of a valid license at the moment of contracting, regardless of what transpires thereafter with regard to the license, constitutes "substantial compliance" with the licensing statute.

Article I of Chapter 87 clearly contemplates that a contractor should be licensed at the time of contracting and during the construction period. G.S. 87-10, prior to its 1981 amendment, authorized the holder of a general contractor's license to "engage in the practice of general contracting"; and G.S. 87-1 defined one who is "engaged in the business of general contracting" as "anyone who shall bid upon or engage in constructing" any building or structure costing $30,000 or more. Thus, one who is *engaged in*

construction of certain structures costing more than $30,000 requires a general contractor's license. We noted in *Construction Co. v. Anderson, supra,* that in addition to lacking a license at the time of contracting, the builder never possessed a valid license at any time during the construction. In contrast, the builder in *Holland v. Walden, supra,* although unlicensed at the time of contracting, procured a license shortly thereafter and remained licensed until completion of the project, constituting 88 percent of the work required under the contract.

As in *Holland,* plaintiff did not possess a valid license at all times contemplated by the statute. Nevertheless, as in *Holland,* the protective policy of the statute was realized by plaintiff's substantial compliance with the licensing provisions. The facts which lead us to this conclusion are as follows: plaintiff was licensed at the significant moment of contracting; plaintiff's license lapsed through inadvertence, not as a result of incompetence or disciplinary action by the licensing board; plaintiff's license was renewed immediately upon its filing of a renewal application and fees; and plaintiff's financial condition and composition, particularly the involvement of Runyon C. Woods, plaintiff's chief designer, carpenter and construction supervisor who qualified plaintiff for its general contractor's license by passing the required written examination, remained unchanged during the period plaintiff was not licensed. Although plaintiff was not licensed for 90 percent of the construction period, the factors listed above, particularly the reason for the license lapse and the automatic renewal thereof, confirming plaintiff's continued competence and responsibility, persuade us that the protective purpose of the licensing statute has been satisfied such that plaintiff should not be barred from recovering under its contract with defendant.

[3] Defendant next assigns error to the trial court's conclusions that plaintiff substantially performed its obligations under the contract to provide defendant with regular monthly statements and to complete the project in 180 days. The pertinent contract provisions state as follows:

> The Builder will provide the Owner with regular statements at least once a month before the *15th* day of each month detailing expenditures to that date with a full explanation of

> any variance from the attached plans and specifications . . . in order to keep the costs in line with the attached projected budget.
>
> . . . .
>
> . . . The Builder shall complete all work to be performed under the terms of this Contract within 180 days from the date hereof, barring acts of God, bad weather or other unforeseen circumstances beyond the Builder's control.

In support of its conclusion that plaintiff had substantially complied with the monthly statement requirement, the court found that plaintiff had provided statements to defendant on 26 April, 30 May, 12 July and in August and September 1978. The first statement was not provided until five months after execution of the contract because, due to severe and unusual weather and soil conditions which delayed construction, the expenditures to that date were minimal. Plaintiff did not provide a statement to defendant in June 1978. The July 1978 statement reflected plaintiff's expenditures to date but did not reflect some invoices received but not yet paid by plaintiff. These outstanding obligations were reported to defendant orally in July and were reflected in the August 1978 statement. In September, plaintiff sent defendant a written statement of costs in anticipation of closing.

These findings are completely supported by the evidence and, in our opinion, support the court's conclusion of substantial compliance by plaintiff with the monthly statement provision. Indeed, defendant's main argument on appeal appears to be, not that he was provided with untimely or an insufficient number of monthly statements, but that one of those statements, in July 1978, was so inaccurate as to mislead him as to the cost of the project. The record does reveal that the July statement reflected only a 7 percent cost overrun, whereas the final accounting revealed a cost overrun of over 30 percent. Nevertheless, the July statement did reflect expenditures to date, as required by the contract, and defendant was informed shortly thereafter of the outstanding invoices not disclosed in the statement. The record further discloses that after being so informed, defendant continued his previous course of selecting the most expensive materials and construction methods for his house. On this ground

the court found, and we agree, that defendant was not harmed by plaintiff's failure to comply more strictly with the monthly statement requirement.

[4] With regard to the timeliness of plaintiff's performance under the contract, the court found that plaintiff had complied with the contract provision in that the delay beyond 180 days was caused by five months of unusually severe weather, defendant's numerous change orders and defendant's detailed involvement in the project, constituting "unforeseen circumstances beyond the builder's control." Defendant disagrees with these findings on the ground that bad weather and change orders are foreseeable circumstances in any building project. The evidence at trial was abundant, however, that the weather during the first five months of the contract period was unusually severe and that the extent of defendant's involvement in the project and the number of changes required by him were far beyond the norm. The crew chief for defendant's house testified that he quickly learned that he could not make ordinary on-the-job decisions without defendant's approval because defendant had strong and unpredictable opinions about every detail of the house. He also testified that defendant often required him to change or redo portions of construction which defendant decided should be done differently for aesthetic purposes, and had him mock up interior partitions so that defendant could decide whether they were aesthetically acceptable. The evidence as a whole supports the court's findings and conclusion that the six month delay in completion of defendant's house fell within the absolving clause of the contract provision.

[5] Defendant's final assignments of error concern the amount of damages awarded to plaintiff on the ground that the court's findings as to plaintiff's costs associated with the project and as to the cost of curing defects in plaintiff's work are not supported by the evidence.

With regard to plaintiff's costs, the court found them to be $82,938.62, including 27 weeks of the salary of Runyon Woods. The court's finding is based upon invoices, cancelled checks and time records submitted by plaintiff at trial and the testimony of plaintiff's managing officers. Defendant contends that these cost figures are inaccurate in that they include the salary of Runyon

Woods for approximately six weeks after he had been removed from the job at defendant's request and include certain "changes and extras" that were not, in fact, changes from the original plans and specifications. We find no error.

The contract specifically provided that plaintiff's costs would include the salary of Runyon Woods "for the duration of construction as overseer." Although Woods was relieved of responsibility for dealing with defendant in mid-August, following an argument between Woods and defendant concerning defendant's withholding of payments to plaintiff and plaintiff's delayed completion of the house, Woods continued to oversee the job by consulting with the crew chief and subcontractors. Consequently, plaintiff continued to carry his salary as a charge to defendant until the end of the job. Further, when Woods ceased dealing directly with defendant, Gerald Barrett, another principal in plaintiff, took over this function; however, plaintiff did not charge Barrett's salary to defendant during this period. Finally, plaintiff did not charge defendant for Woods' salary during the "down time" caused by the severe weather even though Woods expended considerable time on the project during that period. The court's inclusion of Woods' salary in plaintiff's costs was justified.

Defendant does not contend that the invoices and cancelled checks submitted by plaintiff are inflated. He merely argues that some of the items reflected therein, which cost more than estimated in the plans and specifications, were not changes or extras but were anticipated in the estimated price of $65,000. Regardless of the status of the items, defendant was obligated to pay for them under the terms of his "cost plus" contract with plaintiff. We conclude that the trial court's determination of plaintiff's costs for the project is amply supported by the evidence.

[6] The trial court allowed defendant an offset of $600 based upon its findings as to the costs of remedying three items of defective workmanship: exposed wires and pipes, a leak around the chimney and water accumulation in the heat ducts and around the house after rain storms. Defendant contends that the amount of the offset was arbitrary and not supported by the evidence. In particular, defendant argues that he should have been awarded damages for numerous incomplete items disclosed by the evidence, such as light fixtures, cabinet work, sliding doors and

screens. The court declined to include these items in the setoff on the ground that they were normal "call back" items which plaintiff was not required to perform because defendant had breached the contract by refusing to pay plaintiff for its work.

The evidence discloses that in early August defendant began withholding payment from plaintiff and that in late September defendant failed to attend three scheduled closings. Plaintiff nevertheless continued to perform under the contract and substantially completed the house prior to ceasing construction, as evidenced by the fact that defendant moved in immediately thereafter. On these facts, the court correctly declined to charge plaintiff for its failure to perform the call back work. Further, defendant presented no evidence as to the cost of performing such work.

[7] Defendant also failed to present evidence as to the cost of remedying other items of alleged defective workmanship, such as acid stains on woodwork, cracks in interior woodwork, inadequate trim work on a hideaway bed and defective cabinet doors. The court therefore correctly declined to award compensation for these items. As for the defective work for which defendant was awarded compensation, defendant contends that the amount awarded was arbitrarily selected in view of his evidence that the cost of remedying the water accumulation problem alone was between $12,000 and $18,000. Defendant did present evidence that to cure that defect, the stone floor in the house would have to be ripped up in order to locate the lowest point in the heating ducts so that a drainage system could be installed. Defendant's estimated cost of repair was therefore based upon assumptions that there was no drainage system already in place and that the lowest point in the duct system could be located only by extensive exploration. Plaintiff offered rebuttal testimony by Runyon Woods that an extensive drainage system was already in place, but most likely had become clogged, and could be cleared at a cost of not more than $300. Woods further testified that he knew where the lowest point in the heating duct system was, so that even if a new drainage system had to be installed, the cost of doing so would be no more than $1,000. As the trier of fact, the court had the right to weigh all of the competent evidence before it and to resolve any inconsistencies or contradictions in the evidence. *See Hodges v. Hodges*, 257 N.C. 774, 127 S.E. 2d 567

(1962). The court's award of $300 for the defective drainage system was clearly supported by the evidence and is therefore conclusive on appeal. *See Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). The awards of $150 for the leaking chimney and $150 for the exposed wires and pipes are supported by defendant's own evidence.

The decision of the trial court is

Affirmed.

Judges VAUGHN and JOHNSON concur.

TOMMY ALFRED HILLMAN v. UNITED STATES LIABILITY INSURANCE COMPANY

No. 8118SC1182

(Filed 19 October 1982)

1. **Insurance § 74; Negligence § 8.1— chain collision—foreseeability of second impact—deduction of more than one deductible improper**

In an action by an insured against his insurance company for damages sustained in a chain collision, it was error for the insurance company to subtract from defendant's damages two deductibles, one for the collision between plaintiff and the car in front of him and one for the collision between plaintiff and the car behind him. The evidence tended to show that the operator of the car in front of plaintiff braked suddenly, plaintiff slammed on his brakes but was unable to stop, slid into the first car, the operator of the third car was able to come to a full stop; however, the operator of the fourth car was not able to stop and some four or five seconds after the first collision, pushed the third car into the rear of plaintiff's car. The fact that the operator of the third vehicle was able to come to a stop for four or five seconds after plaintiff hit the first car does not break the chain of proximate causation set in motion by the first car's action.

2. **Attorneys at Law § 7.5; Rules of Civil Procedure § 56.4— award of attorney's fees against insurer—summary judgment for insured proper where no opposing affidavits**

The trial court properly denied defendant's oral motion in open court that the trial court conduct an evidentiary hearing to determine whether the defendant's conduct amounted to an unwarranted refusal to pay plaintiff's insurance claim under G.S. 6-21.1 since plaintiff's supporting papers sufficiently demonstrated his entitlement to attorney's fees, and since defendant failed to file any affidavits pertaining to additional factual matters other than those ad-

dressed in his pleadings which might have had a bearing on the issue of "an unwarranted refusal" to pay plaintiff's claim. G.S. 1A-1, Rule 56(c) and (f).

3. Attorneys at Law § 7.5— assessment of attorney's fees as part of court cost in insurance action proper

The trial court did not abuse its discretion in assessing the defendant insurer plaintiff's attorney's fees under G.S. 6-21.1 where the trial court made a finding of "an unwarranted refusal by the defendant insurance company to pay the claim which constitute[d] the basis" of his suit.

APPEAL by defendant from *Lane (Arthur), Judge.* Judgment entered 23 July 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 31 August 1982.

Plaintiff, Tommy Alfred Hillman was involved in a four-car automobile accident on U.S. Highway 29. Plaintiff's automobile received damages from this accident totaling $906.37. Pursuant to his collision insurance policy, plaintiff submitted a claim for $906.37, less the $100.00 deductible. Defendant, United States Liability Insurance Company tendered a check to plaintiff in the amount of $706.37, representing plaintiff's loss, less two deductibles. Plaintiff returned the check to defendant and commenced this action.

Plaintiff's causes of action were for breach of contract and bad faith refusal to pay plaintiff for damages to his automobile. The complaint alleges that damage to plaintiff's automobile was caused by a single accident wherein plaintiff's vehicle struck a vehicle which had suddenly stopped in front of him, and in turn, plaintiff's vehicle was struck from the rear by another vehicle. Plaintiff claimed that defendant insurer was liable to plaintiff for $906.37, less the $100.00 deductible. The prayer for relief also contained a request that defendant be assessed plaintiff's attorney's fees pursuant to G.S. 6-21.1, for an unwarranted refusal to pay the claim, as part of the costs of the action.

Defendant answered admitting liability but asserting that the "accident" involved two separate "accidents" or collisions, one in the front and one in the rear, entitling defendant to subtract two deductibles under the terms of the insurance policy.

Plaintiff moved for partial summary judgment on the issue of liability and for assessment of counsel fees pursuant to G.S. 6-21.1. Movant's supporting affidavit stated that at the time of the

accident the operator of the vehicle in front of him suddenly applied her brakes. Plaintiff slammed on his brakes and slid into the rear of that first vehicle. This was the "first impact." Immediately after the first impact, the vehicle behind plaintiff, referred to as the "third vehicle," was in turn propelled into the rear of plaintiff's vehicle by a fourth vehicle. This constituted the "second impact."

In opposition, defendant filed an affidavit of the operator of the third vehicle, stating that he had come "to a full stop and was sitting there four or five seconds when the van behind me hit me and knocked me into Hillman."

At the conclusion of the summary judgment hearing, the defendant made an oral motion that the court conduct an evidentiary hearing on the issue of attorney's fees to determine whether defendant's conduct amounted to an unwarranted refusal to pay the claim. The motion was denied. An order was entered granting partial summary judgment in plaintiff's favor, awarding plaintiff $806.37 as well as attorney's fees under G.S. 6-21.1.

Defendant assigns error to the granting of partial summary judgment for plaintiff, to the award of specific damages and attorney's fees and to the denial of defendant's oral motion to conduct a hearing to determine if its refusal to pay the claim was unwarranted.

Pearman & Pearman by Richard M. Pearman, Jr. and Larry W. Pearman, for defendant appellant.

Gabriel, Berry, Harris & Weston by M. Douglas Berry, for plaintiff appellee.

JOHNSON, Judge.

I. Defendant's Liability for Collision Damage

[1] Defendant argues that the trial court erred in granting partial summary judgment for plaintiff on his contract claim because the affidavit submitted by defendant raises a genuine issue of material fact as to the number of collisions and therefore, number of deductibles that are applicable to the claim. Plaintiff maintains that the affidavit raises only an issue as to the exact sequence of the two impacts, which is neither genuine nor material to its claim under the policy.

G.S. 1A-1, Rule 56(c) of the Rules of Civil Procedure provides that summary judgment will 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 judgment as a matter of law. The burden of establishing the lack of any triable issue of fact is on the party moving for summary judgment, and the movant's papers are carefully scrutinized while those of the opposing party are regarded with indulgence. *Bank v. Gillespie*, 291 N.C. 303, 230 S.E. 2d 375 (1976). If the party moving for summary judgment successfully carries its burden of proof of showing that there is no genuine issue as to any material fact, the opposing party, by affidavits or otherwise, as provided by Rule 56, must set forth specific facts showing that there is a genuine issue for trial. *Haithcock v. Chimney Rock Company*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971). An issue is material if the alleged facts constitute a legal defense or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "genuine" if it may be maintained by substantial evidence. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972).

The applicable provision of the insurance policy governing the claim states:

> "Collision or Upset: To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto."

The deductible amount, as stated in the declarations of plaintiff's policy is $100.00.

The number of "collisions" or "accidents" is material to the amount of defendant's liability under the policy. However, the controlling facts before the trial judge did not give rise to a triable issue as to the number of "accidents" involved in plaintiff's "accident."

Plaintiff's supporting affidavit characterizes the accident in the following manner:

"At the time of the accident, the Plaintiff was following a 1973 Dodge being operated by one Josephine Herbin Manson (hereinafter referred to as 'first vehicle') when the operator of the first vehicle suddenly applied her brakes, at which time the Plaintiff slammed on his brakes and slid into the rear of the first vehicle. Immediately after the impact of the Plaintiff's vehicle (hereinafter referred to as the 'first impact'), a 1979 Ford being operated by Clifton Franklin (hereinafter referred to as 'third vehicle') which was following the Plaintiff's vehicle slammed on his brakes and slid into the rear of the Plaintiff's vehicle, and immediately thereafter, a 1979 Chevrolet being operated by Keith Allen Sills (hereinafter referred to as 'fourth vehicle') slammed on his brakes and slid into the rear of the third vehicle, pushing it into the rear of Plaintiff's vehicle (hereinafter referred to as the 'second impact')."

Plaintiff also alleged that no more than several seconds passed between the first and second impacts. While the affidavit appears to have the third vehicle sliding into plaintiff twice, it is clear that plaintiff intended to describe two impacts, one in the front and one in the rear of his automobile. In short, the affidavit describes a classic four car "chain collision" accident, occurring in the span of several seconds.

Defendant's affiant, the driver of the third vehicle, characterized the accident in the following manner: "I came to a full stop and was sitting there four or five seconds when the van behind me hit me and knocked me into Hillman." Defendant maintains that the chain of causation set in motion by the first vehicle's sudden stop was broken or interrupted and was replaced by another chain of causation, thus resulting in two accidents.

According to the terms of the insurance policy, defendant insurer has an obligation to pay for the plaintiff's property damage in excess of $100.00 provided that it was "caused by" the plaintiff's collision with the vehicle in front of him.

The principles of "proximate cause" that are applicable in automobile negligence cases apply in this case.

"In order to bring the loss of, or damage to, the insured automobile within the coverage of a collision policy, such loss

> or damage must be the result of a collision, that is, a collision must be the proximate cause of the loss or damage . . . *45 C.J.S., Insurance,* § 800, p. 844."

The law is generally stated as follows:

> "With respect to the coverage of a collision or upset policy the broad rule has been stated that, where the peril specifically insured against sets other causes in motion which, in an unbroken sequence and connection between the act and the final injury, produce the final result for which a recovery is sought under the policy, the peril insured against will be regarded as the proximate cause of the entire loss so as to render insurer liable for such loss within the limits fixed by the policy . . ."

Id., at 845.

Therefore, under the terms of plaintiff's collision insurance policy, as long as the first impact or initial collision is a proximate cause of any subsequent damage, the defendant insurer is obligated to cover all of that damage, less only one deductible.

The principles of proximate cause that serve to delineate superceding and intervening causes in negligence cases are applicable to this question of contract interpretation also.

In the case of *Hester v. Miller,* 41 N.C. App. 509, 255 S.E. 2d 318, *disc. rev. denied,* 298 N.C. 296, 259 S.E. 2d 913 (1979), this Court stated:

> "There may be more than one proximate cause of an injury. It is not required that the defendants' negligence be the sole proximate cause of injury, or the last act of negligence . . . In order to hold the defendant liable, it is sufficient if his negligence is one of the proximate causes . . .
>
> In order to insulate the negligence of one party, the intervening negligence of another must be such as to break the sequence or causal connection between the negligence of the first party and the injury. The intervening negligence must be the *sole* proximate cause of the injury . . . In cases involving rearend collisions between a vehicle slowing or stopping on the road without proper warning signals, and following vehicles, the test most often employed by North Carolina

> Courts is foreseeability. The first defendant is not relieved of liability unless the second independent act of negligence could not reasonably have been foreseen . . . The foreseeability standard should not be strictly applied. It is not necessary that the whole sequence of events be foreseen, only that some injury would occur." (Emphasis original)

Id. at 512-513, 255 S.E. 2d at 320-321.

In the earlier decision of *McNair v. Boyette*, 15 N.C. App. 69, 189 S.E. 2d 590 (1972), this Court discussed in detail the legal definition of intervening negligence. The *McNair* decision involved a time lapse of several minutes from the first alleged act of negligence and the second. The *McNair* court stated:

> " . . . the test by which negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury . . ."

Id. at 72, 189 S.E. 2d at 593.

Citing the case of *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808 (1940), the *McNair* court stated:

> "The decisions are all to the effect that liability exists for the natural and probable consequences of negligent acts or omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the first wrongdoer, if such intervention ought to have been foreseen. In such case, the original negligence still remains active and a contributing cause of the injury. The test is to be found in the probable consequences reasonably to be anticipated, and not in the number or exact character of events subsequently arising."

McNair, 15 N.C. App. at 72, 189 S.E. 2d at 593.

The affidavits submitted by the parties describe a line of cars traveling on a highway at about 45 to 50 miles per hour. The operator of the first car braked suddenly. The plaintiff in the second car slammed on his brakes but, unable to stop, slid into the first car. The operator of the third car was able to come to a full stop. However, the operator of the fourth car was not able to stop

and some four or five seconds after the first collision, pushed the third car into the rear of plaintiff's car.

Defendant's affidavit does not allege specific facts raising an inference of intervening negligence on the part of the operator of the fourth vehicle sufficient to defeat plaintiff's motion for summary judgment. In terms of proximate causation it is not unforeseeable that one or more, if not all, of the following cars will not be able to stop in time to avoid a "chain reaction" collision. The probable consequences reasonably to be anticipated from suddenly stopping on a highway are exactly those outlined here, a line of cars undergoing a series of impacts in an unbroken sequence. *See Lewis v. Fowler*, 22 N.C. App. 199, 206 S.E. 2d 329 (1974), *cert. denied*, 285 N.C. 660, 207 S.E. 2d 754 (1974).[1]

The fact that the operator of the third vehicle was able to come to a stop for four or five seconds after plaintiff hit the first car does not break the chain of proximate causation set in motion by the first car's action.

Defendant relies on *Liberty Mutual Insurance Company v. Rawls*, 404 F. 2d 880 (5th Cir. 1968) to support the argument that two separate "chains of causation" resulted in two separate "losses" to plaintiff's automobile. However, *Liberty Mutual* is clearly distinguishable from the case under discussion, as the facts there did not contain an unbroken sequence of events caused by the first collision and leading up to the second collision. In *Liberty Mutual* the insured's first collision was separated by both time, two—five seconds and distance, between 30 and 300 feet from the second collision. Yet, the critical aspect of the case was the lack of evidence of loss of control on the part of the insured after the first collision necessary to raise the inference that there were fewer than two distinct collisions. The court found the question of the number of accidents appropriate for summary judgment, stating, "the only reasonable inference is that Bess (the driver) had control of his vehicle even after the initial collision." *Id.* at 880. The only reasonable inference arising from the affidavits submitted here is that the first car's act of braking suddenly set in motion an unbroken sequence of driver reactions in

1. In *Lewis v. Fowler*, this Court found that a "pile up" of vehicles was the reasonably foreseeable result of a substantial blockage of traffic lanes.

cars two through four which resulted in damage to both the front and rear of plaintiff's automobile. No unforeseeable independent acts of negligence were alleged to break the initial causal chain. There being no genuine issue of material fact to present to the trier of fact, partial summary judgment in favor of plaintiff on his contract claim was proper. Defendant's first assignment of error is without merit.

II. Allowance of Plaintiff's Attorney Fees

Defendant's other assignments of error relate to the award of attorney's fees to plaintiff pursuant to the provisions of G.S. 6-21.1.[2] Defendant argues that the trial judge (a) erred in denying his oral motion that the court conduct an evidentiary hearing on the issue of attorney's fees and (b) that the trial judge erred in assessing defendant of the plaintiff's attorney's fees as part of the costs of the action. We find merit in neither of these contentions.

A

[2] Following the hearing of plaintiff's motion for summary judgment, the defendant made an oral motion in open court that the trial court conduct an evidentiary hearing to determine whether the defendant's conduct amounted to an unwarranted refusal to pay the plaintiff's claim. That motion was properly denied by the trial court.

The plaintiff's claim for the assessment of attorney's fees was properly made in his prayer for relief in the original complaint. The claim was then restated in his motion for partial summary judgment. The plaintiff's motion for partial summary judgment was properly served on the defendant's attorney on 24 April 1981, and was not heard until approximately three months later. The defendant had more than ample opportunity to gather and

2. G.S. 6-21.1. In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages if five thousand dollars ($5,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

present any evidence bearing on the question of plaintiff's entitlement to attorney's fees under G.S. 6-21.1.

G.S. 1A-1, Rule 56(c) gives the party opposing a summary judgment motion up until the day prior to the day of the hearing to serve opposing affidavits. Aside from defendant's answer, his only responsive affidavit went to the issue of liability, not attorney's fees. Plaintiff's supporting papers sufficiently demonstrated his entitlement to attorney's fees. The burden then shifted to the defendant under Rule 56(c) to show that there is a genuine issue for trial, or to provide an excuse for not doing so under Rule 56(f). *Brooks v. Smith*, 27 N.C. App. 223, 218 S.E. 2d 489 (1975). The defendant failed to do either.

If the party moving for summary judgment successfully carries his burden of proof, the opposing party must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial and he cannot rest upon the bare allegations or denials of his pleading. *Id.* at 227, 218 S.E. 2d at 492, *citing*, *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971).

In the instant case, defendant failed to file any affidavits pertaining to additional factual matters which might have had a bearing on the issue of "an unwarranted refusal" to pay the claim. Therefore, the defendant failed to set forth specific facts in a timely manner to show that there was a genuine issue as to the plaintiff's entitlement to attorney's fees.

Rule 56(f) provides ample opportunity for the opposing party to move for a continuance of the motion in order to obtain more facts through discovery or, in the alternative to move for a continuance on the grounds that the party is not, at that time, able to obtain the relevant facts in time to file opposing affidavits. In the case at bar, the defendant did neither.

The defendant is correct in arguing that the wording of G.S. 6-21.1 contemplates some type of inquiry by the presiding judge before the court may exercise its discretion in awarding a fee to plaintiff's counsel. However, the record in this case shows that defendant had notice of the claim and an ample amount of time to obtain opposing affidavits. The trial court had before it pleadings and affidavits sufficient to rule on plaintiff's motion for summary

judgment on the issue of attorney's fees. The defendant's oral motion at the conclusion of the summary judgment hearing was not timely under Rule 56 and was properly denied.

Furthermore, we note that while oral testimony is permissible on a motion for summary judgment, G.S. 1A-1, Rule 43(e); *Chandler v. Savings and Loan Assoc.*, 24 N.C. App. 455, 211 S.E. 2d 484 (1975), the admission of such testimony is in the court's discretion. *Pearce Young Angel Co. v. Enterprises, Inc.*, 43 N.C. App. 690, 260 S.E. 2d 104 (1979). Defendant gives no reason why he failed to present his evidence by affidavit. There was no abuse of discretion in the denial of defendant's motion for an evidentiary hearing.

B

[3] Defendant next argues that the trial judge erred in taxing plaintiff's attorney fees as a part of the court costs of the action.

The allowance of counsel fees under G.S. 6-21.1 is, by the express language of the statute, in the discretion of the presiding judge. The case law in North Carolina is clear that to overturn the trial judge's determination, the defendant must show an abuse of discretion. *Callicut v. Hawkins*, 11 N.C. App. 546, 181 S.E. 2d 725 (1971); *Harrison v. Herbin*, 35 N.C. App. 259, 241 S.E. 2d 108 (1978), *cert. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978).

The requirement of G.S. 6-21.1 that the trial court make a finding of "an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such a suit" has been met in the case at bar. The order granting partial summary judgment states that the court heard arguments of counsel for both plaintiff and defendant, reviewed the record, including the affidavits of both parties and found no triable issue affecting plaintiff's entitlement to $806.37 on his contract claim and the assessment to the defendant of the plaintiff's attorney's fees. The order specifically states that the assessment is:

> "[F]or the Defendant's unwarranted refusal to pay the full amount of said claim, said reasonable attorney's fees being the sum of Eight Hundred Fifty and No/100 Dollars ($850.00) based on the verified affidavit submitted by the plaintiff's attorney showing a minimum of 21.8 hours of the said attorney's time."

Having heard the parties, the trial judge was in the best position to determine whether the defendant's refusal was unwarranted. The order clearly shows that the trial judge made the required finding of "unwarranted refusal," *Piping, Inc. v. Indemnity Co.*, 9 N.C. App. 561, 176 S.E. 2d 835 (1970), as well as the required finding regarding the reasonableness of the court-awarded attorney's fees. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168 (1975), *cert. denied*, 288 N.C. 240, 217 S.E. 2d 664 (1975).

The intent and purpose of G.S. 6-21.1 was set forth in the case of *Hubbard v. Lumberman's Mutual Casualty Company*, 24 N.C. App. 493, 211 S.E. 2d 544, *cert. denied*, 286 N.C. 723, 213 S.E. 2d 721 (1975), where this Court stated:

> "The obvious purpose of this section is to provide relief for a person who has sustained injury or property damage in an amount so small that, if he must pay his attorney out of his recovery, he may well conclude that it is not economically feasible to bring suit on his claim . . . This legislation, being remedial, should be construed liberally to accomplish the purpose of the Legislature and to bring within it all cases fairly within its intended scope . . . "

24 N.C. App. at 497, 211 S.E. 2d at 546.

The finding that the defendant's refusal to pay the full amount of the plaintiff's claim was "unwarranted" is supported by the record in this case. Defendant has demonstrated no abuse of the trial judge's discretion in assessing the defendant of plaintiff's attorney's fees.

Affirmed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. DAVID ERIC MORRIS

No. 8218SC180

(Filed 19 October 1982)

1. **Criminal Law § 75.15— confession—insufficient evidence of intoxication**

The evidence did not show that defendant was so intoxicated as to render his in-custody statement inadmissible.

2. **Robbery § 4.5— armed robbery—aider and abettor—sufficiency of evidence**

The evidence in an armed robbery case, including defendant's in-custody statement that he and two others drove around looking for a place to rob, was sufficient to support defendant's conviction of armed robbery as an aider and abettor.

3. **Criminal Law § 114.2— instructions on confession—no expression of opinion**

The trial judge expressed no opinion concerning the partly inculpatory and partly exculpatory in-custody statement of the defendant by instructing the jury that there was evidence "which tends to show" that defendant confessed that he committed the crime charged.

4. **Criminal Law § 138; Robbery § 6.1— Fair Sentencing Act—armed robbery—aggravating factors—pecuniary gain—use of deadly weapon**

Under G.S. 15A-1340.4(a)(1), the possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in an armed robbery case. Similarly, if the pecuniary gain at issue in a case is inherent in the offense, then that "pecuniary gain" should not be considered an aggravating factor.

5. **Criminal Law § 138— Fair Sentencing Act—improper aggravating factors—lesser sentence not necessarily required**

The mitigating factors would not necessarily have outweighed the aggravating factors so as to have entitled defendant to a lesser sentence in an armed robbery case if the trial court had not improperly used elements of the offense as aggravating factors where there was support in the record for the court's finding of the additional aggravating fact that "defendant did not tell the truth under oath."

6. **Criminal Law § 138; Robbery § 6.1— presumptive sentence for armed robbery**

Considering the combined effect of the provision of G.S. 14-87(d) establishing a minimum sentence of 14 years for robbery with a firearm, the provision of G.S. 15A-1340.4(f) excepting robbery with a firearm from the twelve-year presumptive sentence of other Class D felonies, and the 1979 Amendment of G.S. 14-87(a) stating that one who robs with a firearm shall be guilty of a Class D felony rather than that such person shall be punished as a Class D felon, 14 years is not only the minimum sentence but is also the presumptive sentence for robbery with a firearm. Therefore, where the trial court imposed the presumptive sentence of 14 years for robbery with a firearm, the court's findings of aggravating and mitigating factors was superfluous.

State v. Morris

APPEAL by defendant from *Wood, Judge.* Judgment entered 24 September 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 September 1982.

The State's evidence tended to show that on 20 July 1981, the defendant, David Morris, and two accomplices, Roy Shaw and Jerry Washington, were involved in the robbery of a Majik Market in Greensboro. Jerry Washington, who testified for the State, stated that he robbed the store by pointing a pistol at the clerk and demanding all of the money while the defendant and Roy Shaw remained in the car. Before defendant and his two accomplices could leave the vicinity of the Majik Market, the police arrived. The police followed the car, driven by Shaw, for several blocks before stopping it. Defendant was searched, and a gun (but not the one used in the robbery) was found on defendant's person.

After being read his *Miranda* rights, defendant gave a statement indicating that Washington, Shaw and he drove around looking for a place to rob after Washington stated he needed some money and didn't care how he got it. Defendant also asserted in his statement, however, that he refused to get out and go into the store.

Defendant testified that he did not know that Washington had a gun; that he did not intend to rob the Majik Market; that he indicated to Washington before and after the robbery that he did not wish to be involved; and that he was merely present at the scene of the crime. Defendant explained that the gun found in his pocket at the scene was one he had found two days earlier, and that he was taking it to a friend's house.

Following his conviction of armed robbery and a judgment imposing a fourteen-year prison sentence, defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Alexander, Moore, Nicholson & Baynes, by E. Raymond Alexander, Jr., for defendant appellant.

BECTON, Judge.

The defendant presents four arguments on appeal: (1) that the trial court erred in determining that the statement given by

him was voluntary and admissible; (2) that the trial court should have allowed his motion to dismiss, since there was no evidence of an intent by defendant to rob the Majik Market; (3) that the trial court erred by referring to defendant's statement as a "confession;" and (4) that the trial court erred by considering "pecuniary gain" and "possession of a deadly weapon" as aggravating circumstances at his robbery with a firearm sentencing hearing. For the reasons that follow, we reject defendant's arguments.

I

[1] Defendant first contends that his statement was involuntary because he was under the influence of alcohol during interrogation and because his statement was not read back to him after it had been reduced to writing. We have reviewed the record and we find competent evidence to support the trial court's finding that the statement was read to defendant and that defendant initialed and signed the statement. Further, we find no evidence to indicate that defendant was so intoxicated as to render his statement inadmissible. *See State v. Atkinson*, 39 N.C. App. 575, 251 S.E. 2d 677 (1979). To the contrary, defendant indicated that he was not impaired; that he "knew what went on" at the time he gave his statement; and that the statement was voluntary.

The trial court, following a *voir dire* hearing, made findings of fact upon which the admissibility of the alleged incompetent evidence depended. The trial court's findings of fact are supported by competent evidence and are conclusive on appeal. *State v. Jackson*, 292 N.C. 203, 232 S.E. 2d 407 (1977) and *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977).

II

[2] We summarily dismiss defendant's second argument that the trial court erred by its failure to allow defendant's motion to dismiss at the close of the State's evidence and at the close of all the evidence. The evidence taken in the light most favorable to the State is sufficient to take the case to the jury. It is to be remembered that the defendant told the interrogating officers: "We left Kayo going to look for a place to robb [sic]."

III

[3] Next, defendant contends that the trial court "erred in instructing the jury as to a 'confession' of the defendant." Although

defendant, in his statement, denied that he was the actual perpetrator of the robbery, the statement is not wholly exculpatory. Defendant clearly implicated himself in the plan to rob. Even defendant admits in his brief that the "statement of the defendant contained exculpatory portions as well as incriminating portions, ... "

Further, and equally significant, the trial court did not tell the jury that defendant "confessed." The trial court said: "There is evidence *which tends to show* that the defendant, David Eric Morris, confessed that he committed the crimes charged in this case. *If you find* that the defendant made the confession, then you should consider all the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it." (Emphasis added.) Considering the trial court's charge in context, it is clear that the judge expressed no opinion concerning the partly inculpatory and partly exculpatory statement of the defendant.

IV

In his final assignment of error, defendant contends that the trial court erroneously found the following as aggravating factors: (1) that the robbery with firearm was committed for hire or pecuniary gain; and (2) that the defendant was armed with a deadly weapon at the time of the robbery with firearm.

Defendant's contention is premised on G.S. 15A-1340.4(a)(1) which states, in relevant part, that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." Arguing that the statute prohibits the dual or multiple use of the same evidence, defendant asserts, first, that the mitigating factors would have outweighed the aggravating factors and, second, that the defendant would have been eligible for a lesser sentence had the trial court not used elements of the offense to prove factors in aggravation.

Defendant's argument is appealing. In addition to the statute's mandatory proscription, our Supreme Court has held that the evidence necessary to prove the underlying felony in a felony murder case could not be used at the penalty phase as an aggravating factor because the underlying felony merged into and formed a part of the capital offense. *State v. Cherry*, 298 N.C. 86,

113, 257 S.E. 2d 551, 567-68 (1979).[1] Further, the use of an element of an offense as a factor in aggravation has been rejected by courts and legislatures in other jurisdictions.

In *Juneby v. State*, 641 P. 2d 823 (1982), the defendant was convicted of burglary and sexual assault. The Alaska Court of Appeals ordered resentencing in the rape case because the trial court, at Juneby's sentencing hearing, relied upon facts that were used to prove the burglary to justify the imposition of a greater sentence in the rape case. Further, Alaska trial courts are specifically prohibited from considering "pecuniary incentive" as an aggravating factor unless it is beyond that inherent in the crime itself. Alaska Stat. § 12.55.155(c)(11) (1980). Similarly in *People v. Roberson*, 81 Cal. App. 3d 890, 146 Cal. Rptr. 777 (1978), resentencing was ordered in an armed robbery case in which the trial court had increased defendant's sentence because he had a weapon. (*See, generally, California Penal Code*, § 1170.6 (West 1982) and *California Civil and Criminal Court Rules*, Rule 441 (West 1981) (Dual Use of Facts; Prohibited Use of Facts).) In Illinois, trial courts can use as an aggravating circumstance the fact that defendant received compensation or pecuniary incentive for the offense *only when* defendant received remuneration other than the proceeds of the offense itself. *People v. Hunt*, 100 Ill. App. 3d 553, 426 N.E. 2d 1268 (1981); *People v. Krug*, 97 Ill. App. 3d 938, 424 N.E. 2d 98 (1981).

[4] As a matter of simple logic, and considering, first, the clear mandate of our Fair Sentencing Act; second, our Supreme Court's decision in *State v. Cherry;* and, third, the support we find in other jurisdictions, we are convinced that possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in a robbery with firearm case. Similarly, if the pecuniary gain at issue in a case is inherent in the offense, then that "pecuniary gain" should not be considered an aggravating

1. Although our Supreme Court later said in *State v. Oliver*, 302 N.C. 28, 62, 274 S.E. 2d 183, 204 (1981), that "the circumstance that the capital felony was committed for pecuniary gain, . . . is not . . . an essential element . . . [of the offense];" and that "it is appropriate for [pecuniary gain] to be considered on the question of [defendant's] sentence" since "the circumstance examines the motive of the defendant rather than his acts," *Cherry* was not overruled. Further, our capital punishment statute does not contain a statutorily mandated proscription against the use of evidence necessary to prove an element of the offense as does our Fair Sentencing Act.

factor. (We note that pecuniary incentive is not always inherent in the crime. Thus, the determination whether pecuniary gain as an aggravating factor, is also an element of the underlying offense, is a factual one. For example, if A hires or pays B to disarm C with the threatened use of a firearm and to throw C's weapon in the river, B could be convicted of robbery with a firearm, and B's sentence could be enhanced by the aggravating fact that the offense was committed for hire or pecuniary gain.)

[5] Notwithstanding its initial appeal, defendant's argument does not withstand closer scrutiny. Indeed, although we have accepted defendant's premises, we reject his conclusions based on the facts of this case. First, defendant's conclusions that the mitigating factors would have outweighed the aggravating factors and that defendant would have been eligible for a lesser sentence had the trial court not used elements of the offense to prove factors in aggravation, are based on rigid mathematical principles that cannot be applied to the sentencing process. In this case the trial court found, and there is support in the record for its finding, the *additional* aggravating fact that "defendant did not tell the truth under oath." On this point, what we said in *State v. Davis*, --- N.C. App. ---, ---, 293 S.E. 2d 658, 661 (1982) bears repeating and is determinative:

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. [Citations omitted.]

[6] We also reject defendant's conclusions for another reason. Our reading of the Fair Sentencing Act and the robbery with firearm statute compels a conclusion that "fourteen years" is the presumptive sentence for robbery with firearms. Therefore, the finding of aggravating and mitigating factors in this case is

superfluous as no finding is required when the trial judge gives the presumptive sentence.[2]

It is true that our legislature did not specifically state that fourteen years is the presumptive sentence for the offense of robbery with firearm. Indeed, to make the robbery with a firearm statute, G.S. 14-87, consistent with the Fair Sentencing Act, G.S. 14-87 was amended in 1979 to state that a person who robs with a firearm "shall be guilty of a Class D felony." Under the Fair Sentencing Act, a Class D felon shall be punished by imprisonment of up to forty years, G.S. 14-1.1(a)(4), and the presumptive sentence for a Class D felony is twelve years, G.S. 15A-1340.4(f)(2). Moreover, because that portion of the Fair Sentencing Act, G.S. 14-1.1, governing punishment for felonies, has no exceptions—that is, it excludes no felonies—it could be argued that the presumptive sentence for robbery with a firearm is twelve years. Such an argument, however, ignores one of the conceded evils the Fair Sentencing Act was designed to remedy—disparate sentences for similar offenses. That argument also ignores two statutory provisions suggesting that twelve years *is not* the presumptive term for robbery with a firearm.

First, G.S. 15A-1340.4(f) states "*unless otherwise specified by statute*, [the] presumptive prison [term] for felonies classified under Chapter 14 . . . (2)[f] or a Class D felony, [is] imprisonment for 12 years." (Emphasis added.) Second, the robbery with a firearm statute states, in relevant part, that "*[n]otwithstanding any other provision of law*, . . . a person convicted of robbery with firearms . . . shall receive a sentence of at least 14 years in the State's prison. . . ." G.S. 14-87(d). That the confluence of these two provisions suggests that fourteen years, instead of twelve years, is the presumptive sentence for armed robbery is further supported by two separate amendments to G.S. 14-87(a) during the 1979 legislative session. During the first session, the legislature substituted "punished as a Class D felon" for the former language "punished by imprisonment for not less than seven years nor more than life imprisonment in the State's

2. We assumed that there was a presumptive sentence for robbery with a firearm in *State v. Davis* when we upheld the imposition of a forty-year sentence in robbery with firearm and assault with a deadly weapon cases after determining that the trial court did not abuse its discretion in weighing the aggravating and mitigating circumstances.

prison" at the end of subsection (a). 1979 N.C. Sess. Laws 760, sec. 5. During the second session, the legislature substituted "Class D felony" for the language it has used during the first session, "punished as a Class D felon" at the end of subsection (a). 1979 N.C. Sess. Laws 1316, sec. 12 (2d session). The first amendment would have permitted a presumptive sentence of twelve years; the latter amendment would not.

We fully recognize that a presumptive sentence in the scheme of our Fair Sentencing Act presupposes both a sentence greater than the presumptive and a sentence less than the presumptive, and that under the robbery with a firearm statute, our trial judges are prohibited from imposing a term of less than fourteen years. Nevertheless, we resolve this case consistent with what we believe to be the paramount legislative intent underlying the Fair Sentencing Act. Considering (1) the combined effect of G.S. 14-87(d) and G.S. 15A-1340.4(f) excepting robbery with a firearm from the twelve-year presumptive sentence of other Class D felonies, and (2) the amendment of G.S. 14-87(a) specifically to state that one who robs with a firearm shall be guilty of a Class D felony (and not that the person shall be punished as a Class D felon), we hold that fourteen years is not only the minimum, but also the presumptive, sentence in robbery with firearm cases.[3] To hold that there is no presumptive sentence in robbery with firearm cases would allow trial judges to impose sentences ranging from fourteen to forty years without considering aggravating and mitigating factors. This, in our view, the legislature did not intend.

For the foregoing reasons, we reject defendant's final assignment of error.

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3. *See* Stevens Clarke and Elizabeth Rubinsky, *North Carolina's Fair Sentencing Act: Explanation, Text, and Felony Classification Table* (rev. 1981) at 43. (The 14-year minimum required sentence under G.S. 14-87 "presumably overrides the presumptive term.")

See also, Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act,* 60 N.C.L. Rev. 631, 635 n. 38 (1982), in which it is stated:

> Despite reclassification under the Fair Sentencing Act, a term may not be imposed that will result in less time served than statutorily mandated. Thus, a person convicted of armed robbery must be sentenced to at least fourteen years imprisonment so he will not serve less than the statutory mandate of seven years.

In defendant's trial we find

No error.

Chief Judge MORRIS and Judge JOHNSON concur.

LUTHER S. DURHAM v. WILLIAM A. McLAMB

No. 8110IC1245

(Filed 19 October 1982)

1. **Master and Servant § 49— workers' compensation—finding of employer-employee relationship supported by evidence**

In a workers' compensation case, the evidence supported the Commission's holding that an employer-employee relationship existed between plaintiff and defendant where the evidence tended to show that (1) plaintiff carpenter was working for an hourly wage and not for a contract price; (2) plaintiff worked full-time for defendant; (3) defendant could discharge plaintiff at any time; (4) plaintiff did not have a business as an independent contractor. The fact that (1) both plaintiff and defendant assumed plaintiff was self-employed; (2) plaintiff did not have regular working hours; (3) defendant did not withhold taxes from plaintiff's pay; and (4) plaintiff was skilled in his job and required little supervision were not determinative of the issue of what relationship existed between plaintiff and defendant.

2. **Master and Servant § 48— workers' compensation—jurisdiction of Commission—minimum number of regular employees**

The evidence supported the Commission's finding that defendant had four or more employees regularly employed at the same business or station when defendant was injured where the evidence tended to show that defendant was building approximately four rental houses; that defendant hired plaintiff and three other skilled carpenters to install subflooring and to frame these houses; that the employment lasted approximately a month; that there was no requirement as to the days or hours the carpenters worked; that plaintiff worked full-time; and that the carpenters were paid an hourly wage.

APPEAL by defendant from order of North Carolina Industrial Commission entered 10 August 1981. Heard in the Court of Appeals 13 September 1982.

On 20 December 1979, while working for defendant, William A. McLamb, plaintiff, Luther S. Durham injured his back when he slipped and fell.

On 17 September 1980 plaintiff filed a notice of the accident with the North Carolina Industrial Commission in regard to his fall and injury on 20 December 1979. The matter was heard before the deputy commissioner on 10 December 1980. On 18 December 1980 the deputy commissioner found facts based on the evidence and concluded an employer-employee relationship did not exist while the plaintiff was working for defendant on 20 December 1979. The deputy commissioner dismissed the case for lack of jurisdiction. Plaintiff appealed the deputy commissioner's decision to the Full Commission. The matter was heard before the Full Commission 3 July 1981. The Full Commission found from the evidence taken before the deputy commissioner that an employer-employee relationship existed between plaintiff and defendant within the meaning of the North Carolina Workers' Compensation Act, and that defendant had four or more employees regularly employed at the same business or station on 20 December 1979. The Full Commission awarded workers' compensation benefits to the plaintiff. Defendant appealed the Commission's award.

On appeal, defendant presents two questions for review:

1) Whether the Full Commission wrongfully and erroneously concluded from the evidence that an employer-employee relationship existed between plaintiff and defendant.

2) Whether the Full Commission wrongfully and erroneously concluded from the evidence that the parties were subject to and bound by the provisions of the North Carolina Workers' Compensation Act.

L. Austin Stevens, for defendant appellant.

Charles T. Hall, for plaintiff appellee.

JOHNSON, Judge.

The evidence in this case shows that in December, 1979, defendant hired plaintiff, Bill Wood, Terry Batchelor, and Roy Russ to perform carpentry work, subflooring, and framing for approximately four houses built by defendant for rental purposes. Defendant hired plaintiff, Wood, Batchelor, and Russ as self-employed carpenters who provided their own tools. Plaintiff,

although he never talked to defendant about it, assumed he was self-employed. However, despite plaintiff's assumption that he was self-employed, he never advertised his services as a carpenter and never hired anyone to help him with a job. Defendant had plenty of carpentry work to be done, but discharged the workers in early January, 1980 because defendant did not have money to pay for additional work. Plaintiff, Wood, Batchelor, and Russ kept their own time and were paid individually on a hourly and weekly basis by check drawn on defendant's account. Plaintiff worked full-time for defendant from the time he was hired until early January, 1980. There were some days when all of the men did not work because of bad weather.

Defendant visited the job site once or twice daily to give the workers instructions as to what jobs he wanted done. The workers were skilled in their work and did not require specific instructions on how to do the job. Defendant did not deduct any withholding taxes from the workers' pay. The workers received the following pay until their discharge in early January, 1980:

Week ending 13 December 1979	
Plaintiff	$180.00
Terry Batchelor	$100.00
Roy Russ	$130.90
Bill Wood	$150.00
Week ending 21 December 1979	
Plaintiff	$240.00
Roy Russ	$216.00
Bill Wood	$122.50
Week ending 28 December 1979	
Plaintiff	$138.00
Terry Batchelor	$155.00
Roy Russ	$ 96.75
Week ending 4 January 1980	
Plaintiff	$180.00
Terry Batchelor	$125.00
Roy Russ	$148.00

It is well settled in this jurisdiction that a claimant who seeks to avail himself of the Workers' Compensation Act, has the burden of proving that the employer-employee relationship existed at the time of the injury. *Lloyd v. Jenkins Context Co.*, 46 N.C. App. 817, 266 S.E. 2d 35 (1980); *Lucas v. Stores*, 289 N.C. 212, 221 S.E. 2d 257 (1976). The question as to whether an employer-employee relationship existed at the time of injury is a question of jurisdictional fact, and the finding of this jurisdictional fact by the Industrial Commission is not conclusive, but is reviewable by this Court on appeal. Thus, it is incumbent on this Court to review and consider all of the evidence of record and make an independent finding. *Lloyd v. Jenkins Context Co., supra; Lucas v. Stores, supra.*

[1] Defendant first contends that plaintiff was not an employee under the provisions of the act.

The term "employee" is defined in G.S. 97-2(2) as:

> "every person engaged in an employment under an appointment or contract of hire or apprenticeship, express or implied, oral or written . . ."

The evidence in the case *sub judice* is remarkably similar to the evidence in *Lloyd v. Jenkins Context Co., supra* which is relied upon by the plaintiff. In *Lloyd*, the plaintiff, a skilled carpenter, was hired by the defendant to perform carpentry work at an hourly rate. Plaintiff kept his own time and was not required to work regular hours, although he normally worked approximately 40 hours per week. At times, a foreman would "point out" to plaintiff what to do and how to do it. Defendant did not make any social security payments for plaintiff or withhold any taxes from plaintiff's pay. The plaintiff assumed that he was self-employed.

In holding that an employer-employee relationship existed within the provisions of the Workers' Compensation Act, this Court stated:

> "We consider the following factors to be determinative: (1) the plaintiff was working for an hourly wage and not for a contract price for a completed job; (2) defendant's own witnesses testified a foreman could instruct the plaintiff in how to do the work. The fact that plaintiff was skilled in his

> job so that he needed very little supervision does not make him an independent contractor; (3) the plaintiff did not have an independent business as a carpenter; (4) the plaintiff worked full-time for Jenkins; (5) the defendant Jenkins apparently had the right to discharge the plaintiff at any time; and (6) there was no evidence that plaintiff had the right to employ people to assist him in the carpentry work without the permission of Jenkins . . . We also do not believe the plaintiff's characterization of himself as 'self-employed' should govern. It is the evidence as to what the relationship was that determines and not what the plaintiff thought it was."

Lloyd, 46 N.C. App. at 819, 266 S.E. 2d at 37. The court also stated that the fact the plaintiff did not have to work regular hours, that defendant did not pay plaintiff's social security or withhold taxes from plaintiff's pay, were not factors determinative of the issue.

In this case also, the fact that (1) both plaintiff and defendant assumed plaintiff was self-employed; (2) plaintiff did not have regular working hours; (3) defendant did not withhold taxes from plaintiff's pay; and (4) plaintiff was skilled in his job, so that he needed very little, if any, supervision are not determinative of the issue of what relationship existed between plaintiff and defendant. Nor is the fact that in this case plaintiff provided his own work tools.

As in *Lloyd v. Jenkins Context Co.*, we find the following factors to be determinative: (1) plaintiff was working for an hourly wage and not for a contract price; (2) plaintiff worked full time for defendant; (3) defendant could discharge plaintiff at any time; (4) plaintiff did not have a business as an independent contractor.

Therefore we hold that at the time of plaintiff's injury, 20 December 1979, an employer-employee relationship under the Workers' Compensation Act existed between plaintiff and defendant.

[2] Defendant next contends that he did not have the four or more employees regularly employed at the same business or station on 20 December, 1979, required to subject him to the Workers' Compensation Act.

Again, the courts of this jurisdiction have held that this is a question of jurisdictional fact and that the reviewing court is required to review and consider the evidence and make an independent determination. *Chadwick v. North Carolina Department of Conservation and Development*, 219 N.C. 766, 14 S.E. 2d 842 (1941). The *Chadwick* court ruled that evidence showing a defendant had in his employ *five* or more employees "must affirmatively appear" in the record to sustain the jurisdiction of the Industrial Commission over the claim.[1] *Id.* at 767, 14 S.E. 2d at 843.

Although we have held that on 20 December 1979, the relationship between plaintiff and defendant was that of employer-employee under the Act, defendant would not be subject to and bound by the Act if at the time of plaintiff's injury, defendant did not regularly employ four or more persons. G.S. 97-2(1); G.S. 97-13(b); *Cousins v. Hood*, 8 N.C. App. 309, 174 S.E. 2d 297 (1970); *Patterson v. Parker & Co.*, 2 N.C. App. 43, 162 S.E. 2d 571, *cert. denied*, 274 N.C. 379 (1968).

It is not disputed that during the week ending 21 December 1979, only three carpenters (plaintiff, Roy Russ, and Bill Wood) were on the job site. Our courts have held that the number of workers on the job site on the date of the injury, standing alone, is not determinative of the issue. If the defendant had four or more "regularly employed" employees, the fact that he fell below the minimum requirement on the actual date of injury would not preclude coverage. *Patterson v. Parker & Co.*, 2 N.C. App. at 48, 162 S.E. 2d at 575, *citing* Larson, Workmen's Compensation Law, Vol. 1A Sec. 52.20.

While there is no statutory definition of "regularly employed," this Court stated in *Patterson:*

> "We believe that the term 'regularly employed' connotes employment of the same number of persons throughout the period with some constancy."

Id. at 48-49, 162 S.E. 2d at 575.

1. G.S. 97-2(1) and G.S. 97-13(b) now require *four* or more employees "regularly employed."

The evidence is undisputed that defendant was building approximately four rental houses; that in early December, 1979 defendant hired plaintiff and three other skilled carpenters to install subflooring and to frame these houses; that the employment lasted through early January, 1980; that there was no requirement as to the days or hours the carpenters worked; that plaintiff worked full-time; and that the carpenters were paid an hourly wage. Further, there was no indication at the time of plaintiff's accident that employment of the plaintiff, Wood, Batchelor, and Russ would be terminated before the carpentry work on defendant's rental houses was completed. In fact, the plaintiff and the three other carpenters were not discharged until early January, 1980, when defendant told the workers that there was plenty of work for the carpenters to perform, but that he had run out of money to pay them for additional work.

We hold that the plaintiff, Russ, Batchelor, and Wood were full-time, "regularly employed" employees of the defendant until their discharge in early January, 1980; that although they worked irregular days and hours, their employment extended over a period of some four weeks, during which they worked, not by chance or for a particular occasion, but according to a definite employment at hourly wages which were paid at the end of each week worked.

Under the circumstances of this case, the fact that the carpenters were not required to work a definite number of hours or days each week, and that only Russ, Wood, and plaintiff reported for work on 20 December 1979 does not alter their (plaintiff, Wood, Batchelor, and Russ) status as "regularly employed" employees of defendant throughout early December, 1979 and early January, 1980.

We find no error of law in the opinion, findings and award of the Industrial Commission.

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

CITY OF WINSTON-SALEM v. HARVEY LEE DAVIS AND BONNIE NAOMI DAVIS

No. 8121SC1302

(Filed 19 October 1982)

1. **Eminent Domain § 5.1— condemned parcel as separate tract—measure of damages**

The condemned parcel of land was a separate tract and not just a portion of an entire tract of three parcels purchased by the owners where there was unity of ownership of the three parcels but there was no physical unity or unity of use in that the three parcels were divided by a paved road, and a large parcel was used for a garage, another parcel was used for parking, and the condemned parcel was used solely for one billboard. Therefore, the amount of damages was the fair market value of the condemned property at the time of the taking.

2. **Eminent Domain §§ 6.1, 6.7— purchase price of entire tract—improvements on another parcel**

Evidence of the purchase price of an entire tract of land was relevant to the value of a condemned parcel of that land where the owners bought the property at a voluntary sale only four years before the condemnation action, and there was no evidence of extensive changes to the condemned parcel or to the surrounding area. However, the cost of improvements on the tract was not relevant where the improvements were not on the condemned parcel but were exclusively on a larger parcel.

3. **Eminent Domain § 6.2— value testimony based upon comparable sales**

An expert witness was properly permitted to state his opinion of the value of the condemned land based on comparable sales of other vacant lots where the comparables used by the witness were all within four blocks of the condemned property and were similar to the condemned property in zoning, time of sale and size.

4. **Eminent Domain § 6.7— actual use of condemned land—inadmissibility**

The trial court properly excluded evidence concerning the owners' use of the condemned property for billboard advertising since the determinative question was the value of the land for its highest and best use and not the rental price for the billboard projected over a period of time.

APPEAL by defendants from *Helms, Judge.* Judgment entered 3 August 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 September 1982.

This case involves a condemnation action by the City of Winston-Salem. The facts are as follows. On 20 January 1979, the City of Winston-Salem, plaintiff appellee, condemned a parcel of

land pursuant to G.S. 136, Article 9. The land was owned by defendant appellants. The parcel of land is surrounded by street rights-of-way on three sides, and Interstate 40 right-of-way on the fourth side. The entire parcel, known as Parcel 4, was condemned. It is 15,459 square feet, which is .354 acres. It was vacant except for a billboard sign.

Appellants presented evidence that they bought the property, an old railroad station, from three railroads in April 1975. The entire property consists of three parcels, which are separated by paved roads. On the largest parcel there was an old building which appellants renovated and converted into a garage and body shop. Beside the large parcel is a small circular tract of land which appellants fenced in and graveled. The third parcel, which is the condemned property, is about one-eighth of the entire property. Appellants paid $55,000.00 for the property in 1975. The only improvements that appellants made to the condemned parcel was to trim the trees and erect a billboard.

Appellants' first expert witness, Mr. Norman, testified that the best use for the property would be a convenience store. He said he believed the market value of the property was $68,000.00. He arrived at that sum by estimating the income an owner would receive by leasing the property to a convenience store operator. He did not base his opinion on the sale prices of comparable property. Appellants' second expert witness, Mr. Walker, testified that he thought the condemned property was worth $72,000.00. His opinion was based on the sale price of a comparable property which was 21,052 square feet.

Appellee introduced evidence that appellants paid $55,000.00 for the entire property in 1975. Appellee's first expert witness, Mr. Avent, testified that in his opinion the condemned land was worth $23,200.00. His opinion was based on sale prices of similar vacant lots. The comparable sales Mr. Avent relied on were made between 1974 and 1978. The lots ranged from 15,048 to 67,516 square feet. He said the highest and best use of the property would be a convenience store. Appellee's second expert witness, Mr. Harland, testified that in his opinion the property was worth $24,750.00. He based his opinion primarily on sales of comparable vacant tracts of land.

The jury returned a verdict of $35,000.00 for the appellants.

City Attorney Ronald G. Seeber and Assistant City Attorney Ralph D. Karpinos, for plaintiff appellee.

Franklin Smith, for defendant appellants.

VAUGHN, Judge.

Appellants bring forward three assignments of error. Their first argument is that the trial court erred in allowing plaintiff to introduce evidence of the prior purchase price of the entire tract of property and in excluding the cost of the improvements to the property. Appellants base their argument on their contention that the condemned parcel was a portion of the entire tract of land and not a separate tract. The issue of whether the condemned land is part of a tract or a whole tract must be resolved first because it determines how damages are measured.

[1] The factors for determining whether the parcels are one tract or several tracts are "unity of ownership, physical unity and unity of use." *City of Winston-Salem v. Tickle*, 53 N.C. App. 516, 281 S.E. 2d 667 (1981), *review denied*, 304 N.C. 724, 288 S.E. 2d 808 (1982). In this case, there is unity of ownership, but no physical unity or unity of use. The evidence shows that a paved road divides the three parcels, indicating there is no physical unity. There is no unity of use because the large parcel is used for a garage, the small round parcel is for parking, but the condemned parcel was used solely for one billboard. Since there is no unity of use and no physical unity, the condemned parcel is a separate tract.

The statute on measuring damages, G.S. 136-112, states:

> The following shall be the measure of damages to be followed by the commissioners, jury or judge who determines the issue of damages:
>
> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

(2) Where the entire tract is taken the measure of damages for said taking shall be the fair market value of the property at the time of taking.

Since the condemned parcel is a separate tract, the amount of damages is the fair market value of the property at the time of taking, 20 January 1979.

[2] This brings us to appellants' question of whether it was erroneous for the trial judge to admit the total purchase price of the entire tract of land.

In general, purchase price is admissible if it is relevant to the value of the land at the time of condemnation. This rule was stated by this Court in *Board of Transportation v. Revis*, 40 N.C. App. 182, 252 S.E. 2d 262, *review denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979).

We review the established rules in North Carolina governing the competency and admissibility of evidence of purchase price paid by a condemnee for land later appropriated for public use, in a proceeding to establish just compensation for the taking:

(1) It is competent as evidence of market value to show the price at which the property was bought if the sale was voluntary and not too remote in point of time.

(2) When land is taken by condemnation, evidence of its value within a reasonable time before the taking is competent on the question of its value at the time of the taking.

(3) Such evidence must relate to the value of the property sufficiently near the time of taking as to have a reasonable tendency to show its value at the time of its taking.

(4) The reasonableness of the time is dependent upon the nature of the property, its location, and the surrounding circumstances. Some of the circumstances to be considered are the changes, if any, which have occurred between the time of purchase by the condemnee and the time of taking by the State, including physical changes in the property taken, changes in its availability for valuable uses, and changes in the vicinity of the property which might have affected its value.

(5) The fact that some changes have taken place does not *per se* render the evidence incompetent. If the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining value at the time of the taking, when purchase price is considered with other evidence affecting value, the evidence of purchase price should be excluded.

(6) The ultimate criterion is whether, under all the circumstances, the purchase price fairly points to the value of the property at the time of the taking.

Board of Transportation v. Revis, 40 N.C. App. at 185-186, 252 S.E. 2d at 264.

Since appellants bought the property at a voluntary sale only four years before the condemnation action, and there was no evidence of extensive changes to the condemned parcel or to the surrounding area, the purchase price was admissible.

Appellants contend that since the purchase price of all the property was admitted, the trial court erred in not allowing them to introduce evidence of improvements to the property. We do not agree. The condemned tract was about one-eighth of the entire property. The largest tract had a run-down building on it when it was purchased, which appellants admitted had some value. Knowing that all the property was purchased for $55,000.00, the jury could determine whether the condemned tract was worth one-eighth of $55,000.00, or $6,875.00, when it was purchased. The evidence of the total purchase price is relevant to the value of the condemned tract. The improvements, however, are not relevant to the value of the condemned tract since they were exclusively on the large tract. That the appellants operated a garage and body shop on the large tract was admissible. But that they spent $150,000.00 renovating the old building and converting it to a garage, is not relevant to the value of the condemned tract and is inadmissible.

Appellants' second argument is that the trial court erred in allowing witnesses to testify about other sales which were not comparable in size or location.

In this State the rule is well settled "that the price paid at voluntary sales of land, similar in nature, location, and con-

dition to the condemnee's land, is admissible as independent evidence of the value of the land taken if the prior sale was not too remote in time. Whether two properties are sufficiently similar to admit evidence of the purchase price of one as a guide to the value of the other is a question to be determined by the trial judge in the exercise of a sound discretion guided by law."

North Carolina State Highway Commission v. Helderman, 285 N.C. 645, 653-654, 207 S.E. 2d 720, 726 (1974), *quoting State v. Johnson*, 282 N.C. 1, 21, 191 S.E. 2d 641, 655 (1972). *See* 1 Brandis on North Carolina Evidence § 100 (1982).

[3] Appellants contend that Mr. Avent's testimony about comparables was inadmissible because the comparable sales were not similar in location and size. On *voir dire*, Mr. Avent described the five comparable sales. Four of the sales took place in 1977 or 1978, one took place in 1974. The prices ranged from forty to ninety-one cents per square foot. All of the comparables were larger than the condemned property, but only one was more than forty thousand square feet. All the comparables were vacant on the day of sale and were within four blocks of the condemned property. Appellants cross-examined Mr. Avent extensively on *voir dire*. The trial judge decided that he would allow the evidence as to the comparables. Appellants objected to the line of questioning.

Appellants' authority for excluding Mr. Avent's testimony is *Duke Power Company v. Winebarger*, 300 N.C. 57, 265 S.E. 2d 227 (1980). That case, however, does not support appellants' argument. In *Winebarger*, defendant's witness had given his opinion on the value of an easement. He did not base his opinion on comparables. On cross-examination, the witness was asked questions about at least ten other sales, for example:

"Q. Let me ask you this, do you know anything of a 225.4 acre sale made by Johnson J. Hayes, Jr., to John and Joy Payne in November, 1976?

A. No. As I stated I did not base any appraisal on any comparable.

Q. You don't know that property sold for $148.00 an acre, do you?

A. No, sir.

Mr. Smith objects. Overruled. . . ."

Duke Power Company v. Winebarger, 300 N.C. at 60, 265 S.E. 2d at 229. There was no showing that these sales were in any way comparable to defendants' property. The Court stated that "while a witness' *knowledge*, or lack of it, of the values and sales prices of certain noncomparable properties in the area may be relevant to his credibility, the specific dollar amount of those values and prices will rarely if ever be so relevant." *Duke Power Company v. Winebarger*, 300 N.C. at 64, 265 S.E. 2d at 231-232.

In the present case, Mr. Avent testified about properties which the trial judge deemed comparable. This is in contrast with *Winebarger, supra*, where the other properties were not alleged to be comparable at all. If the properties are comparable, the general rule applies and the price is admissible.

The comparables Mr. Avent used were, in fact, quite similar to the condemned property in zoning, time of sale, location and size. Naturally, they could not be in an identical location, but they were all within four or five blocks of the condemned property. Any dissimilarities go to the weight of the evidence, not its admissibility. The jury obviously weighed the evidence since they awarded appellants approximately $2.25 per square foot while the highest price paid for Mr. Avent's comparables was ninety-one cents per square foot.

[4] Appellants' third argument is that the trial court erred in failing to consider the evidence about the use of the property for billboard advertising. We do not agree. This Court stated in *Duke Power Company v. Mom 'n' Pops Ham House, Inc.*, 43 N.C. App. 308, 310-311, 258 S.E. 2d 815, 818 (1979):

> In condemnation proceedings, the determinative question is: In its condition on the day of taking, what was the value of the land for the highest and best use to which it would be put by owners possessed of prudence, wisdom and adequate means? The owner's actual plans or hopes for the future are completely irrelevant. Such aspirations are regarded as too remote and speculative to merit consideration.

The value of the land for its highest and best use must be considered, not the rental price for the billboard projected over a

period of time. The investment return of the property was, at least in part, the basis for the opinions of appellants' expert witnesses. Mr. Norman testified that he valued the property based on what a builder or developer would be willing to pay for the property. Mr. Walker stated that he looked at the potential for income for different ways the property might be used.

We have carefully reviewed appellants' assignments of error and find no error.

No error.

Judges WEBB and WELLS concur.

LOUISE PHILLIPS v. HARRIE PARTON

No. 8130SC1256

(Filed 19 October 1982)

Contracts § 6.1 — unlicensed general contractor — directed verdict against contractor's counterclaims proper

The trial court did not err in directing a verdict for plaintiff against defendant's counterclaim for an alleged breach of contract where the court found defendant was not a licensed general contractor under G.S. 87-1.

Judge VAUGHN dissenting.

APPEAL by defendant from *Sitton, Judge.* Judgment entered 19 June 1981 in Superior Court, JACKSON County. Heard in the Court of Appeals 14 September 1982.

Defendant appeals from dismissal of his counterclaim in plaintiff's suit for breach of a building contract. To defeat defendant's counterclaim, plaintiff had established that defendant was not a licensed general contractor under G.S. 87-1.

Holt, Haire & Bridgers, by Ben Oshel Bridgers, for plaintiff-appellee.

Herbert L. Hyde and G. Edison Hill for defendant-appellant.

HILL, Judge.

In this civil action, plaintiff sought injunctive relief barring defendant from access to plaintiff's property and damages for the alleged breach of a construction contract. Defendant counterclaimed, seeking $9,000 on the original contract plus $9,311.30 for extra work, change orders and additions to the residence. The judge granted plaintiff's motion for directed verdict against defendant's counterclaim on grounds that defendant's failure to meet licensing requirements for general contractors (G.S. 87-10) precluded his recovery on the contract or in *quantum meruit.*

Defendant presents two questions for review: (1) whether the directed verdict against defendant's counterclaim was improvidently granted; and (2) whether the court correctly excluded defendant's evidence of "extras." Since defendant offers no argument in support of the latter assignment of error, we deem it abandoned. Disposition of the remaining question hinges on the propriety of the trial judge's finding that defendant was a general contractor. We hold that the trial judge properly found defendant to be a general contractor and, therefore, properly dismissed the counterclaim for defendant's failure to comply with the licensing statute. We affirm the judgment below.

Defendant is a farmer and sawmill operator with limited building experience. He is not a licensed building contractor. Although illiterate, he can sign his name. Plaintiff asked defendant to sell her some logs for a house which she also asked him to construct. Plaintiff had rough plans prepared and revised. After agreeing to further changes in the plans, the parties entered into a construction contract providing:

> I, *Harrie Parton,* agree to complete log and stone house for Louise Phillips in Jackson County, N.C. according to the changes in final blue prints for $39,000 . . . .

The parties later agreed upon a payment schedule and made additional changes in the original agreement. Certain "extras" were added. Defendant started construction, receiving three installment payments of $10,000 each. A dispute arose between the parties as a result of which plaintiff refused to pay both the $9,000 balance due under the original contract and the amount claimed for "extras." In turn, defendant refused to let plaintiff enter the

house. Plaintiff's action for breach of contract and injunctive relief ensued. Following dismissal of plaintiff's claim, the trial court dismissed defendant's counterclaim, concluding that since defendant was a general contractor as defined by G.S. 87-1, his failure to be licensed barred recovery.

The pertinent part of G.S. 87-1 states:

> any person . . . who for a fixed price . . . undertakes . . . to construct or who undertakes to superintend or manage, on his own behalf or for any other person . . . that is not licensed as a general contractor pursuant to this Article, the construction of any building . . . where the cost of the undertaking is thirty thousand dollars ($30,000) or more, shall be deemed a "general contractor" . . . .

One who contracts with a landowner to construct a house at an agreed price [of thirty thousand dollars or more], is a general contractor and subject to the provisions of the licensing statute. *Holland v. Walden*, 11 N.C. App. 281, 181 S.E. 2d 197, *cert. denied*, 279 N.C. 349, 182 S.E. 2d 581 (1971). *See also Fulton v. Rice*, 12 N.C. App. 669, 184 S.E. 2d 421 (1971). In determining whether the builder is a general contractor within the scope of the statute, the cost of the undertaking is controlling. *See Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976). The general contractor may be distinguished from a subcontractor or employee by the degree of control that he or she exercises over the entire project. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970); *Furniture Mart v. Burns, supra.* An unlicensed general contractor may neither affirmatively enforce his contract nor recover in *quantum meruit. Holland v. Walden, supra.*

The trial judge correctly found that plaintiff and defendant had entered into a binding construction contract by which defendant was, in terms of G.S. 87-1, a general contractor. The defendant contended in rebuttal that, despite the contractual terms, he did not exercise sufficient control over the project to be the general contractor. In effect, the defendant asks us to find that he offered sufficient evidence of an alleged lack of supervisory control to turn his status as general contractor into a jury question. We find, however, that the evidence plainly indicated defendant was the general contractor, and that defendant failed to offer evidence that would indicate otherwise. Having failed to meet the

licensing requirements of G.S. 87-10, defendant was properly denied recovery, and the directed verdict against his counterclaim was properly granted.

Plaintiff's testimony tended to show that she contacted defendant Parton about building the house. Together they examined a prototype of the lodge plaintiff desired. Agreeing that logs from Parton's sawmill were to be used in the project, plaintiff had house plans prepared. The parties eventually reached an agreement concerning construction. Plaintiff testified that defendant was "in charge of all work, hired all men and pay [sic] all men." She stated without objection:

> After discussion of the materials, I and Parton reached an agreement that Parton was to build the house, complete the floors, the total house, put locks on the doors and give the keys to my satisfaction. A price of $39,000 was agreed upon. Parton was in charge of all work, hired all men and paid all men. He furnished all materials, paid for them from the $39,000 I was to pay Parton. Electrical construction work was done on the house. Parton paid for it . . . . Mr. Parton provided the rock masons. I did not hire plumbers . . . . I and my son were to finish the inside, install the plumbing, set the kitchen and the cabinets. Parton only stubbed the electrical work. We were to finish the electrical work. I was not to furnish anything except some steel. My son was in the steel erection business. My son and Parton worked out a supply and installation of the steel beams in the cathedral part of the big room to support the roof . . . .

Plaintiff noted that as construction progressed she and Parton agreed to changes in the plans and specifications. She became dissatisfied with his work. She questioned the quality of the logs and the manner in which they were caulked. She complained of buckled flooring and water seepage. She expressed distress that the work lagged, suggesting that if Parton could not finish it in time, she might try to do so.

On cross-examination, plaintiff said that she went with defendant to building supply houses to select materials, and that she selected almost everything except the lumber. She further testified:

> I was on the premises almost every day from 5 May until about December. I went up there to look and supervise, I guess. A lot of things that's not in these plans were in the building. These are very basic plans . . . . I did not tell Mr. Parton the information that went into the building of the house on a daily basis, what to do and how to do it . . . . I could have a choice of this and I could have a choice of that . . . . I did change the structure of the roof because the roof was collapsing.

Defendant testified that since he could not read or write, plaintiff's son obtained the building permit. He also indicated that plaintiff made changes in the plans before and after construction began. As to the original agreement, Parton testified:

> I agreed to furnish what stuff that I furnished and what we priced to buy . . . . What we'd priced in materials I agreed to build for $39,000 . . . . I used the draw money to buy materials to go into the building. I furnished the logs but I counted the money that she paid me for them. Just like she bought 'em from somebody else. She bought them from me. The other materials that went into the house that I put in that I didn't furnish myself I went to the store and bought them and paid for them myself . . . . I told Mrs. Phillips I had possession of the house until she paid me.

The record fails to disclose that plaintiff exercised control sufficient to render defendant a subcontractor or employee. The pleadings establish that defendant contracted to build the house for $39,000. Defendant was clearly in charge of the project. Plaintiff appeared to be on site only to select materials when needed and to inspect the house for faulty construction. The record reveals that the house was of extraordinary design, requiring selection of building materials from time to time and changes in construction to fit plaintiff's needs. It is an accepted fact that homeowners are often on site during construction. After discovering deficiencies in defendant's work, plaintiff frequented the site to ensure the quality of workmanship and building materials and to answer questions. Although she stated that she was present "to look and supervise, I guess," we find no evidence that she actually directed construction.

As general contractor, defendant advised plaintiff when he made changes which he considered "extras," indicating that since such changes were outside the original contract they merited additional compensation. His failure to meet the licensing requirements of G.S. 87-10, however, precludes his recovery. *Sand and Stone, Inc. v. King,* 49 N.C. App. 168, 270 S.E. 2d 580 (1980). Nor is defendant entitled to a setoff, since the trial court dismissed plaintiff's claim for damages, leaving nothing to which a setoff might attach. *See Builder's Supply v. Midyette,* 274 N.C. 264, 162 S.E. 2d 507 (1968). We overrule defendant's assignment of error.

The judgment of the trial judge is

Affirmed.

Judge HEDRICK concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

There were several paper writings. There was testimony from both sides as to the agreement of the parties. The evidence was conflicting. Defendant testified that Mr. Phillips agreed to be the contractor. Phillips obtained the building permits. There was other evidence from which conflicting inferences could be drawn. The jury should be allowed to draw those inferences and find where the truth lies. I vote to reverse and remand for trial.

STATE OF NORTH CAROLINA v. RONNIE WAYNE HOWELL

No. 827SC107

(Filed 19 October 1982)

1. Constitutional Law § 30; Criminal Law § 89.8— whether witness granted immunity—disclosure not required

The trial court did not err in the denial of defendant's motion that the district attorney be required pursuant to G.S. 15A-1054(c) to disclose whether a prosecuting witness had been granted immunity or concessions by prosecutors in other counties where the district attorney informed the court that *no*

arrangement had been made with his office, the prosecuting witness denied that he was to receive preferential treatment for testifying, and there was nothing in the record to show that an agreement had been made with the witness.

2. **Receiving Stolen Goods § 4— felonious possession of stolen property—relevancy of evidence**

In a prosecution for felonious possession of stolen firearms, testimony by a witness that he had visited defendant's store to deliver a television set and to accompany a friend who wanted to pawn his sister's watch, and testimony by an undercover agent that defendant had sold a gun to him was relevant to prove defendant's motive for the crime, to establish a link between the witnesses and the defendant, and to show defendant's reason to believe that the firearms he possessed had been stolen.

3. **Receiving Stolen Goods § 4— property owned by defendant and his wife—irrelevancy—harmless error**

In a prosecution for felonious possession of stolen firearms, testimony by defendant's wife as to how much personal and real property she and defendant owned was irrelevant, but its admission was not prejudicial error.

4. **Attorneys at Law § 4; Criminal Law § 88.3— refusal to permit attorney to withdraw and testify**

The trial court did not err in denying defendant's request to allow one of his attorneys to withdraw and testify as to a prior inconsistent statement of a State's witness in order to contradict testimony by the witness on cross-examination where defendant's request was based on the contention that the statement concerned a material issue and the trial court properly found that the witness's prior statement was "collateral" and had nothing to do with the material issues of the crime with which defendant was charged. Even if defendant's objection had been based on the contention that the statement came within an exception to the rule concerning the acceptance of a witness's answer on cross-examination about collateral matters, any error in the court's ruling was harmless.

5. **Criminal Law § 96— withdrawal of evidence—curative instructions**

Any prejudicial effect of a witness's remarks during cross-examination by the district attorney was removed by the trial judge's instructions to the jury to disregard the remarks.

APPEAL by defendant from *Reid, Judge.* Judgment entered 7 October 1981 in Superior Court, NASH County. Heard in Court of Appeals 14 September 1982.

The defendant was charged in a proper bill of indictment with felonious possession of stolen goods, to wit: four firearms with a total value of $850. Upon defendant's plea of not guilty, the State offered evidence tending to show the following: On 13

March 1981, law enforcement officers from the Rocky Mount Police Department, Nash County Sheriff's Office and the United States Department of the Treasury searched the defendant's residence in Nash County. The officers seized twenty-seven firearms of various descriptions. A subsequent investigation revealed that four of the firearms had been stolen. The State offered further evidence tending to show that the defendant took possession of the firearms knowing and having reasonable grounds to believe the guns to have been feloniously stolen. The defendant offered evidence tending to show he did not know or have reasonable grounds to believe that the guns in his possession had been stolen.

The jury found the defendant guilty of felonious possession of three of the firearms. The trial judge imposed a prison sentence of one to three years. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lemuel W. Hinton, for the State, appellee.

Moore, Diedrick, Whitaker and Carlisle, by L. G. Diedrick and Joe M. Hester, Jr., for the defendant, appellant.

HEDRICK, Judge.

[1] The defendant first contends by his Assignment of Error No. 3 that the trial judge erred when he failed to require the District Attorney to disclose whether the prosecuting witness, Willie Lee Smith, had been granted immunity or concessions by prosecutors in other counties in violation of G.S. § 15A-1054. Our review of the record finds no ruling on the defendant's motion requesting the trial judge to order such a disclosure by the district attorney. Therefore, there is no question properly before this court for review. However, assuming that the trial judge actually denied the defendant's motion, the defendant failed to show any violation of G.S. § 15A-1054(c) which provides:

> When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrange-

> ment is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interest of justice require, the court must grant a recess.

G.S. § 15A-1054(c) requires disclosure of a prosecutor's arrangement with a witness *only* when an arrangement has been reached. In this case, there is nothing in the record to show that any agreement had been made with the witness, Smith.

The trial record indicates that the District Attorney informed the court, in response to this motion, that no arrangement had been made with his office. Furthermore, under cross examination the witness, Smith, expressly denied that he was to receive preferential treatment for testifying. The defendant has made no showing of proof to the contrary, and he only speculates that concessions had been made because the witness had not been sentenced in one case and had received shorter sentences than his co-criminals in another case. Therefore, we find no violation of G.S. § 15A-1054(c).

[2] The defendant next contends in Assignment of Error Nos. 4, 5 and 6, based on Exception Nos. 3-23 and 25-27, that the trial court erred in allowing witnesses to testify about matters tending to show that the defendant was involved in a continuing criminal enterprise of receiving stolen goods. The defendant argues such testimony was intended solely to impugn the defendant's character and that such evidence was irrelevant, immaterial and prejudicial.

The standard test for relevancy and materiality is whether the evidence "has any logical tendency, however slight, to prove a fact in issue." 1 *Brandis on North Carolina Evidence*, § 77 (2d ed. 1982).

> It is not required that evidence bear directly on the question in issue, and evidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact. (Citations omitted.)

State v. Arnold, 284 N.C. 41, 47-48, 199 S.E. 2d 423, 427 (1973). The basic fact in issue in this case was whether the defendant

knew and had reason to believe that the firearms he possessed were stolen. The defendant's exceptions relate to three pieces of testimony. First, Willie Lee Smith testified that he had visited defendant's grocery store on several occasions, once to deliver a television set and another time to accompany a friend, who wanted to pawn his sister's watch. Second, an undercover agent of the Bureau of Alcohol, Tobacco and Firearms testified that the defendant had sold a gun to him. Third, defendant's wife testified as to how much personal and real property she and the defendant owned.

We find that all the evidence challenged by these exceptions, except that of the wife regarding the property she and defendant owned, was not irrelevant or immaterial. Although the evidence did not relate directly to the crime for which the defendant was tried, it did have a logical tendency to prove the defendant's motive for the crime, the witnesses' familiarity with the defendant, the connection between defendant's witnesses and the State's witnesses and the defendant's reason to believe the guns he possessed had been stolen. Defendant, in Assignment of Error No. 6, specifically objects to the testimony of the ATF agent as irrelevant, immaterial and incompetent because it tends to show the defendant's involvement in an independent offense. However, the testimony is relevant and material insofar as it establishes the defendant's motive for possessing firearms and establishes a link between the witness and the defendant. As a general rule, evidence showing the defendant has committed another distinct or separate crime is inadmissible evidence, *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), but here the testimony objected to did not amount to evidence of a separate, independent offense. The ATF agent simply testified that the defendant had sold him a shotgun. The trial judge struck from the record further testimony by the ATF agent that he had asked the defendant about keeping record of the sale. Thus, there was no evidence admitted that showed the defendant's involvement in a separate offense. The testimony was properly limited by the trial judge and admitted as relevant, material and competent evidence.

[3] With respect to the testimony of the wife with respect to the property she and defendant owned, we agree with the defendant and find no relevance for this testimony; however, its admission was clearly not prejudicial error. The trial judge has considerable

discretion with respect to cross examination and we find no abuse of discretion in his allowing the wife's testimony. Even so, its admission was clearly harmless error beyond a reasonable doubt. These assignments of error have no merit.

[4] In his Assignment of Error Nos. 7 and 8, defendant claims the trial court erred in denying his request to allow one of his counsel to withdraw and testify on his behalf. The parties stipulated that had defendant's counsel been allowed to testify he would have related a prior inconsistent statement of the State's witness. On cross examination, the State's witness testified as follows:

> Q. And do you remember telling him that the law told you after your arrest that the reason you were arrested is because Ronnie Howell gave the police a description of your vehicle, including the license plate number, and a description of what you looked like and where you would be?
>
> A. No sir.

Defendant's counsel then requested that his co-counsel be permitted to withdraw and testify as to a prior conversation with the witness contradicting the above testimony on grounds that the testimony and prior inconsistent statement went to a material, not collateral, issue.

We hold the trial judge properly found the witness's statement was "collateral" and had nothing to do with the material issues of the crime for which defendant was charged. On collateral matters, the cross examiner usually must accept the witness's answer as conclusive and may not contradict it with testimony from other witnesses. *See,* 1 *Brandis on North Carolina Evidence,* § 48 (2d ed. 1982). However, we recognize there are exceptions to this general rule, one of which appears when the "collateral" statement demonstrates bias or interest of the witness toward the cause or the parties. *State v. Murray,* 27 N.C. App. 130, 218 S.E. 2d 189 (1975). In the instant case, the attorney for the defendant specifically objected to the trial judge's ruling on grounds that the witness's statement raised a material issue. Insofar as the objection was to whether the statement was "collateral" or material, the trial judge made a proper ruling. Assuming, however, that the proper specific objection, i.e. that

the statement was within an exception to the rule on "collateral" matters, had been made and overruled, we would find any error to be non-prejudicial and harmless beyond a reasonable doubt.

[5] Finally, through Assignment of Error Nos. 11 and 12, defendant argues the trial judge's instructions to the jury to disregard prejudicial testimony elicited during cross examination by the district attorney failed to cure the prejudicial impact of the testimony. We do not agree with the defendant and find the trial judge's curative instructions to disregard the testimony were sufficient. As the North Carolina Supreme Court stated in *State v. Siler*, 292 N.C. 543, 553, 234 S.E. 2d 733, 740 (1977):

> Ordinarily, where objectionable evidence is withdrawn and the jury instructed not to consider it no error is committed because under our system of trial by jury we assume that jurors are people of character and sufficient intelligence to fully understand and comply with the court's instructions and they are presumed to have done so.

In this case, the prejudicial effect of the witness's remarks was removed by the judge's instructions; accordingly, we find the defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. OID MICHAEL HAWKINS

No. 825SC157

(Filed 19 October 1982)

Criminal Law § 101.2— juror's visit to crime scene—discussion of lighting at crime scene during jury deliberations

Defendant's motion for appropriate relief was properly denied where the motion was accompanied by affidavits of four of the jurors which stated that during deliberation they used information related to them by a juror concerning the degree of lighting which he observed on a visit to the scene of the crime since there was considerable testimony as to the visibility during the commission of the offenses, since the findings of the court were amply supported by the evidence, and since the affidavit of the four jurors did not contain additional or different matters not in evidence at trial.

State v. Hawkins

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 18 September 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 September 1982.

Defendant was indicted and convicted for attempted safecracking, felonious breaking or entering, and possession of housebreaking tools, and given consecutive sentences of five years imprisonment on each conviction.

State's evidence was that a Wilmington police officer responded to a call to the Winter Park Texaco Station at about 4:30 a.m. on 9 July 1981. The building no longer functioned as a full service station, but had been converted into a convenience store with large windows in the front of the store and fluorescent lights which stayed on all of the time. There was a floor safe at the front of the building, and a burglar alarm that was sensitive to movement within the building.

The officer saw a man dressed in a black t-shirt inside the building rise from a crouch at the front of the station and move toward a hole at the back of the station. The officer ran to the back of the station where he found a hole punched through the concrete blocks which formed the back wall of the station. A street light provided good lighting of the area. A man in a black t-shirt was walking on a street behind the station. No one else was visible. Five to ten seconds had passed since the officer had seen the man move to the back of the building.

The officer called to the man, who began running. The man was chased into a cornfield, where he disappeared briefly. After the officer called for assistance the defendant was found crouching in the field. A pair of brown work gloves were found under defendant. A search of defendant's person revealed a pair of pliers and a punch. The officer had seen defendant throw something into the bushes during the chase; a search revealed a radio transceiver. There was a grayish white powder on the back of defendant's shirt. An officer got the same type of powder on his clothes when he crawled through the hole in the back of the station. The safe inside the station had been pried open. Several tools, including hammers, a pry bar, a screwdriver, and a punch, were found around the safe.

Defendant's evidence was that he had met a girl in a lounge around 11:30 or 12:00 p.m. They had left in her car, going first to

Wrightsville Beach and then to her trailer. When defendant left the trailer at about 3:30 a.m., the girl's car would not start. He had crawled under it on some gravel to try to fix it, but could not. He had then started hitchhiking back to his car. Another girl gave him a ride part of the way. He was walking when he reached the vicinity of the Texaco station and went into the woods behind the station to urinate. He heard someone yell at him from the station. He could not see well enough to identify the person as a police officer, but could tell that the person was carrying something in his hand. Defendant began running because he was frightened and did not realize that he was being chased by an officer until he was found hiding in the cornfield. He had not seen the brown gloves until he got to the police car. Defendant admitted on cross examination that he had been convicted of 68 felonies, including safecracking, arising from about 25 break-ins in 1975.

An officer testified for the State on rebuttal that defendant had not mentioned being with a girl or working on a car when he was arrested.

Attorney General Edmisten by Special Deputy Attorney General T. Buie Costen, for the State.

Poisson, Barnhill & Britt by Stuart L. Egerton, for the defendant.

MARTIN (Robert M.), Judge.

Defendant's motion for nonsuit was properly denied. The evidence for the State and the inferences therefrom were sufficient to take the case to the jury on the charged crimes. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Marr*, 26 N.C. App. 286, 215 S.E. 2d 866 (1975).

The defendant also contends the trial court erred in refusing to hear any evidence of jury misconduct. Defendant's motion for appropriate relief was accompanied by affidavits of four of the jurors which stated that during deliberation they used information related to them by juror Raylas concerning the degree of lighting which he observed on a visit to the scene of the crime at 3:30 a.m., 15 September 1981.

N.C. Gen. Stat. 15A-1240(c) (1978) provides that:

> "After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served . . . only when it concerns: (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witness against him."

There was considerable testimony as to visibility during the commission of the offenses which occurred on 9 July 1981. Officer Douglass testified:

> "As I have said, there is a clear shot from that corner to where I observed Mr. Hawkins. When I spotted Mr. Hawkins, he was walking away. At that point, I called out to him, when I first spotted him. I called for him to stop. I identified myself. What my exact words were, I do not know.
>
> At this point, he began running. I did not lose sight of him during my chase, for a second, even as he passed trees or shrubs. I did not notice any other fleeing figures in the area. There is a clear scan of that area. The street light would illuminate any shadows or people. At this time, I did scan the area, but did not make an exhaustive search. I characterized it as a scan. It was a complete scan. It was easy to stand at the corner and look at the area.
>
> I did not spot any person emerging from that hole in the back wall, either before or after my chase.
>
> When I saw this figure inside the building, when I drove up, I had time to take at least a second to look at him. There was enough time to identify him."

The court entered the following order:

> THIS CAUSE coming on for hearing before the undersigned Judge of the Superior Court on September 18, 1981, upon a Motion for appropriate relief filed 18 September, 1981, and the Court having examined the record and having heard the attorneys representing each side finds the facts as follows:

1. That the petitioner was convicted of felonious breaking and entering, possession of implements of housebreaking, and attempted safecracking on 15 September, 1981;

2. That the petitioner admitted at trial that he was at the scene of the crimes;

3. That the police testified as to the lighting conditions at the scene of the crimes;

4. That the scene of the crime is located at one of the most heavily travelled intersections in New Hanover County;

5. That the evidence against petitioner was overwhelming;

6. That no prejudice to the Defendant has been shown.

Based upon the foregoing, the Court finds and concludes as a matter of law as follows:

1. That no matter not in evidence came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him;

2. That none of the petitioner's constitutional rights have been violated.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the prayer of the petitioner be and the same is DENIED.

The findings of the court are amply supported by the evidence, and the affidavits of four jurors did not contain additional or different matters not in evidence at the trial.

We hold that the court correctly concluded that none of petitioner's constitutional rights were violated.

No error.

Judges HEDRICK and HILL concur.

PINKNEY LECK HARRIS v. JAMES DANIEL BRIDGES, B & P MOTOR LINES, INC. AND MICHAEL EDWARD VAUGHN

No. 8127SC1251

(Filed 19 October 1982)

Rules of Civil Procedure § 15.2; Automobiles and Other Vehicles § 90.5— speeding—issue tried by implied consent—failure to instruct

Where evidence of defendant's speeding in excess of 65 miles per hour was admitted at trial over defendant's general objection, and no objection was made to such evidence on the ground that it was outside the issues raised by the pleadings, the issue of speeding was tried by the implied consent of the parties, and the trial court erred in failing to instruct the jury that speeding in excess of 55 miles per hour is a violation of G.S. 20-141(b) and is negligence *per se*. G.S. 1A-1, Rule 51(a).

APPEAL by plaintiff from *Burroughs, Judge.* Judgment entered 11 June 1982 in Superior Court, GASTON County. Heard in the Court of Appeals 14 September 1982.

This case arises from an automobile accident which occurred on 3 April 1977. Plaintiff, Pinkney Leck Harris, was a passenger in a car driven by defendant, Michael Edward Vaughn. It was foggy, and a misty rain was falling as they drove along Highway 150 at approximately 1:50 a.m. They collided with a tractor-trailer truck driven by James Daniel Bridges, as the truck was making a left turn onto Highway 150.

The case was first tried in Superior Court in Gaston County. The jury found that only defendant Vaughn was negligent, but found no damages. The court ordered a new trial. Plaintiff and defendant Vaughn appealed to this Court. We affirmed, holding that the trial court acted within its discretion in ordering a new trial when the verdict on damages was inconsistent. 46 N.C. App. 207, 264 S.E. 2d 804, *review denied*, 300 N.C. 556, 270 S.E. 2d 107 (1980).

At the second trial, former defendant Bridges testified by deposition. He said that after he started turning onto Highway 150, he saw the lights of defendant's car about four-tenths of a mile away. He first saw the car when it was approximately three-tenths of a mile away, and he accelerated from five to seven miles per hour. He had almost completed his turn, but the rear wheels of the trailer were still in the left lane, when defendant's car hit

his truck. He said that about ten seconds elapsed from the time he saw defendant's headlights to the time of impact. He estimated that defendant's car was traveling at sixty-five or seventy miles per hour.

Plaintiff testified that at 8:00 p.m., on 2 April 1977, he, the defendant, and a friend drove to a club in South Carolina. The club was closed, so they bought a case of beer at a convenience store and drove to the Broad River. While they socialized with some other college students there, he drank five beers and saw defendant drink one. When they left the Broad River, at about 1:30 a.m., defendant was driving "all right." Plaintiff testified that he remembered seeing some lights but did not remember the impact. He regained consciousness in an ambulance. Plaintiff offered evidence as to his injuries and medical expenses in the amount of $5,717.06.

After all the evidence was presented, plaintiff moved to amend his complaint to conform with the evidence to allege speed in excess of the posted speed limit. The motion was denied.

The jury returned a verdict in favor of defendant. Plaintiff appealed.

Frank Patton Cooke, by James R. Carpenter, for plaintiff appellant.

Hollowell, Stott, Hollowell, Palmer and Windham, by Grady B. Stott, for defendant appellee.

VAUGHN, Judge.

Plaintiff's first assignment of error is in two parts. Plaintiff argues first that the trial court committed prejudicial error by denying plaintiff's motion to amend to conform to the evidence. Although the amendment should have been allowed, denial of the motion does not affect the result we must reach on the appeal. According to G.S. 1A-1, Rule 15(b):

> When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to

> raise these issues may be made upon motion of any party at any time, either before or after judgment, *but failure to so amend does not affect the result of the trial of these issues.* (Emphasis added.)

The comment to the statute states that Rule 15(b) deliberately abandons the old code prohibitions against variance between the pleadings and the evidence. Instead, it "lays down a directive based directly upon the truly legitimate policy consideration which should control amendment privilege here, namely, whether, notwithstanding variance of some degree, there has nevertheless been informed consent to try the issues on the evidence presented."

Rule 15(b) was discussed in *Mangum v. Surles*, 281 N.C. 91, 187 S.E. 2d 697 (1972). In that case, plaintiffs did not specifically allege fraud in their complaint, but they introduced evidence of fraud at trial. The trial court refused to allow them to amend their complaint to comply with G.S. 1A-1, Rule 9(b). The Supreme Court said:

> [W]here no objection is made to evidence on the ground that it is outside the issues raised by the pleadings, the issue raised by the evidence is nevertheless before the trial court for determination. . . . Failure to make the amendment will not jeopardize a verdict or judgment based upon competent evidence. If an amendment to conform the pleadings to the proof should have been made in order to support the judgment, the Appellate Court will presume it to have been made. However, amendments should always be freely allowed unless some material prejudice is demonstrated. . . .

Mangum v. Surles, 281 N.C. at 98-99, 187 S.E. 2d at 701-702.

Since the evidence of defendant's speeding in excess of sixty-five miles per hour was admitted at trial, and opposing counsel's general objection was overruled, the issue of speeding was tried by the implied consent of the parties. As was stated in 1972 North Carolina Case Law Survey, 51 N.C.L. Rev. 989, 1008 (1973):

> If opposing counsel fails to object on the proper grounds, a presumption will arise that consent is given to the broadened scope of the trial. Under this presumption all issues raised will be treated as if they were in the pleadings. Professor

Moore confirms what the language of 15(b) implies: "Rule 15(b) is not permissive in terms; it provides that issues tried by express or implied consent *shall* be treated as if raised in the pleadings."

Once the evidence of speeding was admitted at trial, it became an important factor of the negligence issue. Plaintiff argues that the trial court should have instructed the jury that speeding in excess of fifty-five miles per hour is a violation of G.S. 20-141(b) and is negligence *per se*. We agree.

The court has the duty to charge the jury on the law on the substantial features of the case arising on the evidence and to apply the law to the various factual situations presented by the conflicting evidence. *Faeber v. E.C.T. Corporation*, 16 N.C. App. 429, 192 S.E. 2d 1 (1972). "In charging the jury in any action governed by these rules, . . . [the judge] shall declare and explain the law arising on the evidence given in the case." G.S. 1A-1, Rule 51(a).

There was evidence that defendant was driving faster than fifty-five miles per hour. James Daniel Bridges testified that he thought defendant's car was going "sixty-five, seventy, maybe better." The evidence indicated a violation of G.S. 20-141(b) and constitutes negligence *per se* although such negligence is not actionable unless it is the proximate cause of the injuries complained of. *Davis v. Imes*, 13 N.C. App. 521, 186 S.E. 2d 641 (1972).

The judge mentioned Mr. Bridges' testimony in summarizing the evidence, but he should have also explained to the jury that speeding in excess of fifty-five miles per hour is a violation of G.S. 20-141(b), and that it is negligence *per se*. This was not done.

Defendant supports his contention that the trial judge properly charged the jury on the evidence of speeding with the following excerpts from the trial judge's charge: "I instruct you that the violation of a statute or motor vehicle traffic law enacted for the public safety is negligence within itself unless the statute provides to the contrary." The judge stated that plaintiff was contending that defendant was negligent by one or both of the following: "(1) Failed to keep a proper lookout; (2) Drove at a speed greater than was reasonable and prudent under the circumstances then existing."

The judge continued: "Considering all such circumstances, a rate of speed may be unreasonably [*sic*] and imprudent even though it is within the maximum speed limit at the place in question." Defendant argues that since the implication of the trial court's instructions is that a rate of speed above the maximum speed limit is presumptively unreasonable and imprudent, there was no prejudice in the trial court's instructions. We do not agree. The judge's duty is not to charge the jury by implication, but to "declare and explain the law arising on the evidence given in the case." G.S. 1A-1, Rule 51(a). The judge's instructions were not based on G.S. 20-141(b), but were based on G.S. 20-141(a): "No person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing."

Since the jury received incorrect instructions, they had to decide how fast defendant was driving, and then decide if it was unreasonable. Had the correct instructions been given, the jury could have simply determined whether they believed Mr. Bridges' testimony that defendant was going sixty-five or seventy miles per hour. If they believed Mr. Bridges, then they would have found negligence on the part of defendant. They would not have to decide if defendant was driving reasonably, because speeding is negligence *per se*. These are two different standards. Consequently, the judge's erroneous instruction was prejudicial error.

New trial.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. TORRENCE DALE LEEPER

No. 8219SC151

(Filed 19 October 1982)

Robbery § 6.1— guilty plea to armed robbery—sentencing hearing—only mitigating factors—mandatory sentence of at least 14 years

Where a defendant was charged with armed robbery, and upon a plea of guilty, the court conducted a sentencing hearing and entered a judgment containing a finding of four factors in mitigation and no factors in aggravation of

punishment, the trial court did not err in ruling that a fourteen year term was required by G.S. 14-87(d) and could not be reduced by the mitigating factors recognized under the Fair Sentencing Act. G.S. 15A-1340.1 through 15A-1340.7 and G.S. 15A-1444.

Judges ARNOLD and WHICHARD concurring.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 18 January 1982 in Superior Court, CABARRUS County. Heard in the Court of Appeals 15 September 1982.

Defendant was charged by bill of indictment with the armed robbery of a convenience store. Upon a plea of guilty, the court conducted a sentencing hearing and entered a judgment containing a finding of four factors in mitigation and no factors in aggravation of punishment. Defendant was then sentenced to the minimum term of 14 years pursuant to G.S. 14-87(d). The court also recommended work release and study release. Defendant appealed.

Attorney General Edmisten by Assistant Attorney General Lucien Capone, III, for the State.

Carroll & Scarbrough by James E. Scarbrough, for the defendant.

MARTIN (Robert M.), Judge.

The question presented by this appeal is whether the court erred in ruling that the fourteen year term required by N.C. Gen. Stat. 14-87(d) (1981) could not be reduced by the mitigating factors recognized under the Fair Sentencing Act.

Prior to entry of judgment the trial court ruled that the minimum 14 year sentence was mandatory for all offenses of armed robbery committed on or after July 1, 1981 and that the minimum sentence could not be reduced by mitigating factors pursuant to the Fair Sentencing Act, N.C. Gen. Stat. 15A-1340.1—1340.7 (Supp. 1981). Defendant appealed under N.C. Gen. Stat. 15A-1444 (Supp. 1981). We affirm the judgment of the trial court.

N.C. Gen. Stat. 14-87(a) provides that persons who commit the crime of armed robbery " . . . shall be guilty of a Class D felony." Defendant contends that this language indicates a legislative intent to make the Fair Sentencing Act applicable to

armed robbery. That Act provides that the presumptive term must be imposed unless, after consideration of aggravating or mitigating factors, or both, the sentencing judge decides to impose a shorter or longer term. N.C. Gen. Stat. 15A-1340.4(a). N.C. Gen. Stat. 15A-1340.4(f)(2) further provides that "[u]nless otherwise specified by statute," Class D felonies carry a presumptive sentence of 12 years.

N.C. Gen. Stat. 14-87(d) provides that:

> *Notwithstanding any other provision of law,* with the exception of persons sentenced as committed youthful offenders, a person convicted of robbery with firearms or other dangerous weapons shall serve a term of not less than seven years in prison, excluding gain time granted under G.S. 148-13. *A person convicted of robbery with firearms or other dangerous weapons shall receive a sentence of at least 14 years in the State's prison* and shall be entitled to credit for good behavior under G.S. 15A-1340.7. The sentencing judge may not suspend the sentence and may not place the person sentenced on probation. Sentences imposed pursuant to this section shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder. (Emphasis added.)

The language of N.C. Gen. Stat. 14-87(d) is unambiguous and its effect is clear. Any person convicted of armed robbery must receive no less than a 14 year sentence, notwithstanding any other provision of law. Thus, there is no room for judicial construction on this point. *In Re Banks,* 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Camp,* 286 N.C. 148, 209 S.E. 2d 754 (1974).

The following factors lead us to the conclusion that the General Assembly considered the relationship between N.C. Gen. Stat. 14-87 and the Fair Sentencing Act. First, N.C. Gen. Stat. 14-87 was rewritten as part of the Act. 1979 N.C. Sess. Laws, c. 760, s. 5. Second, the rewritten version specifically refers to N.C. Gen. Stat. 15A-1340.7, the section of the Fair Sentencing Act allowing credit for good behavior. Third, the General Assembly amended the last part of N.C. Gen. Stat. 14-87(a) in the 1979 second session changing the phrase " . . . punished as a Class D felon" to " . . . guilty of a Class D felony." 1979 N.C. Sess. Laws, c. 1316, s. 12.

These factors lead to the conclusion that the General Assembly intended to impose a minimum sentence for armed robbery greater than the presumptive sentence for a Class D felony and also intended that the minimum be irreducible, except for credit for good behavior, "notwithstanding any other provision of law. . . ." N.C. Gen. Stat. 14-87(d).

Where one statute deals with a subject in detail with reference to a particular situation (in this case, armed robbery) and another statute deals with the same subject in general and comprehensive terms (felonies), the particular statute will be construed as controlling in the particular situation unless it clearly appears that the General Assembly intended to make the general act controlling in regard thereto. *Food Store v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). In this case the legislature clearly intended the provisions of N.C. Gen. Stat. 14-87(d) to control over the conflicting provisions of the Fair Sentencing Act.

The North Carolina Supreme Court has previously recognized that the General Assembly intended to provide more severe punishment for armed robbery offenses when it enacted N.C. Gen. Stat. 14-87. *State v. Jones*, 227 N.C. 402, 42 S.E. 2d 465 (1947). The statutory construction which we have set forth is in accordance with the legislature's firm stand on the punishment of persons committing armed robbery. "It is not for us to say that the policy judgment of the General Assembly with respect to punishment for armed robbery is wrong. Armed robbery is a crime of violence and those who take the risk must assume the consequences involved." *State v. Legette*, 292 N.C. 44, 58, 231 S.E. 2d 896, 904 (1977).

As the General Assembly has chosen to remove much of the discretionary power which judges previously exercised in the sentencing process we must hold that the 14 year sentence for armed robbery specified in N.C. Gen. Stat. 14-87(d) is a minimum which may not be reduced under the Fair Sentencing Act except by credit for good behavior.

Affirmed.

Judges ARNOLD and WHICHARD concur.

Judges ARNOLD and WHICHARD concurring.

The evidence at the sentencing hearing showed the following:

A police officer investigated a call regarding a suspicious car. He approached the car and asked two of the four occupants to get out. He then received a call reporting a robbery at a nearby Fast Food Store. The occupants of the car heard the call; and two of them, including defendant, ran. It is not clear from the record whether it was known at the time that defendant was one of the occupants who ran. It would appear that it was not. Investigation established that the person who robbed the store pulled a knife with a three inch blade, ordered the store clerk to step back, took $55.00 from the cash register, and left.

The following day defendant voluntarily surrendered himself at the police station, signed a statement confessing to the robbery, and assisted the police by returning to the crime scene to look for the money and the knife he had lost when he ran from the police car. Defendant had no prior record of criminal convictions. Affidavits and character witnesses indicated that he was a person of good character and reputation in the community in which he lived and worked.

The court found no factors in aggravation of punishment. It found four mitigating factors as follows: (1) defendant had no prior record of criminal convictions, (2) prior to arrest defendant voluntarily acknowledged his wrongdoing in connection with the offense, (3) defendant had been a person of good character and reputation in his community, and (4) defendant made a complete confession and assisted the police in an investigation. Despite those mitigating factors, the court had no choice but to impose a minimum sentence of fourteen years.

The mitigating factors in the case would seem to have called for exercise of prosecutorial discretion by the acceptance of a plea to a lesser charge. They also call into question the desirability of mandatory minimum sentences which remove all possibility of exercise of judicial discretion, regardless of the mitigating circumstances presented.

LORENE LINEBERRY v. J. MICHAEL LINEBERRY

No. 8123DC1225

(Filed 19 October 1982)

1. **Agriculture § 7; Evidence § 32.7— lease of tobacco allotment—contract provision unambiguous—parol evidence inadmissible**

A provision in a lease of plaintiff's tobacco allotment to defendant permitting any unused portion of the tobacco quota to be sold to another farmer, credited by defendant at thirty cents per pound and used by plaintiff the following year, or used by defendant the following year was unambiguous, and parol evidence was not admissible to explain such provision.

2. **Agriculture § 7; Evidence § 32.2— lease of tobacco allotment—parol evidence inadmissible to vary terms**

Where a contract leasing plaintiff's land and tobacco allotment to defendant provided that defendant "is entitled to produce 11,353" pounds of tobacco but did not require defendant to produce 11,353 pounds, and there was no finding that the contract was not a final agreement, parol evidence regarding an alleged oral promise by defendant to grow plaintiff's full tobacco allotment was inadmissible.

APPEAL by defendant from *Osborne, Judge.* Judgment entered 26 June 1981 in District Court, YADKIN County. Heard in the Court of Appeals 2 September 1982.

On 8 April 1980, plaintiff and defendant entered into a written contract. The contract provided that plaintiff would lease to defendant twenty-five acres of cropland, four barns, and the right to raise tobacco using plaintiff's tobacco allotment quota for 1980.

The first page of the contract recited that the rent would be $4,655.90, payable on or before 1 October 1980. According to defendant, the rent was computed as follows: $30.00 per acre for twenty-five acres of cropland; $500.00 for four barns; and thirty cents per pound of tobacco raised for 11,353 pounds of allotment quota. This computation of the rent was not expressly set out in the contract.

Page two of the contract provided that plaintiff would furnish four barns and a source of irrigation for the tobacco to the defendant.

The contract also provided that defendant would raise tobacco as follows: "That the party of the second part is entitled to

produce 11,353 number of pounds and the party of the first part will receive $00.30 per pound, and payment will be due the party of the first part on or before October 1, 1980."

The contract further provided that

> In the event that the party of the second part shall fail to sell 100% of the quota of tobacco poundage alotted [*sic*] during the term of this Contract, the party of the first part shall give to the party of the second part a written signed release and shall make all arrangements necessary to permit the party of the second part to resell the unused and unsold poundage in the sole discretion of the party of the second part as follows: Party of the first party [*sic*] agree [*sic*] to pay 30 cents per pound for any un-sold [*sic*] pounds on farm or replace equal numbers of pounds by March 15, 1981.

Defendant purchased 4,331 additional pounds of allotment from other farmers in anticipation of selling more than 11,353 pounds of tobacco.

According to the Agricultural Stabilization and Conservation Service (ASCS), defendant planted only 7.86 acres on plaintiff's farm. The maximum amount of acreage was 11.05 acres.

Farmers are allowed to transfer pounds of allotment to other farmers, but only if the transferor has planted 80% of his effective allotment for the year. Since defendant planted less than 80%, he was not able to transfer any excess allotment.

On 1 October 1980, defendant paid plaintiff $2,343.50, which was determined as follows: $750.00 for cropland rent; $500.00 for the barns; and $1,093.50 for 3,645 pounds of tobacco allotment at thirty cents per pound. The defendant had not used the remaining 7,708 pounds of allotment. Plaintiff then filed suit against defendant for the remaining $2,312.40, which she claimed was due.

The trial court found that the provision in the contract which stated that plaintiff agrees to pay thirty cents per pound for any unsold pounds was ambiguous. After admitting parol testimony, the court deleted the sentence. The court found that defendant breached the contract by not planting the full tobacco allotment in 1980, not using the remaining tobacco allotment in 1981, and not paying the full amount of rent due. The court ordered defend-

ant to pay plaintiff the balance due which was $2,312.40 plus interest.

Finger, Park and Parker, by M. Neil Finger, for plaintiff appellee.

Jenkins, Lucas, Babb and Rabil, by S. Mark Rabil, for defendant appellant.

VAUGHN, Judge.

[1] Defendant presents three issues on appeal. The first issue is whether the trial judge properly admitted parol evidence to change the written terms of the contract.

In general, when the language of a contract is unambiguous, the court may not ignore or delete any of its provisions. As stated in *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E. 2d 190, 196 (1975), "The intention of the parties must be determined from the language of the contract, the purposes of the contract, the subject matter and the situation of the parties at the time the contract is executed." An ambiguous term may be explained or construed with parol evidence. *Vestal v. Vestal*, 49 N.C. App. 263, 271 S.E. 2d 306 (1980).

The question here is whether the provision on the bottom of page two in the contract is ambiguous. A statement is ambiguous if it is susceptible of more than one meaning. Defendant contends that the statement is not ambiguous because it may fairly be interpreted in only one way. We agree. The provision states three alternatives available to plaintiff if defendant failed to sell 100% of the quota. First, plaintiff could give defendant a written signed release and make all arrangements necessary to permit defendant to resell the unsold tobacco allotment to other farmers. Second, plaintiff could credit defendant for unsold pounds at thirty cents per pound. The third alternative would be for plaintiff to allow defendant to use the unsold pounds in 1981. This means theoretically each pound of tobacco allotment could be either used for tobacco grown by defendant, sold to another farmer, credited to defendant at thirty cents per pound (and used by plaintiff the following year), or used by defendant the following year. Since defendant failed to grow 80% of his effective allotment, he was precluded from transferring his allotment to other farmers, but the remaining two choices, thirty cents credit or the carry-over to

1981, were still available. Because defendant chose to deduct the thirty cents per pound for the unused allotment, plaintiff used the excess allotment the following year. To allow plaintiff to recover thirty cents per pound from defendant after using the allotment in 1981 would be unfair.

Since we do not find the contract ambiguous, the parol evidence was improperly admitted.

[2] Defendant's second argument is that the trial court erred in admitting parol evidence regarding an alleged promise by defendant to plant and grow plaintiff's full tobacco allotment.

The contract provided that "the party of the second part is entitled to produce 11,353" pounds. The contract did not require defendant to produce 11,353 pounds.

"Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing." 2 Brandis on North Carolina Evidence § 251 (1982). If the oral testimony would vary or contradict the written agreement, it should be excluded. *Van Harris Realty, Inc. v. Coffey*, 41 N.C. App. 112, 254 S.E. 2d 184 (1979). An excellent statement of the rule is found in an old North Carolina case:

> A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Neal v. Marrone, 239 N.C. 73,77, 79 S.E. 2d 239, 242 (1953).

Since there was no finding that the contract was not a final agreement, the alleged oral agreement to plant the full allotment should not have been admitted.

Defendant's third argument is that the trial court erred in denying defendant's motion for summary judgment.

Summary judgment should 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).

In this case the contract is not ambiguous, and the actions of the parties are not in dispute. The issues raised by plaintiff were inadmissible under the parol evidence rule. Since there is no genuine issue of material fact, summary judgment should have been entered in favor of defendant.

Reversed and remanded.

Judges HILL and JOHNSON concur.

ROBERT C. CECIL, PLAINTIFF v. MARY A. CECIL, DEFENDANT

No. 8119DC1257

(Filed 19 October 1982)

Divorce and Alimony § 19.5— modifiability of support provisions of separation agreement after parties divorced

Where defendant moved for an increase in support payments alleging a change in circumstances, the court erred in denying defendant's motion by ruling "as a matter of law" that a prior order was "not an order that may be modified so as to permit an increase in the amount of alimony." Under the facts of the case, a separation agreement was merged into the divorce decree and became a decree of the court; however, since the agreement did not state whether the provisions were reciprocal or separable, there should be a hearing to determine the intention of the parties as to the reciprocity or separability of the provisions for support payments and property division.

APPEAL by defendant from *Grant, Judge.* Order entered 11 August 1981 in District Court, ROWAN County. Heard in the Court of Appeals 14 September 1982.

The parties to this action were married in 1949 and separated in 1975. The defendant brought an action against the

plaintiff in 1975 for alimony without divorce which was settled by a consent judgment. The consent judgment recited that the parties had entered into a separation agreement settling all matters between them and had agreed that the court could enforce the terms of the agreement by contempt proceedings. The court found as a fact that the terms of the agreement were fair to both parties and that the alimony which the plaintiff had agreed to pay was appropriate and commensurate with the plaintiff's earnings and the defendant's needs. The court ordered the plaintiff to comply with all the terms of the separation agreement. The separation agreement provided, among other things, that the plaintiff would make support payments to the defendant of $400.00 per month to be reduced by any amount the defendant received in disability insurance payments, that the plaintiff would make available to the defendant his health and accident insurance policy, that plaintiff would pay certain outstanding bills, and that defendant would have possession of the parties' residence until the parties were divorced, at which time the residence would be sold and the proceeds divided equally between the parties. These provisions were specifically incorporated into the judgment and the plaintiff was ordered to comply with them. The judgment recited that the cause was retained by the court in order to punish either party by contempt should such party willfully fail to abide by the terms of the judgment.

The plaintiff brought this action for divorce on 4 May 1976. On 3 June 1976 the parties entered into an agreement modifying the separation agreement by providing the defendant could live in their residence for one year with a provision for a sale of the plaintiff's interest to the defendant at the end of the one-year period. The amended agreement also stated that if the consent judgment, which had previously been filed, should be incorporated into the final divorce decree, the defendant would not contest the plaintiff's action for divorce. Plaintiff was granted a divorce on 8 June 1976. The court signed an order on 8 June 1976 which provided that the original separation agreement, the consent judgment in the alimony action, the 3 June 1976 amendment to the separation agreement, and an agreement by the parties not germane to this case, were all incorporated into the order, that they survived the granting of the divorce and that they were enforceable by the contempt power of the court.

The defendant made a motion for an increase in support payments on 2 July 1981 alleging a change in circumstances. The court denied the defendant's motion on 10 August 1981, ruling "as a matter of law that the order of September 25, 1975 is not an Order that may be modified so as to permit an increase in the amount of alimony." The defendant appealed.

Robert M. Davis for plaintiff appellee.

Mona Lisa Wallace for defendant appellant.

WEBB, Judge.

This appeal brings to this Court a question of the modification by the court of support provisions of a separation agreement after the parties are divorced. This question has been the subject of many cases. *See White v. White,* 296 N.C. 661, 252 S.E. 2d 698 (1979); *Levitch v. Levitch,* 294 N.C. 437, 241 S.E. 2d 506 (1978); *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240 (1964); *Allison v. Allison,* 51 N.C. App. 622, 277 S.E. 2d 551 (1981); *Baugh v. Baugh,* 44 N.C. App. 50, 260 S.E. 2d 161 (1979); *Britt v. Britt,* 36 N.C. App. 705, 245 S.E. 2d 381 (1978); *see also* Sharp, *Divorce and The Third Party: Spousal Support, Private Agreements, and the State,* 59 N.C.L. Rev. 819 (1981). In this state, the rule is stated that if a divorce decree or a consent judgment merely approves and sanctions the support payments which the parties have agreed in a separation agreement will be paid to a spouse, then the separation agreement is simply a contract approved by the court. It cannot be modified by order of the court. If the court adopts the separation agreement as its own determination of the rights and obligations of the parties and orders the support payments to be made, the separation agreement becomes a decree of the court. The support payments may then be modified upon a showing of a change in circumstances, unless the support provision and the other provisions of the separation agreement constitute reciprocal consideration for each other so that the agreement would be destroyed by a modification of the support provision.

We believe that under the above cited cases, particularly *Levitch,* the separation agreement in this case was merged into the divorce decree and became a decree of the court. We believe we are bound by *White* to hold that there must be a hearing to determine whether the provisions of the separation agreement

are separable or reciprocal. In *White* the separation agreement merged into the judgment provided that the husband would pay the wife $1,000.00 in a lump sum and $100.00 per month for support, and that he would convey his 1/2 interest in their home to her. The agreement did not state whether the provisions were reciprocal or separable. Our Supreme Court held there should be a hearing to determine the intention of the parties as to the reciprocity or separability of the provisions for support payments and property division. We believe this case is so similar that we are bound by *White* to reverse and remand for a hearing as to whether the support payments and the agreement by the plaintiff to sell his interest in their home to the defendant were reciprocal or separable. The burden of proof will be on the plaintiff to prove by the preponderance of the evidence that they were reciprocal. The opinion in *White* recites the factors which may be considered in reaching a decision.

The plaintiff argues that the judge who signed the consent order was the same judge who denied the defendant's motion and that it was obvious it was his intention that the order not be modifiable. It is not the intention of the judge but the intention of the parties as to separability or reciprocity which is crucial. The separation agreement in this case provides that it is a permanent settlement and each of the parties shall live as if they "had never been married to each other" and the plaintiff argues that this means that the parties intended the obligations arising from the marriage were permanently settled. If the court should find the support provision of the separation agreement is separable from the other provisions, it became alimony when it was adopted by the court; whatever the intention of the parties at the time the separation agreement was signed, the provision for alimony is subject to modification. There was not a finding that the defendant was a dependent spouse. This is a factor to be considered but it is not determinative.

We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. MICHAEL LOVELLE CANNADY

No. 826SC111

(Filed 19 October 1982)

Criminal Law § 143.8— probation and suspended sentence—crime after probation period—revocation of suspension of sentence

Where defendant was placed on supervised probation for one year and his prison sentence was suspended for three years, his probation could not be revoked because of his convictions of misdemeanor breaking and entering and larceny which occurred eight months after the one-year probation period had expired, even though his probation officer had filed a probation violation report before the probation period expired alleging other probation violations. However, the court could revoke the suspension of defendant's sentence on the basis of the breaking and entering and larceny convictions.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 16 October 1981 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 14 September 1982.

The facts are as follows. On 23 July 1979, defendant pleaded guilty to felonious breaking and entering. On 24 July 1979, Judge Barefoot sentenced defendant to not less than three nor more than five years, suspended for three years upon compliance with the following conditions: (1) that defendant not violate any state or federal laws; (2) that defendant be placed on probation for one year under the usual terms and conditions of probation; and (3) that defendant pay the court costs under the supervision of his probation officer.

On 14 January 1980, probation officer Kenneth L. Bazemore filed a violation report stating that he had probable cause to believe that defendant violated the terms of his probation. The alleged violations were: (a) that in open court defendant stated that he resided with his aunt in Rocky Mount, N.C., and had since changed his residence to an address unknown to the probation officer; and (b) that defendant had refused to pay court costs of $219.00.

An order for arrest was issued 15 January 1980. It was not executed. Defendant was eventually arrested 11 June 1981.

Probation officer Bazemore filed another violation report on 12 June 1981. It stated that he had probable cause to believe:

(a) that defendant changed his residence without notifying probation officer; and (b) that on 21 March 1981, defendant committed a felonious breaking and entering and larceny to which defendant pleaded guilty to misdemeanor breaking and entering and larceny and received a two-year suspended sentence. This violated the condition of probation that defendant not commit any criminal offense.

Although the judge failed to find any probation violation that occurred during the one-year period of probation, he concluded that defendant willfully violated a condition of his probation by committing the breaking and entering and larceny. He revoked the probation and the suspension of the sentence, and ordered defendant confined in prison for not less than three nor more than five years.

Defendant appealed from this order.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

VAUGHN, Judge.

The only question addressed by the parties relates to the revocation of defendant's one-year probation judgment. Although not necessary to our disposition of the appeal, we will answer that question first.

When a sentence is suspended and defendant placed on probation on certain named conditions, the court may, after notice and hearing, modify or revoke probation at any time prior to the expiration or termination of the probation period. G.S. 15A-1344(d); *State v. Camp*, 299 N.C. 524, 263 S.E. 2d 592 (1980).

After the probation period has expired, probation may be revoked pursuant to G.S. 15A-1344(f) which provides:

> Revocation after Period of Probation—The court may revoke probation after the expiration of the period of probation if:

(1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and

(2) The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.

The official commentary to G.S. 15A-1344(f) states that "probation can be revoked and the probationer made to serve a period of active imprisonment even after the period of probation has expired if a violation occurred during the period and if the court was unable to bring the probationer before it in order to revoke at that time."

To satisfy G.S. 15A-1344(f), three conditions must be met: the probationer must have committed a violation during his probation, the State must file a motion indicating its intent to conduct a revocation hearing, and the State must have made a reasonable effort to notify the probationer and conduct the hearing sooner.

In this case, the three conditions were not satisfied. The order revoking defendant's probation was based solely on the breaking and entering and larceny offenses which occurred after the one-year probation period. The order stated:

> That when the defendant was placed on probation on July 24, 1979, as set out above, he was directed both orally and in writing by the probation officer of the condition of probation that he "not commit any criminal offense"; that on or about March 21, 1981, the defendant committed the offense of breaking and entering and larceny; that at the June 11, 1981, term of the Nash County District Court, as set out above, the defendant entered a plea of guilty to the misdemeanor of breaking and entering and the misdemeanor of larceny; and that this is in willful violation of the condition of probation that he "not commit any criminal offense", in addition to being in violation of the aforesaid special condition of probation ordered by Judge Barefoot on July 24, 1979.

Since the probation violation in the order occurred eight months after the probation expired, the conditions of G.S.

15A-1344(f) were not met, and the court had no authority to revoke probation.

The State contends that when the first violation report was filed, the probationary period was tolled. According to the State, the failure to revoke the probation during the original term of the probation is attributable solely to defendant's lack of cooperation. This assertion has no merit. Probation may have tolled for the alleged violations in the first violation report which occurred during the probation period. *State v. Best*, 10 N.C. App. 62, 177 S.E. 2d 772 (1970). It was, however, the breaking and entering, not the alleged violations in the first report, which were considered by the trial court.

The statute clearly provides that the violation must have occurred during the probation period. The State may not file erroneous violation reports to toll the probation period, and then revoke probation for an action which occurred after the probation period ended.

The foregoing, however, will mean little to the defendant in this case. Although the court saw fit to place defendant on supervised probation for *one* year, his prison sentence was suspended for *three* years. One of the three conditions upon which the sentence was suspended was that defendant "not violate any state or federal law." It is undisputed that less than two years after the sentence was suspended, he entered a plea of guilty to the misdemeanor offenses of breaking and entering and larceny. "Absent specific prohibition by the Legislature, courts have the power to suspend sentence in their discretion." *In the Matter of Greene*, 297 N.C. 305, 310, 255 S.E. 2d 142, 146 (1979). Obviously, if the sentence is suspended on lawful conditions, the court can revoke the suspension for a violation that occurs during the term of the suspension, even though the act occurs after a period of supervised probation has expired.

For the reason stated, the judgment revoking the suspended sentence is

Affirmed.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. ODELL R. HILL

No. 8212SC226

(Filed 19 October 1982)

1. **Crime Against Nature § 4— crime against nature as lesser included offense of first degree sexual offense**

In a prosecution for a first degree sexual offense, the trial court did not err in submitting as a lesser included offense the charge of crime against nature since it was apparent that the first degree sexual offense for which the defendant was tried involved the penetration of the prosecuting witness's genital opening which is one of the sexual acts listed under G.S. 14-27.1(4) and since penetration is required in order to convict someone of a crime against nature under G.S. 14-177.

2. **Crime Against Nature § 4— prosecution for first degree sexual offense—no prejudicial error in submission of crime against nature charge**

Where the prosecuting witness testified that she was held by two persons while the defendant committed a sexual act, and the defendant testified that there was no sex act, there was no reason to believe that the submission of a crime against nature charge to the jury kept the jury from considering the defendant's evidence or contentions which were that he did not commit any sexual act with the defendant at the time in question.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 19 August 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 September 1982.

The defendant was tried for a first degree sexual offense in violation of G.S. 14-27.4. The State's evidence tended to show that on 23 March 1981 two persons held the prosecuting witness while the defendant undressed her and inserted his tongue in the prosecuting witness's vagina. The defendant testified that he was with the prosecuting witness on 23 March 1981, that no one removed any of her clothes, and that he did not have any sexual contact with her.

The court submitted to the jury possible verdicts of guilty of first degree sexual offense, second degree sexual offense, crime against nature, assault on a female, or not guilty. The defendant was convicted of a crime against nature.

The defendant appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the court's submitting to the jury the charge of crime against nature. He argues that a crime against nature is not a lesser included offense of a first degree sexual offense for which he was tried. If a person is indicted for an offense, he may be convicted of that offense or any lesser included offense if proof of the crime for which he was indicted would prove every element of the lesser offense. If the lesser offense requires proof of an element for conviction which is not required for conviction of the crime for which the defendant is indicted, the defendant may not be convicted for the lesser offense whatever the proof may show as to the greater offense. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981). The defendant, relying on *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981), argues that a crime against nature is not a lesser included offense of a first degree sexual offense because to prove a crime against nature, it is necessary to prove a penetration, and it is not necessary to prove a penetration to convict of a first degree sexual offense. It was held in *Ludlum* that a person could be convicted of the first degree sexual offense involving cunnilingus without proving a penetration. Proof of penetration is required in order to convict of a crime against nature under G.S. 14-177. *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961).

We might agree with the defendant if a cunnilingus were the only sexual act which is subject to being a first degree sexual offense. G.S. 14-27.1(4) provides:

> (4) "Sexual act" means cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes.

G.S. 14-27.4 provides in part:

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

* * *

(2) With another person by force and against the will of the other person, and:

* * *

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

G.S. 14-27.1(4) defines several sexual acts. G.S. 14-27.4 makes the commission of these acts first degree sexual offense if done under certain circumstances. One of the sexual acts proscribed by the statute is "the penetration, however slight, by any object into the genital . . . opening of another person's body." The indictment in this case did not specify the type of sexual act for which the defendant was to be tried. This is proper under G.S. 15-144.2. The defendant did not move for a bill of particulars. It is apparent that the first degree sexual offense for which the defendant was tried involved the penetration of the prosecuting witness's genital opening which is one of the sexual acts listed under G.S. 14-27.1(4). The prosecuting witness testified there was a penetration. The court charged the jury they would have to be satisfied there was a penetration before they could convict the defendant of a first degree sexual offense. In order to obtain a conviction of a first degree sexual offense in this case, it was necessary for the State to prove a penetration, which is an element of a crime against nature. The crime against nature was a lesser included offense of the first degree sexual offense for which the defendant was tried in this case, and it was not error to submit the crime against nature to the jury. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant argues that it was prejudicial error to submit the crime against nature to the jury because all the evidence showed it was either a forcible sex act or there was no sex act. The prosecuting witness testified that she was held by two persons while the defendant committed the act. The defendant testified there was no sex act. He argues that the jury had to find him guilty of a first degree sexual offense or not guilty. Ordinarily, the submission of a lesser offense

is harmless error when all the State's evidence shows a greater offense. The defendant, relying on *State v. Ray*, 299 N.C. 151, 261 S.E. 2d 789 (1980), argues that there was prejudicial error in this case. In *Ray* it was held to be prejudicial error to submit involuntary manslaughter to the jury when the defendant relied on self-defense to the greater degrees of homicide, and there was no evidence of involuntary manslaughter. The Supreme Court held that on the facts of that case there was a reasonable possibility that the jury would have found the defendant not guilty if involuntary manslaughter had not been submitted. It based its holding on the definition in the charge of involuntary manslaughter as an intentional act for which self-defense was not an excuse. The Supreme Court said this could have short-circuited the jury's consideration of self-defense. *See State v. Cason*, 51 N.C. App. 144, 275 S.E. 2d 221 (1981). In this case, there is no reason to believe that the submission of crime against nature kept the jury from considering the defendant's evidence or contentions which were that he did not commit any sexual act with the defendant at the time in question. If it was error to submit the charge of crime against nature, it was error favorable to the defendant. The defendant's second assignment of error is overruled.

In his third assignment of error, the defendant asks us to reconsider our holding in *State v. Poe*, 40 N.C. App. 385, 252 S.E. 2d 843, *cert. denied*, 298 N.C. 303, 259 S.E. 2d 304 (1979), *cert. denied*, 445 U.S. 947, 100 S.Ct. 1593, 63 L.Ed. 2d 782 (1980) and hold that G.S. 14-177 is unconstitutional. This we decline to do.

No error.

Judges HEDRICK and HILL concur.

WAYNE SEAY v. ALLSTATE INSURANCE COMPANY AND JACK KING

No. 8121SC1361

(Filed 19 October 1982)

Insurance § 74— action on automobile collision policy—punitive damages—summary judgment

In an action to recover damages for defendant insurer's failure to pay a collision loss claim under plaintiff's automobile insurance policy, summary judgment was properly entered for defendant insurer on the issue of punitive damages where plaintiff failed to present competent evidence in support of his allegation of fraudulent conduct.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 17 August 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 September 1982.

Plaintiff brought this action to recover compensatory damages for defendant Allstate's failure to pay a collision loss claim under plaintiff's automobile insurance policy and punitive damages for defendants' fraudulent acts in attempting to defeat plaintiff's claim.

Plaintiff alleged in a verified complaint that prior to 5 July 1977 plaintiff maintained an automobile liability policy with defendant Allstate. On 5 July 1977, plaintiff borrowed $2,500.00 from North Carolina National Bank (NCNB) and pledged his automobile as collateral for the loan. In order to obtain the loan, it was necessary for plaintiff to maintain collision coverage on the pledged automobile. On 5 July 1977, defendant King, Allstate's agent, represented to plaintiff that plaintiff had $100.00 deductible collision coverage on the pledged automobile. Plaintiff obtained the loan on 5 July 1977 on the assurance of King to plaintiff and to NCNB that plaintiff had collision coverage on plaintiff's pledged automobile effective 5 July. On 6 July plaintiff incurred a collision loss to his car, in the amount of $839.75. Plaintiff notified King of the loss on 7 July and was told by King to call an adjuster. Plaintiff then reported the loss to Allstate's claims office. By letter of 21 July, Allstate informed plaintiff that plaintiff's collision coverage would not be continued beyond 7 July 1977 due to two previous collision losses by plaintiff, one of which was the 6 July loss. Plaintiff had the car repaired and submitted a claim to Allstate which Allstate failed and refused to

pay. On information and belief, plaintiff alleged that Allstate afforded him collision coverage on 5 July, but when defendants learned of the 6 July loss, defendants willfully and fraudulently attempted to change the date of plaintiff's coverage to 7 July to avoid payment of plaintiff's claim, and that defendants falsely represented that plaintiff had no collision coverage on 5 July when in fact defendants knew that plaintiff did have such coverage effective 5 July and that such statements by defendants were knowingly false and made with intent to defraud plaintiff; or in the alternative that King's representation to plaintiff on 5 July that King was immediately effecting collision coverage was knowingly false, made with the intent of defrauding plaintiff.

Defendants answered admitting that plaintiff had a liability policy in effect on the pledged car on 5 July, but otherwise made general denials. Defendants' answer was served on 29 August 1980.

The record on appeal includes the depositions of Herbert Clyde Watson, III, a loan officer for NCNB; Edward B. Ballard, an acquaintance of plaintiff; and John Staples King, Jr. (Jack King), an agent for defendant Allstate. These depositions were taken on 4 December 1980. The record does not show by whom they were taken nor when they were filed.

On 15 April 1981, defendants moved to dismiss plaintiff's action in its entirety for plaintiff's failure to comply with discovery and for partial summary judgment as to plaintiff's claim for punitive damages. On 5 October 1981, the trial court granted defendants' motion for partial summary judgment and plaintiff has appealed.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Daniel W. Donahue and Keith A. Clinard, for defendant-appellees.

WELLS, Judge.

In the usual summary judgment situation, the burden is on the movant to show to the trial court that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law. *Lowe v. Bradford*, 305 N.C. 366, 289

S.E. 2d 363 (1982); *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). The procedure under the rule being designed to allow a preview or forecast of evidence or proof of the parties in order to determine whether a jury trial is necessary and to allow the trial court to "pierce the pleadings" to determine whether any genuine factual controversy exists, *Lowe*, supra, it is therefore incumbent on the trial court to consider all of the papers before him on hearing the motion in order to make an appropriate disposition of the motion.[1]

All of the fraudulent or intentionally wrongful acts alleged by plaintiff in his verified complaint were alleged upon information and belief and therefore do not meet the "personal knowledge" requirements of Rule 56(e). *Metal Works, Inc. v. Heritage, Inc.*, 43 N.C. App. 27, 258 S.E. 2d 77 (1979). Plaintiff did not offer a personal affidavit or deposition.

The only witness whose testimony deals with the alleged representations of defendant King to plaintiff on 5 July 1977 was NCNB's loan officer, Watson. In his deposition, Watson testified as to the events in his office on 5 July. He testified that plaintiff applied for an automobile loan, that he informed plaintiff as to the bank's requirement for collision coverage; that plaintiff informed Watson plaintiff had insurance with Allstate and that King was his agent; that while plaintiff was in Watson's office, plaintiff made a phone call, and as a result of that call, Watson obtained plaintiff's insurance policy number and that the only information he had as to plaintiff's insurance coverage was what plaintiff told him. Thus, it is clear that Watson would not be competent to testify as to anything that King did or said on 5 July 1977. *See Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

Edward Ballard's deposition testimony indicates that he had no personal knowledge of the events of July 5, 6, or 7, and thus he would not be competent to testify as to King's alleged acts on those dates. Ballard did testify that he went with plaintiff to see

1. Although the record on appeal in this case does not make it clear that the depositions before the trial court were produced by the plaintiff, the opposing party, the briefs of the parties seem in agreement that such was the case, and we therefore presume that defendants, the movants, relied on plaintiff's deposition of defendant King to provide defendants' forecast of evidence or proof in support of their motion for partial summary judgment.

King in September or October (of 1977) and that in his presence, King made the statement to plaintiff that "If anything come (sic) up and we go to court, I'll deny everything that I said." This statement attributed to King by Ballard is not probative of any facts at issue in this case, but if offered at trial, would only bear upon King's credibility.

We are persuaded that the forecast of evidence before the trial court shows that plaintiff has failed to properly support his allegations of fraudulent conduct, *Lowe*, supra, and that there is no forecast of competent evidence which would raise an issue of punitive damages in this case. *See Murray v. Insurance Co.*, 51 N.C. App. 10, 275 S.E. 2d 195 (1981). Accordingly, the judgment of the trial court is

Affirmed.

Judges VAUGHN and WEBB concur.

MARLENE J. JONES v. SHIRLEY SAPP WHITAKER AND CHARLES KENDALL WHITAKER

No. 8121SC1360

(Filed 19 October 1982)

1. **Rules of Civil Procedure § 4— service of process incorrectly stating name of one of parties—no fatal error**

The trial court erred in allowing one defendant's motion to dismiss for insufficient service of process in that the summons served on her stated her name as "Sherrie" instead of "Shirley." All that is required is that the proper party be properly served, and that was done.

2. **Process § 3— service of amended complaint only—complaint amended three years after accrual of action—no bar to claim**

Where plaintiff and defendant were involved in an automobile accident on 26 January 1978, where plaintiff filed a complaint on 31 December 1980, where plaintiff attempted to serve her complaint and summons on defendant and then attempted to serve several alias and pluries summons before amending her complaint on 27 February 1981 to correct the given name of a codefendant, and where proper service of proper process was had on defendant on 17 June 1981, the trial judge erred in dismissing plaintiff's claims against defendant as being commenced after the running of the three year statute of limitations since the

amended complaint related back to the issuance of the summons and the filing of the original complaint.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 24 August 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 September 1982.

This appeal is from an order granting the defendants' motions to dismiss for insufficient service of process. The record discloses the following.

On 26 January 1978 an automobile accident occurred involving the above parties. On 31 December 1980 a complaint was filed and summons issued naming as defendants *Sherrie* Sapp Whitaker and Charles Kendall Whitaker. The complaint and summons were returned unserved on 2 January 1981. An alias and pluries summons was issued on 30 January 1981. When the deputy sheriff attempted to serve the alias and pluries summons and complaint on Shirley Sapp Whitaker she pointed out her name was not Sherrie, but her daughter's name was Sherrie. The deputy marked through the name Sherrie, wrote in Shirley and served the alias and pluries summons and original complaint on defendant, Shirley Sapp Whitaker. The deputy made return that service was had on 3 February 1981 on the defendant Shirley Sapp Whitaker. This alias and pluries as returned shows personal service on Shirley Sapp Whitaker; with respect to the defendant Charles Kendall Whitaker the alias and pluries summons contained the notation that "Charles Kendall Whitaker is in the Marines stationed at this time at Camp LeJeune, N.C. s/ Mike Fritts, Deputy, 2/3/81."

On 27 February 1981 plaintiff moved to amend the complaint. The motion was granted and the complaint was amended by changing the name of one of the defendants from Sherrie Sapp Whitaker to Shirley Sapp Whitaker. Otherwise, the amended complaint and the original complaint were identical. Also, on 27 February 1981 another alias and pluries summons was issued for Charles Kendall Whitaker. Before being served, Charles Whitaker filed an answer denying the material allegations of the complaint and a motion to dismiss on 2 March 1981.

On 25 March 1981 the alias and pluries summons for Charles Whitaker was returned showing non-service with the following

comment: "Unable to serve before expiration as def't Charles K. Whitaker is currently on military duty in Norway. s/ C. S. Koonce, Deputy, 3/25/81." Yet another alias and pluries summons naming Charles Whitaker was issued on 27 May 1981. On 17 June 1981 this summons and a copy of the amended complaint were served on Charles Kendall Whitaker.

Defendant Shirley Whitaker moved to dismiss for insufficient service of process and failure to state a claim on 12 June 1981, and on 19 June 1981 Charles Whitaker moved to dismiss for insufficient service of process, failure to state a claim and failure to file a claim within the applicable statute of limitations. The motions to dismiss were allowed on 24 August 1981.

Plaintiff appealed.

Kennedy, Kennedy, Kennedy and Kennedy, by Annie Brown Kennedy and Harold L. Kennedy, III for the plaintiff, appellant.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by Grover G. Wilson and Michael L. Robinson for the defendants, appellees.

HEDRICK, Judge.

[1] The only question we need consider on this appeal is whether proper service of summons and complaint was had on the defendants, Shirley Sapp Whitaker and Charles Kendall Whitaker. Plaintiff first contends the trial judge erred in dismissing her claim against the defendant Shirley Sapp Whitaker for lack of proper service. Defendants, citing *Roshelli v. Sperry*, 57 N.C. App. 305, 291 S.E. 2d 355 (1982), argue service on the defendant Shirley Sapp Whitaker was improper since the summons and complaint served on defendant Shirley Sapp Whitaker named Sherrie Sapp Whitaker.

Although service of process should correctly state the name of the parties, a mistake in the names is not always a fatal error, and as a general rule a mistake in the given name of a party who is served will not deprive the court of jurisdiction. 62 Am. Jur. 2d *Process* § 18 (1972). As stated in *Patterson v. Walton*, 119 N.C. 500, 501, 26 S.E. 43 (1896), "Names are to designate persons, and where the identity is certain a variance in the name is immaterial." Also, error or defects in the pleadings not affecting

substantial rights are to be disregarded. *Id.* When original process has been served properly and amendments to it are to make process and pleadings consistent, the court will retain jurisdiction. *Fountain v. County of Pitt,* 171 N.C. 113, 87 S.E. 990 (1916).

In the present case, the record discloses that proper service of process was had on the defendant, Shirley Sapp Whitaker, on 3 February 1981. The fact that the summons and complaint were directed to Sherrie Sapp Whitaker and the deputy sheriff changed the name from Sherrie to Shirley when he served the defendant is of no legal significance since the proper party was actually served. Under these circumstances, the defendant could not have suffered any prejudice. All that is required is that the proper party be properly served. The case cited by defendants, *Roshelli v. Sperry,* is clearly distinguishable. There the proper party was not served. Furthermore, assuming only the original complaint was served on the defendant the amending of the complaint to correct the misnomer for the sake of conformity in process and pleading did not invalidate the earlier proper service. 171 N.C. at 115, 87 S.E. at 992.

[2] With respect to the defendant Charles Whitaker, the defendant contends the court correctly dismissed the action against him because the amended complaint, filed on 27 February 1981, discloses on its face plaintiff's action was barred by the three year statute of limitations. Defendant argues that, although plaintiff's claim had been kept alive by the issuance of alias and pluries summonses, he was never served with the original complaint, and was served only with the amended complaint on 17 June 1981. Charles Whitaker contends, that because the only pleading received by him was filed more than three years after the accident giving rise to this action, the applicable statute of limitations, G.S. 1-52(5), bars any claim against him by this plaintiff.

Assuming arguendo, that the answer filed by the defendant on 2 March 1981 did not give the court jurisdiction, we hold the trial court erred in dismissing plaintiff's claim against this defendant. As pointed out above, the amendment to the complaint merely corrected the given name of the codefendant. The action against the defendant, Charles Whitaker, was commenced on 31 December 1980 by the issuance of summons and filing of a com-

plaint. The action was commenced before the running of the three year statute of limitations. The amended complaint related back to the issuance of the summons and the filing of the original complaint since the amendment did not in any way alter the substance of the complaint. Proper service of proper process was had on the defendant Charles Whitaker on 17 June 1981. The judgment dismissing plaintiff's claims against defendants is reversed.

Reversed.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. DONNA JONES SMITH

No. 8218SC217

(Filed 19 October 1982)

Criminal Law § 5.2— defense of unconsciousness—evidence requiring instruction

The trial court in an armed robbery prosecution erred in failing to instruct the jury on the defense of automatism or unconsciousness where defendant's evidence tended to show that she had no independent recollection of the robbery or of that day's events because of the large amount of drugs and alcohol she had taken for several days.

APPEAL by defendant from *Wood, Judge.* Judgment entered 29 October 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 September 1982.

The defendant was indicted for armed robbery. From a jury verdict of guilty of armed robbery and a judgment imposing a prison sentence of fifteen to twenty years, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

Frederick G. Lind, Assistant Public Defender, for defendant appellant.

BECTON, Judge.

I

The defendant held a gun on Rumel Smith and robbed her of money while she was working at the Majik Market on Lee Street in Greensboro, North Carolina, during the early morning hours of 21 November 1980. Greensboro Police Officers, alerted by a secret alarm system, came to the scene and arrested defendant inside a car just outside the store. Items from the store, including money and receipts, were found in the car. There was evidence also that Anthony May and the defendant, Donna Jones Smith, had ridden around in the car, drinking heavily, for several hours prior to the robbery. The State introduced defendant's statement to the officers that her husband had held a gun on her and had taken her to the store to rob the store for him.

According to defendant, she had no independent recollection of the robbery or that day's events because she had been drinking heavily and using a large quantity of narcotic drugs for several days prior to the robbery. Thus, she could not form the intent required to commit an armed robbery.

II

By her third assignment of error defendant contends that the trial court erred by failing to submit to the jury an instruction on automatism or unconsciousness and that that failure was so prejudicial as to warrant a new trial. We agree.

The trial court is required to instruct on all substantial features of a case, even absent a request by counsel. N.C.G.S. § 15A-1232 (1978). Further, defenses raised by the evidence are substantial features requiring an instruction. *State v. Jones*, 300 N.C. 363, 366, 266 S.E. 2d 586, 587 (1980). Failure to instruct on a substantial feature of a case, such as evidence of a complete defense, is error for which the defendant is entitled to a new trial. *State v. Dooley*, 285 N.C. 158, 166, 203 S.E. 2d 815, 820 (1974); *State v. Jones*, 254 N.C. 450, 453, 119 S.E. 2d 213, 215 (1961).

In the case *sub judice*, defendant's evidence tended to show that she had no independent recollection of the robbery or of 21 November 1980, because of the large amount of drugs and alcohol

she had taken for several days. Under the law of this State, unconsciousness, or automatism, can be a complete defense to a criminal charge. *State v. Caddell*, 287 N.C. 266, 290, 215 S.E. 2d 348, 363 (1975). Delirium from drugs or drunkenness is recognized as a source of unconsciousness for purposes of this defense. *Id.* at 285.

In *State v. Coffey*, 43 N.C. App. 541, 259 S.E. 2d 356 (1979), this Court held that defendant's evidence was sufficient to support an instruction on unconsciousness. In the *Coffey* case, defendant was charged with assault with a deadly weapon (an automobile) inflicting serious injury, and hit and run after inflicting personal injury. The State's evidence tended to show that Coffey had driven his car down a hill through a campfire which had a flame about a foot high, and run over Dennis Miller, who was lying beside the fire. Miller was permanently paralyzed because of a fractured neck. He also suffered a broken arm and other injuries. Defendant said he had no recollection of the accident; that he remembered nothing between the time he began drinking and using drugs until the morning after the incident. He testified:

> [W]e smoked six or seven joints and that's all I know. I don't know what happen [sic] after that.
>
> I felt drunk. I was out of it; drunk enough to be out of it.
>
> The next thing I remember is waking up on the Roby Greene road the next, I guess it was the next day . . . . I do not remember anything else between the time I was down at the river and the next morning.

Id. at 545, 259 S.E. 2d at 358.

In the case *sub judice*, the defendant, as in *Coffey*, testified that she remembered nothing of the events of the robbery or that night and that her recollections were only of waking up in jail the morning after. She testified:

> I do not have any independent recollection of the evening of November 20th and of November 21st, 1980, until I woke up in jail. I woke up in jail on Saturday afternoon. I did not remember robbing any place, any store. I do not remember riding around town with my cousin Tony.

I remember seeing Officer Russ yesterday. I don't remember seeing him any time in November, 1980.

One time I worked at the Majik Market. I don't have any memory at all whatsoever as to November 20th and 21st of 1980. I barely remember Halloween much less then.

. . . .

On this night I do not recall leaving my residence with Mr. Tony May at all. I don't remember talking to Sergeant Batten of the Greensboro Police Department after the arrest.

State v. Coffey and the case *sub judice* are similar. In both cases the defendant produced competent evidence of a drug and alcohol induced delirium. Cognizant of the high potential for abuse inherent in defenses of this sort, we express no opinion as to the weight or credibility properly accorded this evidence; that determination is for the jury. Nevertheless, since there was competent evidence introduced at trial which would support an instruction on automatism or unconsciousness, failure to so instruct unduly prejudiced this defendant.

New trial.

Chief Judge MORRIS and Judge JOHNSON concur.

JANE CHRISTIE (NOW WARREN) v. FRANK BURTON CHRISTIE, III

No. 8121DC1357

(Filed 19 October 1982)

1. Divorce and Alimony § 27— modification of child support—awarding counsel fees error

In an action to modify the child support provisions of a separation agreement, the court erred in awarding counsel fees to plaintiff since the court did not find as facts that the plaintiff was acting in good faith, that plaintiff did not have sufficient means to defray the expenses of the action, or that defendant had refused to provide support which was adequate.

2. Divorce and Alimony § 24.4— separation agreement—enforcement by specific performance inappropriate—no finding that plaintiff had inadequate remedy at law

The court erred in ordering the defendant to pay one-half of the expenses of orthodontic care of his children pursuant to a separation agreement without finding that the plaintiff had an inadequate remedy at law.

3. Divorce and Alimony § 24.1— child support—one sum for all children rather than allotted payments

There is no error in requiring defendant to pay one sum in child support for all children rather than having the support payments allotted among the children.

APPEAL by defendant from *Tanis, Judge.* Order entered 23 September 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 23 September 1982.

This appeal arises from an action by the plaintiff on a separation agreement. The parties entered into a separation agreement in 1975 which they amended in 1976. Under the terms of the separation agreement as amended, the defendant was to pay $400.00 per month for the support of their three children and the parties would each pay one-half the medical and dental expenses of the three children. The parties were divorced and the separation agreement was not incorporated in the divorce decree.

The plaintiff brought this action alleging a change in circumstances which required increased child support and that the two youngest children would require orthodontic care which would cost in excess of $2,500.00 for each child. The plaintiff prayed that the court enter a decree for specific performance of the provisions of the separation agreement providing for orthodontic care, that the court order payment of child support based on the needs of the children, and that the plaintiff be awarded attorney fees. The defendant filed an answer in which he denied the material allegations of the complaint.

The court heard the matter without a jury. After the hearing, it entered an order in which it found facts to the effect that there had been a change in circumstances as to the needs of the children; that the two youngest children would require orthodontic treatment in the future that would cost approximately $2,600.00 per child. The court ordered that the defendant pay $528.02 per month to the plaintiff for support of the children, that

the defendant pay one-half of the expenses of orthodontic treatment for the two youngest children, and that the defendant reimburse the plaintiff in the amount of $500.00 for orthodontist expenses paid for the oldest child.

The defendant appealed.

Pettyjohn and Molitoris, by Theodore M. Molitoris, for plaintiff appellee.

Green and Leonard, by Robert K. Leonard and David L. Spence, for defendant appellant.

WEBB, Judge.

This is an action to modify the provisions of child support contained in a separation agreement. The court has the power to make this modification. *See McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E. 2d 616 (1976).

[1] The defendant's first assignment of error is to the court's awarding counsel fees to the plaintiff. We believe this assignment of error has merit. The court did not find as facts that the plaintiff was acting in good faith, that plaintiff did not have sufficient means to defray the expenses of the action, or that defendant had refused to provide support which was adequate. It was error to award attorney fees to the plaintiff without these findings of fact. *Hudson v. Hudson*, 299 N.C. 465, 263 S.E. 2d 719 (1980) and *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975).

[2] In his second assignment of error, the defendant argues that it was error to order the defendant to pay one-half the expenses of the orthodontist. The defendant contends that a decree for specific performance should not have been entered without a finding that the plaintiff had an inadequate remedy at law. We believe this assignment of error has merit. In *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979) it was held that a wife was entitled to a decree for specific performance of alimony payments in a separation agreement. The Supreme Court said that to require a multiplicity of suits to collect support payments did not give the plaintiff an adequate remedy at law. In this case it will not require a multiplicity of suits to collect the orthodontist charges should the defendant fail to pay them. We do not believe the plaintiff has shown she does not have an adequate remedy at law.

[3] In his third assignment of error, the defendant concedes that the support payments for the children are reasonable. He objects to being required to pay $528.02 in one sum for all children rather than having the support payments allotted among the children. We find no error in the way the defendant was ordered to make the support payments. We note that the oldest child is now eighteen years of age so that the defendant is no longer responsible for her support. The defendant may move the court to reduce his child support payments by the amount of the total payments allotted to his oldest child.

Reversed and remanded in part; affirmed in part.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. KATHLEEN HARGROVE MATTHIS

No. 824SC122

(Filed 19 October 1982)

1. **Homicide § 21.9— involuntary manslaughter—sufficiency of evidence to support conviction**

Evidence showing that defendant pointed a gun at the deceased which she did not know would fire because two chambers were usually left empty so that a bullet would not be discharged the first time the trigger was fired, but that the gun did in fact fire, causing the death of the deceased, was evidence from which the jury could find the defendant guilty of involuntary manslaughter.

2. **Jury § 5— release of persons from jury panel prior to trial—only two women on jury—absence of prejudice**

The female defendant failed to show that she was prejudiced by the court's release of twelve women and ten men from the jury panel prior to trial where the jury which was impaneled contained only two women and defendant contended that she would rather have been tried by a jury containing more women, but the record did not show that women were systematically excluded from the panel or how many women were left on the panel after the 22 persons were released, and the record did not show whether defendant exercised all of her peremptory challenges.

3. **Homicide § 19.1— inadmissibility of reputation of deceased for violence**

Evidence that the deceased was a violent person and had a reputation for violence was properly excluded in a homicide case where there was no evidence that defendant acted in self-defense.

State v. Matthis

APPEAL by defendant from *Rouse, Judge.* Judgment entered 26 November 1980 in Superior Court, DUPLIN County. Heard in the Court of Appeals 14 September 1982.

The defendant was tried for second degree murder. The State's evidence showed the defendant and the deceased were married. On 3 July 1980 they quarreled. During the course of the argument, the defendant shot her husband with a pistol thereby causing his death. The defendant testified that she and her husband kept only four bullets in the pistol, leaving two chambers empty so that a bullet would not be discharged the first time the trigger was pulled. She did not think a bullet would be discharged when she pulled the trigger. She testified she pointed the pistol at her husband and pulled the trigger "because I wanted him to see how serious I was about ending the fuss and getting things straightened out."

Defendant was found guilty of involuntary manslaughter. She appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Joseph B. Chambliss for defendant appellant.

WEBB, Judge.

[1] The defendant assigns error to the submission to the jury of the charge of involuntary manslaughter. The defendant argues that all her acts which resulted in the death of her husband were intentional and she could not be guilty of involuntary manslaughter. Involuntary manslaughter is an unintentional killing proximately resulting from culpable negligence or the commission of an unlawful act not amounting to a felony. *See State v. Cates,* 293 N.C. 462, 238 S.E. 2d 465 (1977). It has been held to be involuntary manslaughter when a person points a gun at another and, believing it to be unloaded, pulls the trigger which causes the gun to fire, proximately causing the death of the person at whom the gun was pointed. *State v. Turnage,* 138 N.C. 566, 49 S.E. 913 (1905) and *State v. Currie,* 7 N.C. App. 439, 173 S.E. 2d 49 (1970). We believe we are bound by *Turnage* and *Currie* to hold that evidence showing defendant pointed a gun at the deceased which she did not know would fire, which did in fact fire, causing

the death of the deceased, is evidence from which the jury could find the defendant guilty of involuntary manslaughter. It was not error to submit this charge to the jury.

[2] The defendant also assigns error to the court's releasing 22 members of the jury panel prior to trial. Apparently there were more than enough persons on the panel and the court gave anyone who desired permission to be excused. Twelve women and ten men were excused. The jury that was empanelled contained ten men and two women. The defendant argues that she would rather have been tried by a jury that contained more women. The record does not show that women were systematically excluded from the panel or how many women were left on the panel after the 22 were released. The court could excuse prospective jurors without challenge from the State or the defendant. *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976). The record does not show whether the defendant exercised all her peremptory challenges. We hold the defendant has not shown she was prejudiced by the release of the 22 jurors. *See State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970).

[3] Finally the defendant assigns error to the exclusion of evidence of previous assaults by the deceased on the defendant. In this case there was no evidence that the defendant acted in self-defense. Evidence that the deceased was a violent person or had a reputation for violence was properly excluded. *State v. Winfrey*, 40 N.C. App. 274, 252 S.E. 2d 283, *aff'd*, 298 N.C. 260, 258 S.E. 2d 346 (1979). This assignment of error is overruled.

No error.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. HERMAN NICKERSON

No. 829SC231

(Filed 19 October 1982)

Appeal and Error § 45; Criminal Law §§ 159.1, 166— filing stenographic transcript —failure to attach portions of transcript as appendix to brief

Defendant's appeal is subject to dismissal where defendant filed the stenographic transcript of the evidence at trial in lieu of narrating the testimony but failed to reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the question presented in defendant's brief as required by Appellate Rule 9(c)(1) and Appellate Rule 28(b)(4).

CERTIORARI to review *Battle, Judge.* Judgment entered 23 April 1981 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 23 September 1982.

Defendant Herman Nickerson was indicted for first degree murder. He was tried for second degree murder. There was evidence before the jury tending to show that defendant acted in self defense and that he acted in the heat of passion. The trial court submitted verdicts on second degree murder, voluntary manslaughter and not guilty. The jury found defendant guilty of second degree murder. Judgment was entered imposing a term of imprisonment. Defendant failed to give timely notice of appeal. This Court granted defendant's petition for review by Writ of Certiorari.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Appellate Defender Adam Stein and Assistant Appellate Defender Ann B. Petersen, for defendant-appellant.

WELLS, Judge.

In his record on appeal, defendant chose to file a stenographic transcript of the trial proceedings, as is allowed under the provisions of Rule 9(c)(1) of the Rules of Appellate Procedure. The sole assignment of error presented by defendant requires a careful examination of the trial record including the trial court's instructions to the jury. In violation of the provisions of Rule

9(c)(1) and Rule 28(b)(4), defendant did not reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the question presented in defendant's brief. Such an omission requires that the entire stenographic transcript be circulated among all the judges on the panel and requires the judges to undertake the burdensome and time-consuming task of searching through the transcript for the pertinent pages. We note that this type of Rule violation is occurring with alarming frequency in appeals filed since the effective date of the rule change allowing the use of stenographic transcripts. Such abuses, if allowed to continue, will significantly impede the work of this Court. Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977); *State v. Wilson*, 58 N.C. App. 819, 294 S.E. 2d 780 (1982).

For the reasons stated, this appeal is

Dismissed.

Judges VAUGHN and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 OCTOBER 1982

FOX v. McCOY No. 8112SC1203	Cumberland (80CVS2705)	Affirmed
GLENN v. GLENN No. 8121SC1323	Forsyth (80CVS3624)	Affirmed
JOHNSON v. STONE No. 8017SC836	Surry (78CVS970)	Affirmed
RAY v. RAY No. 8124DC1320	Yancey (81CVD126)	Affirmed
STATE v. CALDWELL No. 8226SC143	Mecklenburg (81CRS29464)	No Error
STATE v. COBLE No. 8215SC141	Alamance (81CRS1600)	No Error
STATE v. COLES No. 8217SC40	Caswell (80CR1530)	New Trial
STATE v. CRAIG No. 8214SC223	Durham (81CRS10644) (81CRS16311)	No Error
STATE v. DALTON No. 8229SC194	Henderson (78CRS4311) (78CRS10179)	Affirmed
STATE v. FORD No. 8221SC164	Forsyth (81CRS34027)	No Error
STATE v. GIBSON No. 8214SC160	Durham (81CRS13511)	No Error
STATE v. GIBSON No. 8227DC197	Gaston (81J125)	Affirmed
STATE v. GRAHAM No. 8219SC86	Randolph (81CRS2289)	Affirmed
STATE v. McINNIS No. 8226SC58	Mecklenburg (80CRS78603) (80CRS78604)	No Error
STATE v. MOSLEY No. 8221SC224	Forsyth (81CRS26983)	No Error
STATE v. STANLEY No. 828SC196	Lenoir (81CRS7642)	No Error
STATE v. TOWNSEND No. 8214SC204	Durham (81CRS10729)	No Error

STATE v. WARE No. 8226SC193	Mecklenburg (81CRS51006)	No Error
STATE v. WOMACK & WOMACK No. 8212SC163	Cumberland (81CRS28346) (81CRS28347)	No Error
TIERNEY v. TIERNEY No. 8110DC1304	Wake (78CVD3748)	Affirmed
VANDIVER v. VANDIVER No. 8121DC1324	Forsyth (76CVD3726)	Affirmed

FILED 19 OCTOBER 1982

IN RE SIEMERS No. 8223DC199	Yadkin (80J49)	Affirmed
STATE v. BOWEN No. 8229SC261	Henderson (81CRS9129)	No Error
STATE v. COX No. 828SC259	Wayne (81CRS8925) (81CRS8926)	No Error
STATE v. DAVILA No. 8224SC135	Watauga (81CRS2578) (81CRS2579) (81CRS2580)	No Error
STATE v. HOBBS No. 8225SC270	Catawba (81CRS9988) (81CRS9989) (81CRS9990) (81CRS9991)	No Error
STATE v. PASCHAL No. 8220SC155	Moore (81CRS2825)	No Error
STATE v. SPINKS No. 8219SC99	Randolph (81CRS736) (81CRS737)	No Error

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION; AND CAROLINA POWER AND LIGHT COMPANY (APPLICANT); RUFUS L. EDMISTEN, ATTORNEY GENERAL; EXECUTIVE AGENCIES OF THE UNITED STATES GOVERNMENT AND UNION CARBIDE CORPORATION v. NORTH CAROLINA TEXTILE MANUFACTURERS ASSOCIATION, INC.; THE PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; AND KUDZU ALLIANCE

No. 8110UC698

(Filed 2 November 1982)

1. Utilities Commission § 24— incorporating increase allowed in fuel cost adjustment proceeding into final rate case—no error

It was not reversible error for the Utilities Commission to incorporate the increase it allowed in a fuel cost adjustment proceeding in the final order in the general rate proceeding since, under the statutory procedure provided, there is no reason to reconsider the same fuel cost in a general rate case, although questions concerning efficiency of operations, heat rate, and plant availability should be considered in a general rate case. G.S. 62-134(e), G.S. 62-130(a), and G.S. 62-92(e).

2. Utilities Commission § 38— matching expenses with revenues associated with new coal fired units

The Court's examination of the evidence led to the conclusion that a real effort was made by the Commission to properly match all items in a cost of service study associated with a new coal fired unit by considering the revenues which the new unit would produce with the increased expenses caused by the unit.

3. Utilities Commission § 24— reasonableness of CWIP expenditures

There is nothing in either G.S. 62-133(b)(1) or G.S. 62-133(c) which requires a finding that expenditures for construction work in progress, CWIP, will be used and useful within a reasonable time. The only expenditure for CWIP which can properly be included in rate base are *reasonable* expenditures, and the Commission made findings that the amount included for CWIP was reasonable and the findings were amply supported by the evidence.

4. Utilities Commission § 24— CWIP statute constitutional

The statute dealing with CWIP, the 1977 CWIP amendment [G.S. 62-133 (b)(1) and (c)] is constitutional.

5. Utilities Commission § 39— ratemaking—normalization of income tax effect of certain expenses—proper

The Commission's findings and conclusions that normalization, rather than the alternative ratemaking policy of flow-through, of the income tax effect of certain expenses is proper was supported by competent, material and substantial evidence and was therefore conclusive and binding on the Court.

6. Utilities Commission § 24- "peak and average" methodology for allocation of production facility costs proper

The Commission's adoption of the "peak and average" methodology for the allocation of production facility costs was not error. The rate allocation difference between high and low factor customers are not arbitrary but are reasonable and based upon actual system load conditions.

Judge HEDRICK dissenting in part.

APPEALS by intervenors, The Public Staff, Kudzu Alliance, and North Carolina Textile Manufacturers Association, Inc., from final order of the Utilities Commission entered 15 January 1981. Heard in the Court of Appeals 8 March 1982.

On 9 May 1980, Carolina Power and Light Company (hereinafter CP&L) filed with the Utilities Commission its application for an increase in its rates and charges to the extent of $91,269,000 per year. Should the requested increase be granted, it would represent a return on equity of 15.0%, a return the Company alleged to be needed to finance its construction programs and efficiently provide electric power sufficient to meet the needs of its customers. The application alleged, in essence, that increases were necessary to enable the Company to earn a fair and reasonable rate of return on equity in order to attract the large amounts of new capital necessary to enable the Company to meet its electric responsibilities; to enable the Company to recover the cost of doing business and the offset for the impact of inflation; to enable the Company to begin to recover the actual expenses associated with the new coal fired unit, Roxboro No. 4; and to enable the Company to recover the expenses associated with construction work in progress and other plant additions, including the capital costs of Roxboro 4. With its application CP&L filed its proposed rates and tariffs and also written testimony and exhibits supporting the application.

On 5 June 1980, the Commission entered an order declaring that the proceedings constituted a general rate case pursuant to G.S. 62-137 and designated it as Docket E-2, Sub 391, setting the test period as the twelve-month period ending 30 September 1979; providing for public notice and intervention; suspending the proposed rates; setting the matter for hearing beginning on 22 September 1980 and requiring all intervenors to file their testimony at least 20 days prior to the hearing.

Orders were entered, on petitions duly filed, allowing North Carolina Textile Manufacturers Association, Inc. (hereinafter TMA); United States of America, Department of the Navy; the Kudzu Alliance; and Union Carbide Corporation to intervene. The Public Staff and the Attorney General filed notice of intervention pursuant to G.S. 62-15(d) and G.S. 62-20. All intervenors filed prehearing testimony and exhibits in response to the directions of the 5 June order.

Hearings began on 22 September and continued through 15 October 1980. During that period, and on 26 September 1980, CP&L filed an application for rate increases for the period from December 1980 through March 1981 to reflect increases in fuel costs incurred from May through August 1980. This fuel adjustment proceeding was designated as Docket No. E-2, Sub 402. Hearing was set for 13 October. TMA and the Public Staff intervened in that proceeding, also.

On 8 October 1980, TMA moved in both proceedings that the fuel cost adjustment proceeding and the general rate case be consolidated and the test period for the consolidated matters be designated as the twelve months ending on 31 August 1980. The Commission, on 10 October, denied the motion for consolidation but did order that the record in the fuel adjustment hearing be incorporated in the general rate proceeding. On 24 October, the Commission entered its order in the fuel adjustment hearing. TMA and the Public Staff appealed. The appeal in that case (Docket No. E-2, Sub 402, Court of Appeals No. 8110UC392) was consolidated with this appeal for oral argument. Opinion by Hedrick, Judge, in No. 8110UC392 was filed 29 July 1982.

On 8 December 1980, the Commission filed its Notice of Decision and Order allowing CP&L a rate increase of $71,811,000 per year and ordering CP&L to file within three days new rate schedules reflecting this increase. CP&L complied, and on 11 December, the Commission entered an order approving these new rates and allowing them to be put into effect. Final Order Granting Partial Increase in Rates and Charges was filed 15 January 1981. This order affirmed the increase set out in the Notice of Decision and contained extensive findings of fact and conclusions of law. From the entry of this order, TMA, the Public Staff, and the Kudzu Alliance appealed assigning error to certain of the findings and conclusions.

Thomas R. Eller, Jr., for appellant North Carolina Textile Manufacturers Association, Inc.

Thomas S. Erwin for appellant Kudzu Alliance.

Robert F. Page, Chief Counsel, and Karen E. Long for appellant, The Public Staff.

Hunton and Williams, by Robert C. Howison, Jr., and Edward S. Finley, Jr., and Richard E. Jones and Robert S. Gillam, for appellee, Carolina Power and Light Company.

MORRIS, Chief Judge.

All three of the appellants have excepted to the failure of the Commission to combine the fuel adjustment clause proceeding (Docket No. E-2, Sub 402, our No. 8110UC392) with the general rate case, and all three have assigned this as error and have brought the exceptions forward and argued them. They argue here, as they did in No. 8110UC392, that to allow an increase in rates based on increased fuel costs in an expedited proceeding under G.S. 62-134(e) where there is no provision for inquiry into the reasonableness of the increased fuel costs rather than in a general rate case wherein inquires into the reasonableness of CP&L's management practices are required constitutes reversible error. Intervenors also argue here, as they did in 8110UC392, that it was reversible error for the Commission to incorporate the increase allowed in Docket No. E-2, Sub 402 resulting from increased fuel costs in the final order in this case because to do so precluded any inquiry into the reasonableness of the increased fuel costs even in the general rate case.

The first of these positions was answered adversely to intervenors, and we affirm that position here without further discussion. The second position was not answered because it was not necessary for decision. See *State of North Carolina ex rel. Utilities Comm., et al v. Public Staff—North Carolina Utilities Comm., et al*, 58 N.C. App. 480, 293 S.E. 2d 880 (1982).

[1] The Commission is bound by law to recognize the right of CP&L to avail itself of the mechanism provided by the legislature in G.S. 62-134(e) and apply for an increase in rates to offset the increased cost of fuel in an expedited proceeding totally separate

and apart from a general rate case. See *State ex rel. Utilities Com'r v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 166 S.E. 2d 663 (1969). In this proceeding the same opportunity exists for intervention as exists in a general rate case. Indeed, both TMA and the Public Staff intervened in the fuel cost adjustment proceeding. They had the opportunity to present whatever testimony and exhibits they wished to counter CP&L's evidence of increased fuel costs. The statute, G.S. 62-134(e), requires the Commission to investigate an application filed pursuant to it, requires the Commission to hold a public hearing, and provides that the Commission's order shall be based upon the record adduced at the hearing, "such record to include all pertinent information available to the Commission at the time of the hearing." The action of the Commission is subject to appellate review. Under the statutory procedure provided, we perceive no reason to reconsider the same fuel costs in a general rate case, although questions concerning efficiency of operations, heat rate, and plant availability should, of course, be considered in a general rate case. That the Commission's action in incorporating the increase allowed in Docket No. E-2, Sub 402, in the order in this case was authorized by statute is demonstrated by the Supreme Court's observation in *Utilities Comm. v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1976), an appeal by the Attorney General from the allowance by the Commission of the imposition by Duke Power Company of a temporary surcharge necessitated by the sharp increase in coal costs occurring since the end of the year used in the then pending rate case. Justice Lake said:

> G.S. 62-134(e) did not roll back electric power rates. On the contrary, *it authorized the Commission, after hearing, to incorporate into the basic rates of the utility,* chargeable on and after 1 September 1975, *an increase determined by the then cost of coal.*

Id. at 466. We find no error in this portion of the Commission's order.

The Utilities Commission was, of course, created by the General Assembly. In fixing rates to be charged by utilities, it exercises a legislative function and has no authority other than that given to it by the Legislature. *Utilities Comm. v. Edmisten*, supra, and cases there cited. G.S. 62-130(a) places upon the Com-

mission the burden of making, fixing, establishing, or allowing "just and reasonable rates for all public utilities subject to its jurisdiction," and G.S. 62-94(e) provides that "[u]pon any appeal, the rates fixed . . . by the Commission under the provisions of this Chapter shall be prima facie just and reasonable." The Commission as fact finder, determines the credibility of the evidence, and its findings of fact "which are supported by competent, material and substantial evidence, are conclusive", and we are bound by them. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 336, 189 S.E. 2d 705, 717 (1972). This Court may not substitute its judgment, either with respect to factual disputes or policy disagreements, for that of the Commission. See *Utilities Comm. v. Edmisten*, 291 N.C. 424, 230 S.E. 2d 647 (1976); *State ex rel. Duke Power Co.*, 285 N.C. 377, 206 S.E. 2d 269 (1974); *State ex rel. Utilities Comm. v. City of Durham*, 282 N.C. 308, 193 S.E. 2d 95 (1972).

> The burden of showing the impropriety of rates established by the Commission lies with the party alleging such error. *See Utilities Commission v. Light Co.* and *Utilities Commission v. Carolinas Committee*, 250 N.C. 421, 109 S.E. 2d 253 (1959). The rate order of the Commission will be affirmed if upon consideration of the whole record we find that the Commission's decision is not affected by error of law and the facts found by the Commission are supported by competent, material and substantial evidence, taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn. *See Utilities Comm. v. Springdale Estates Assoc.*, 46 N.C. App. 488, 265 S.E. 2d 647 (1980).

Utilities Commission v. Duke Power Co., 305 N.C. 1, 10, 287 S.E. 2d 786, 792 (1982).

Adhering to those fundamental legal principles in applying the statutory provisions to the issues brought forward in this appeal, we are unable to find reversible error.

[2] The Commission included the Roxboro Unit No. 4 at $123,565,000. CP&L's evidence placed cost of construction at $204,619,000. The Public Staff's witness Lam recommended that the unit be valued at $194,447,880. His value was reduced because, in his opinion, if the higher value were used, the plant should be able to produce 720 MW reliably, whereas the evidence is that it is a 650 MW plant. Appellant TMA concedes in its brief

that "the Commission properly allowed an adjustment to CP&L's rate base in the amount of $123,565,000" for the increase in plant cost caused by Roxboro Unit No. 4 and further that the Commission made adjustments to increase depreciation expense, depreciation reserve, and operating expenses associated with Roxboro Unit No. 4. Intervenor appellants argue, however, that the Commission was required to and did not make matching adjustments for revenue increase, decreased fuel expenses resulting from the plant's greater efficiency, lowered operating and maintenance expenses resulting from Roxboro No. 4's displacement of older plants with higher maintenance costs.

As is usually the case in proceedings of this type, the evidence is, of course, voluminous. The record and briefs comprise more than 700 pages. Our examination of the evidence leads us to the conclusion that a real effort was made properly to match all items in the cost of service study. There was no specific evidence with respect to how much, if any, the revenues of the Company would be increased by reason of inclusion of Roxboro Unit No. 4. There was testimony that the plant would not produce new customers. While Intervenor's expert witnesses seemed to agree that matching should apply to Roxboro No. 4, there was simply no specific evidence with respect to figures to rebut the evidence of CP&L. With respect to the decreased fuel cost, obviously under the statutory scheme of rate setting in effect at the time, any savings in fuel cost would be taken into account in a fuel cost adjustment proceeding.

Kudzu and TMA contend that the Commission made insufficient findings with respect to the Construction Work in Progress (CWIP) included in rate base. TMA argues, in the alternative, that if CWIP was properly included in rate base in this case, the 1977 CWIP Amendment [G.S. 62-133(b)(1) and (c)] is unconstitutional because so lacking in standards as to be in excess of the limitations on legislative power contained in the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19 of the Constitution of North Carolina.

[3] With respect to the first argument (Kudzu assignments of error 1, 2, 3, 4, 5 and 6 and TMA's assignment of error 2), appellants contend that the 1977 revision to G.S. 62-133 requires detailed,

specific findings by the Commission with respect to expenditures as to whether the expenditures for CWIP were "reasonable and prudent" and that they were made for a plant which the Commission expressly finds will be "used and useful within a reasonable period of time after the test period."

G.S. 62-133(b)(1) provides that, in fixing rates which will be fair both to the public utility and the consumer, the Commission shall

> Ascertain the reasonable original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense plus the reasonable original cost of investment in plant under construction (construction work in progress). In ascertaining the cost of the public utility's property, construction work in progress as of the effective date of this subsection shall be excluded until such plant comes into service but reasonable and prudent expenditures for construction work in progress after the effective date of this subsection shall be included subject to the provisions of subparagraph (b)(5) of this section.

G.S. 62-133(c) provides:

> The original cost of the public utility's property, including its construction work in progress, shall be determined as of the end of the test period used in the hearing and the probable future revenues and expenses shall be based on the plant and equipment in operation at that time. The test period shall consist of 12 months' historical operating experience prior to the date the rates are proposed to become effective, but the Commission shall consider such relevant, material and competent evidence as may be offered by any party to the proceeding tending to show actual changes in costs, revenues or the cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, including its construction work in progress, which is based upon circumstances and events occurring up to the time the hearing is closed.

We find nothing in either section which requires a finding that the CWIP will be used and useful within a reasonable time. The statute clearly requires that the Commission establish the rate based by ascertaining "the *reasonable* original cost of the public utility's property used and useful, or to be used and useful within a reasonable time after the test period . . . plus the *reasonable* original cost of investment in plant under construction (construction work in progress)."

There can be no question but the Legislature mandates that the only expenditures for CWIP which can properly be included in rate base are *reasonable* expenditures. The Commission so found in Finding No. 8:

> That the reasonable original cost of CP&L's property used and useful, or to be used and useful within a reasonable time after the test period, in providing the service rendered to the public within this State, less that portion of the cost which has been consumed by previous use recovered by depreciation expense, plus the reasonable original cost of investment in plant under construction (construction work in progress or CWIP) is $1,544,143,000.

and again in Finding No. 10:

> That CP&L's reasonable original cost rate base is $1,630,739,000. This amount consists of net utility plant in service and construction work in progress of $1,544,143,000, plus a reasonable allowance for working capital and deferred debits and credits of $86,596,000.

Our review of the record leads us to the conclusion that the finding is amply supported by the evidence. Without going into great detail we simply note a few examples which we think will suffice to demonstrate that the finding is supported by the evidence. Mr. Smith, on cross examination by TMA, testified from Exhibit H, filed with the Commission, with respect to the $213,792,201 reflected in the exhibit as CWIP. He testified further that an inventory by groups of property could be supplied. Counsel for TMA responded that he wasn't asking that that information be supplied. There was testimony from both Mr. Smith and Mr. Bradshaw that the Public Staff of the Utilities Commission had audited the amount included. There was testimony the

figure included was based on expenditures from October 1979 through March 1980 on certain generating units; that CP&L planned to phase in the CWIP in the rate base over a period of time and the amount included in this filing did not include all that to which the Company was entitled; that $81,531,308 of the amount had previously been approved; the Company files quarterly reports with the Commission which are analyses of Construction Work in Progress; the figures have been completely verified and include the four generating units at the Harris Plant and the two generating units at the Mayo Plant; the analyses submitted to the Commission quarterly on construction work in progress cover literally hundreds of items of construction work in progress. We note also that the Public Staff's figure with respect to CWIP was the same as the Company's, adjusted only for jurisdictional allocation. It is elementary law in utility matters that the rates fixed by the Commission are deemed just and reasonable. The Legislature has so provided. G.S. 62-132, G.S. 62-94(e). "The burden of showing the impropriety of rates established by the Commission lies with the party alleging such discrimination." *Utilities Comm. v. Edmisten*, 291 N.C. 424, 428, 230 S.E. 2d 647, 650 (1976). To require the Company to introduce evidence with respect to every item comprising CWIP would be an exercise in futility. The burden of proof would be unduly and unnecessarily burdensome, and the ratemaking process would become even more time consuming and difficult of administration. In *Utilities Comm. v. Telephone Co.*, 12 N.C. App. 598, 184 S.E. 2d 526 (1971), *modified and affirmed* 281 N.C. 318, 189 S.E. 2d 705 (1972), we said:

> Where the property has been purchased from a stranger, ordinarily the price actually paid by the utility would be considered its reasonable cost, though it would not necessarily be so. Even in such a case the Commission may find the management of the utility acted improvidently or carelessly and paid a price greater than reasonable.

Id. at 12 N.C. App. at 606, 189 S.E. 2d at 531. *See also West Ohio Gas Co. v. Ohio Public Utilities Commission*, 294 U.S. 63, 55 S.Ct. 316, 79 L.Ed. 761 (1935).

There has been no contention here that the Company acted improvidently or carelessly. Nor does the record before us reflect

any evidence at all that the amount shown for CWIP was in any manner unreasonable. *See Alabama Public Service Com'n. v. Southern Bell Telephone & Telegraph Co.*, 253 Ala. 1, 42 So. 2d 655 (1949), where the Court said the Commission had discretion to disallow expenses actually incurred only where affirmative evidence is offered challenging the reasonableness of the operating expenses incurred. The Commission's finding that the amount included for CWIP was reasonable is amply supported by the evidence.

[4] Nor do we find merit in the argument that the statute is unconstitutional. In *Utilities Comm. v. Edmisten, Attorney General*, 294 N.C. 598, 610, 242 S.E. 2d 862, 870 (1978), the Court said:

> Stimulation of the economy is an essential public and governmental purpose and the manner in which this purpose is to be accomplished is, within constitutional limits, exclusively a legislative decision. *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 159 S.E. 2d 745 (1968). The authority to set rates to be charged by a public utility for its services rests in the Legislature and is delegated by it to the Utilities Commission under sufficient rules and standards to guide the Commission in exercising this power. *Utilities Commission v. State*, 239 N.C. 333, 80 S.E. 2d 133 (1954).

See also Utilities Comm. v. Intervenor Residents, 52 N.C. App. 222, 278 S.E. 2d 761, *rev'd on other grounds*, 305 N.C. 62 (1981). The 1977 amendment including CWIP in rate base did not lessen the rules and standards. Reasonableness remains the standard.

[5] Appellant Public Staff argues that the Commission erred by failing to adjust properly CP&L's accumulated deferred federal income tax balance in light of the decrease in the federal corporate income tax rate. The tax rate was decreased from 48 percent to 46 percent after the end of the 12-month test period but prior to the hearings in this matter. The Public Staff contends that CP&L's continuation of its use of a normalization policy in which future taxes will be credited for book purposes at the 48 percent rate, even though a different rate may be in effect at that time, is discriminatory because the ratepayers who benefit from the reduction in tax rate may not be the ratepayers who existed at the time of the deferral. The Public Staff recommends adoption

of a flow-through policy for income tax expense, rather than the normalization policy utilized by CP&L.

Flow-through and normalization are alternative ratemaking policies for determining the cost component of a regulated utility's cost of service. Under flow-through, ratepayers realize the tax benefits of expenses at the time those expenses are used as tax deductions by the utility. Normalization defers this tax benefit until the expense is recovered through the rates.

The Public Staff presented the expert testimony of two accountants in support of their recommendation that the Commission employ flow-through. Their testimony indicated that CP&L will continue to receive a tax reduction every year for items which are capitalized for book purposes but are expensed for tax purposes, resulting in an ongoing tax savings. Normalization results in higher rates to consumers than would exist under flow-through. The Public Staff argued that the tax effect of an expense should be recognized in the same period as the expense itself to achieve equity between present and future ratepayers.

CP&L's accounting experts rebutted this testimony by stating that over the life of a transaction, the total amount of the transaction recognized for ratemaking will equal the total amount recognized for tax purposes. CP&L argued that over the life of an asset which generates deferrals, the total revenue requirement is greater under flow-through than under normalization. When viewed on a present-worth basis, the revenue requirement between normalization and flow-through is virtually equal before any allowance is made for the adverse impact flow-through has on such factors as debt coverage and cash flow. Since plant items which generate deferrals are used to provide service over a useful life period, normalization properly allocates the annual benefit of the deferral to the consumer using the service which created the deferral. CP&L witness Utley testified that Congress, the accounting profession and many federal administrative agencies endorse normalization accounting.

After hearing the testimony on this issue, the Commission found as a fact and concluded as a matter of law that normalization of the income tax effect of certain expenses is proper. The Commission found that the arguments in favor of normalization "clearly outweighed the arguments of the Public Staff in support

of flow-through." The Commission summarized CP&L's compelling arguments as follows:

(1) Normalization as opposed to flow-through results in a better matching of revenues and costs.

(2) Normalization as opposed to flow-through results in the most equitable allocation of costs and benefits among present and future customers.

(3) Normalization as opposed to flow-through materially improves the Company's financial position with respect to cash flow.

(4) Normalization as opposed to flow-through materially improves key financial ratios (e.g., fixed charge coverage rates, effective tax rates, etc.) used by the investment community in determining the rental rate its members will charge for the use of its capital—the more favorable the ratios the lower the capital costs.

(5) Normalization as opposed to flow-through results in more informative disclosure in financial reporting with respect to an entity's potential future income tax liability.

(6) Normalization as opposed to flow-through when limiting one's considerations solely to a present worth analysis (i.e., without considering advantages of normalization), when based upon realistic assumptions, results in economic advantages to both the Company and its customers.

Based upon our review of the record, we hold that the findings of fact made by the Commission on this issue (finding of fact No. 6) was supported by competent, material and substantial evidence and is, therefore, conclusive and binding on this Court. *Utilities Comm. v. Telephone Co.*, supra. A finding of fact cannot be reversed or modified by a reviewing court merely because the court would have reached a different finding upon the evidence. *Id.* We, therefore, overrule this assignment of error.

[6] CP&L recommended that a "peak and average" methodology be adopted, and this was accepted by the Commission, as its final order reflects. Appellants TMA and Kudzu assign as error the Commission's adoption of the "peak and average" methodology for the allocation of production facility costs. The allocation proc-

ess involves a determination of which jurisdictions and which classes of customers are responsible for particular portions of costs of providing service. CP&L, the Public Staff, and TMA supported abandonment of the traditional one-hour summer coincident peak allocation formula, which has been used for the past ten years to separate plant, or demand-related, costs between the service jurisdictions of South Carolina and North Carolina. At the hearing expert witnesses proposed three different methods for allocation of demand-related costs associated with production facilities: CP&L's peak and average method; appellant Public Staff's peak and base method; and appellant TMA's use of the average of summer and winter one-hour coincident peaks, which was endorsed by appellant Kudzu.[1]

In its order the Commission described the extensive testimony of the expert witnesses concerning demand allocation and evaluated the advantages and disadvantages of each proposed method. While recognizing that each method had merit, the Commission concluded that "the peak and average method for making cost of service allocation is the most appropriate method for use in this proceeding." Based upon our review of the testimony contained in the record, we find that the finding of fact on this issue is fully supported by competent, material and substantial evidence and is, therefore, conclusive. *Utilities Comm. v. Telephone Co.*, supra.

The peak and average method separates demand-related costs to retail customers into two categories: one allocated according to demand at the time of the system peak and one allocated on the basis of respective cost responsibilities for the average annual demand as determined by the system load factor. These two portions reflect peak and average production costs and are based upon actual system load conditions. CP&L's expert witness Nevil stated that this method promotes cost-based rates by better matching cost of production plant with each jurisdiction's or class of customers' use of specific types of plant. The peak and base method recommended by the Public Staff is very similar to the peak and average method. The only difference is the portion of

1. Intervenor Federal Government agencies, not an appellant in this appeal, supported continuation of the one-hour summer coincident peak method.

the investment to be allocated by average demand and the coincident peak.

TMA advocated the use of a summer-winter average peak demand method in which the production costs are allocated in proportion to the usage of each class of customers at the time of the seasonal peaks. The Commission stated that this proposed method differs little from the traditional one-hour summer coincident peak formula and suffers some of the same weaknesses. Both methods assign a lesser portion of demand costs to general service customers than do either peak and average or peak and base methods.

The Commission concluded that:

> . . . the CP [coincident peak] allocation method no longer properly allocates demand costs to the jurisdictions or customer classes creating the need for the type of generating facilities actually being constructed today. There is little difference between the Company's P&A [peak and average] and the Public Staff's P&B [peak and base] method but, conceptually, the P&A method better recognizes the use of all base load production facilities through the use of the system load factor to determine the portion of the investment to be allocated by average demand, as opposed to the P&B method which uses the relationship of minimum weekday demands to the coincident peak demand. The minimum weekday demand is of short duration and is much less than the total base load capacity available, whereas the load factor better reflects the average use of production facilities—the use for which they were constructed—and therefore is an appropriate method of allocating the majority of the plant costs.

Appellants argue that the peak and average method unfairly benefits customers with lower load factors and penalizes customers with higher load factors. G.S. 62-140 prohibits public utilities from making or granting any unreasonable preference or advantage to any customer and from establishing "any unreasonable difference as to rates or services either as between localities or as between classes of service." *Utilities Com. v. Mead Corp.*, 238 N.C. 451, 78 S.E. 2d 290 (1953).

The evidence indicates that the use of the peak and average method would increase the cost of electricity for high load factor

customers. However, the evidence also shows that the method balances the average usage of production facilities throughout the year with related cost. Use of this method recognizes that since higher load customers receive the continuing benefit of energy savings from more efficient base load facilities, they should also share in the increased capital costs related to those facilities. Classifications of customers and differences in rates must be "based on reasonable differences in conditions and . . . the variance in charges [must bear] a reasonable proportion to the variance in conditions." *Utilities Comm. v. Edmisten, Attorney General*, 29 N.C. App. 428, 440, 225 S.E. 2d 101, 109, *aff'd*, 291 N.C. 424, 230 S.E. 2d 647 (1976). From our review of the record, we find that the rate allocation differences between high and low load factor customers are not arbitrary but are reasonable and based upon actual system load conditions. We, therefore, overrule this assignment of error.

The order of the Commission is, in all respects, affirmed.

Judge VAUGHN concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting in part.

It appears from the order that the Commission derived CP&L's cost of fuel in this general rate case by using the fuel cost found reasonable by the Commission in a separate fuel clause proceeding. The Commission accomplished this result by consolidating the record in Docket No. E-2, Sub. 402, the fuel clause proceeding, into the record of this case. As we held in *Utilities Comm. v. Power Co.*, 48 N.C. App. 453, 269 S.E. 2d 657 (1980), *cert. denied*, 301 N.C. 531, 273 S.E. 2d 462 (1980), a fuel clause proceeding is an expedited one where the Commission may consider only the actual cost of fuel used. In that same opinion, we emphasized that in a general rate case, it is not only appropriate but necessary for the Commission to consider overall system efficiency in deriving the reasonable cost of fuel during the test year. The Commission used the fuel clause short-cut record to find the reasonable cost of fuel in this general rate case. In doing so, the Commission erred. The Commission's findings of fact as to

the reasonable cost of fuel during the test year is not, therefore, supported by the evidence *in this record*, and I, therefore, am of the opinion that this matter must be remanded for further hearings to determine CP&L's reasonable cost of fuel for the test year in this general rate case.

BOARD OF TRANSPORTATION v. JAMES T. BRYANT, J. HOWARD CLARK, JAMES F. KIRKPATRICK, LAWRENCE Z. CROCKETT AND F. P. BODENHEIMER, JR., TRADING AND DOING BUSINESS AS AMERICAN INVESTMENT COMPANY; O. T. NARF, TRUSTEE; FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION; L. P. McLENDON, JR., TRUSTEE; JAY F. ZOOK, INC., AND HOWARD JOHNSON COMPANY, LICENSOR

No. 8118SC1200

(Filed 2 November 1982)

1. **Eminent Domain § 2.5; Highways and Cartways § 5.2— right-of-way agreement—no right of direct access to ramp**

A right-of-way agreement providing that defendants' predecessor and her heirs and assigns shall have no right of access to an interstate highway constructed on said right-of-way except by way of ramps constructed at a survey station which is the center line of the intersection of the interstate highway and another highway did not create a right of direct access to an adjacent ramp leading to the interstate highway but required only an indirect access to the ramp. Therefore, defendants were not entitled to compensation because of the elimination of an intersection of a road abutting their property with the ramp where their property was provided with reasonable and adequate indirect access to the ramp.

2. **Eminent Domain §§ 2.5, 6.4— right-of-way agreement—exclusion of attorney's opinion as to effect**

The trial court in an eminent domain proceeding properly excluded an attorney's expert testimony with respect to the chain of title to defendants' property and the effect on defendants' chain of title of a right-of-way agreement executed by defendants' predecessor in title since (1) title to defendants' property was not in issue and (2) the construction and legal effect of the right-of-way agreement was a matter of law for the court.

3. **Eminent Domain § 2.2; Highways and Cartways § 5.1— interference with access by highway construction—no right to compensation**

In a proceeding to condemn land for highway purposes, defendant landowners were not entitled to compensation for "unreasonable" interference with access to their remaining property because some impairment of access occurred during construction of the highway where access to defendants' property was not totally cut off for any period of time and defendants had reasonable

and adequate access to their property by abutting streets or highways during the construction period.

APPEAL by defendants from *Lane, Judge.* Order entered 8 September 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 September 1982.

The Board of Transportation instituted this eminent domain proceeding, pursuant to G.S. 136-103, to condemn for highway use certain property of defendants located in the northwest quadrant of the interchange of High Point Road with Interstate Highway 40 (hereinafter referred to as I-40) in Greensboro. Defendants own two contiguous tracts of land, totaling approximately 4.39 acres, on which they have constructed a Howard Johnson motel. The westerly tract was originally owned by Mrs. Lillie York Lauder who entered into a right-of-way agreement with the State Highway and Public Works Commission on 26 June 1956. The Lauder right-of-way agreement states:

> It is further understood and agreed that the undersigned and their heirs and assigns shall have no right of access to the highway constructed on said right-of-way except at the following survey stations: By way of ramps constructed in connection with grade separation at Survey Station 372.05.96.

The Board and defendants stipulated that Survey Station 372.05.96 "is the point at which the center line of Interstate Highway 40 passes over the center line of High Point Road."

Before the filing of this action, defendants' property abutted upon High Point Road, a portion of a ramp leading from travel lanes of High Point Road to westbound travel lanes of I-40, and Pinecroft Road. Pinecroft Road intersected the ramp slightly west of the ramp intersection with High Point Road. In making highway improvements, the Board eliminated this Pinecroft Road-ramp intersection and constructed a cul-de-sac of Pinecroft Road a short distance northwest of defendants' property and a new road abutting the northeastern property line of defendants' property and connecting Pinecroft Road with High Point Road. Construction of the new road necessitated a taking of a new right-of-way along High Point Road of approximately 0.07 acres and two rectangular areas of drainage easement.

As a result of these changes, defendants no longer have access to the ramp leading to and from westbound lanes of I-40 by way of Pinecroft Road, along the southwestern boundary of defendants' property. However, defendants continue to have access to the ramp by way of High Point Road and the newly constructed road, along the northeastern boundary of defendants' remaining property.

During construction of these highway improvements, defendants' access to their remaining property was impaired, but the parties disagree as to the extent of this impairment. Defendants contend that although their access was never totally cut off, it was unreasonably impaired and they should, therefore, be compensated, the compensation to be determined either by submission of a separate issue or as an element of damages under the "before and after" measure prescribed by G.S. 136-112(1). Defendants also argue that because the Lauder right-of-way agreement provided for direct access to the ramp, they should be compensated for the dead ending of Pinecroft Road.

After the Board's complaint was filed, a hearing pursuant to G.S. 136-108 was held to determine all issues except the issue of damages. Defendants sought to introduce Attorney Charles Melvin's expert testimony regarding the chain of title of defendants' property and the effect on title of the Lauder right-of-way agreement. The court refused to admit this testimony; found, as a matter of law, that defendants were not entitled to compensation for the temporary impairment of access during construction, for the dead ending and cul-de-sac of Pinecroft Road, or for the Board's alleged failure to comply with access provisions of the Lauder right-of-way agreement; and ordered the case calendared for trial by jury on the issue of damages. Defendants appealed.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for petitioner appellee.

Block, Meyland and Lloyd, by Michael R. Pendergraft and A. L. Meyland, for defendant appellants.

MORRIS, Chief Judge.

[1] The first question for determination is whether the trial court erred in concluding that the Lauder right-of-way agreement

did not reserve for defendants any right of direct access to the ramps leading to I-40 and reserved only abutters' rights of access to Pinecroft Road.

A right-of-way agreement similar to the Lauder right-of-way agreement was dealt with by the Supreme Court in *Abdalla v. Highway Commission*, 261 N.C. 114, 134 S.E. 2d 81 (1964). The Abdalla agreement provided that the grantors "and heirs and assigns shall have no right of access to the highway constructed on said right-of-way except by way of service roads and ramps built in connection with this project in the vicinity of survey station 0 + 00." The plaintiffs did not argue that their access was denied by the Highway Commission. However, they did contend that they should be allowed to designate the route of access. Plaintiffs admitted their access to the highway itself was indirect because they were limited to access "by way of service roads and ramps", but plaintiffs believed they were entitled to direct access to the service roads and ramp on the right-of-way near and parallel to their boundary. The court disagreed, concluding that the right-of-way agreement did not reserve to plaintiffs a right of direct access to the ramp adjacent to remaining property, because a ramp is not constructed for the benefit of abutting property owners; rather, it is designed to connect two heavily travelled highways, where one passes over the other. "For all practical purposes it is a part of the main highway within the meaning of the word 'highway' as set out in the 'Right of Way Agreement.'" *Id.* at 120, 134 S.E. 2d at 85. It was obvious from inclusion of the words "by way of service roads or ramps" that the parties did not contemplate maintaining direct access to the highway. Thus, the Court held that plaintiffs were not entitled to direct access to the ramp.

The facts in *Abdalla* are similar to the facts of this case. First, both right-of-way agreements were executed prior to the enactment of G.S. 136-89.52 which governs the rights of owners of property abutting new highway projects. Thus, neither agreement is controlled by the statute. Second, *Abdalla* involved intersection of a service road with a ramp while this case involves intersection of Pinecroft Road with a ramp. Third, the trial court like the Abdalla court held that the ramp was considered to be part of the highway. Finally, the language of both right-of-way agreements indicated the parties intended to maintain indirect ac-

cess to the highway and not direct access. The right-of-way agreement in this case stated that access to the highway was "by way of ramps", indicating direct access to the highway was not contemplated. Since the ramp is part of the highway, only indirect access to the ramp is required. The trial court correctly determined that defendants have indirect access to I-40 and to the ramp by way of the newly constructed road abutting defendant's property and High Point Road. Thus, the requirements of the right-of-way agreement are satisfied.

Defendants are not entitled to compensation for construction of the cul-de-sac of Pinecroft Road, slightly west of defendants' property, because the Board has provided defendants' remaining property with reasonable and adequate access by the new road abutting defendants' property on the north which connects Pinecroft Road with High Point Road and its interchange with I-40. As long as a landowner is afforded reasonable access to an abutting street or highway, he is not entitled to compensation. Mere inconvenience resulting from circuity of travel is not compensable. *Abdalla v. Highway Commission*, supra; *Board of Transportation v. Warehouse Corp.*, 44 N.C. App. 81, 260 S.E. 2d 696 (1979), *rev'd on other grounds*, 300 N.C. 700, 268 S.E. 2d 180 (1980). Because we agree that the Lauder right-of-way agreement reserved for defendants only a right of indirect access to the ramp leading to I-40 and abutters' rights of access to Pinecroft Road, defendants' first assignment of error is overruled.

[2] Defendants next argue by their fifth assignment of error that the trial court erred in excluding Attorney Charles Melvin's expert testimony with respect to the chain of title to defendants' property and the effect on title of the Lauder right-of-way agreement. We disagree.

First, testimony regarding the chain of title to defendants' property is irrelevant because title to defendants' property was not in issue. The complaint alleged defendants had title, the answer admits the allegation, and the trial court found defendants own the property in question.

Second, the very issue before the trial court was the construction and interpretation of access rights provided by the Lauder right-of-way agreement. To allow Attorney Melvin to relate his opinion of the proper construction and interpretation of

the agreement would clearly invade the province of the court. Construction of an agreement is a matter of law for the court where the agreement is plain and unambiguous. *Kent Corp. v. Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1967); *Olive v. Williams*, 42 N.C. App. 380, 257 S.E. 2d 90 (1979). The court, as was its duty to do, determined the legal effect of the agreement. Therefore, the witness's proffered expert testimony was properly excluded by the court.

[3] Defendants' final argument concerns the court's failure to admit evidence as to whether, following condemnation of a portion of their property, there was unreasonable interference with access to their remaining property during the resulting construction on a public road project. Defendants contend that the court erred in concluding that so long as all access to property abutting a highway is not completely cut off for an appreciable period of time during construction, reconstruction, or maintenance of a public street or highway, there is no right to compensation for unreasonable interference either as a separate issue for the jury or as an element to be considered by the jury in determining the difference between the fair market value of the property before and after the taking.

When only a portion of a tract of land is taken, the measure of damages provision of G.S. 136-112(1) governs. The provision follows:

> (1) Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

In applying this statute, "the fair market value of the remainder immediately after the taking contemplates the project in its completed state and any damage to the remainder due to the user to which the part appropriated may, or probably will be put." *Board of Transportation v. Brown*, 34 N.C. App. 266, 268, 237 S.E. 2d 854, 855 (1977), *aff'd*, 296 N.C. 250, 249 S.E. 2d 803 (1978). This rule of damages provides a landowner compensation only for damages arising from a taking of property and which

flow directly from the use to which the land taken is put. No compensation is awarded for damages which are shared by neighboring property owners and the public and which arise regardless of whether the landowner's property has been condemned. See *Board of Transportation v. Warehouse*, supra. Damages for unreasonable interference with access to defendants' remaining property during construction on a public road project do not arise from the taking of the right-of-way or from the use to which the taken property is put. These damages are noncompensable because they are not unique to defendants. They are shared by defendants in common with the public at large, and the fact that a taking occurs does not make all other damages automatically compensable. *Id.*

The rights of landowners with property abutting a street or highway were set forth in *Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E. 2d 376, *cert. denied*, 382 U.S. 822 (1965), to be as follows:

> The landowner has an easement consisting of the right of reasonable access to the particular highway on which his land abuts. He has no constitutional right to have anyone pass by his premises at all; highways are built and maintained for public necessity, convenience and safety in travel and not for enhancement of property along the route. An abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria.*
> . . .
>
> Where a cul-de-sac is created, or the movement of traffic has been limited to one direction, the landowner's right to use the street is no more restricted than is that of other citizens making use thereof, and the landowner has no constitutional right to have others pass his premises. *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E. 2d 732. The restriction upon the landowner and the restriction upon the public generally, in the use of the street for travel, is no different in kind, but merely in degree. A property owner is not entitled to compensation for mere circuity of travel. Absolute equality of convenience cannot be achieved, and those who purchase

> and occupy property in the proximity of public roads or streets do so with notice that they may be changed as demanded by the public interest.

263 N.C. at 680-81, 140 S.E. 2d at 379-80.

Although some impairment of access to defendants' property occurred during construction, defendants never contended that their access was totally cut off for any period of time. Defendants wanted to introduce evidence "that during the course of construction, the Highway Department by putting up barricades, by changing the flow of traffic, by putting up no turn signs, eliminated us from using the High Point Road as a means of access to the motel." However, this evidence was irrelevant because reasonable and adequate access to defendants' motel was provided during the construction period by way of other abutting streets or highways. As long as reasonable access to abutting property is maintained, no taking of the landowner's right occurs, and no compensation is awarded for temporary obstruction of access to property during construction. The rationale underlying this general rule is that it is impossible to construct, repair, or maintain streets or highways without obstructing access to abutting property in some way, and "the consequent danger of a multiplicity of suits from the determination of which it might be impossible as a practical matter to exclude mere damage to business, have led the courts to reject claims of this character as a matter of public necessity." Nichols' The Law of Eminent Domain, Revised Third Edition § 6.4442[2], p. 6-252.

Having concluded that defendants have no right to compensation for "unreasonable" interference to access, it is unnecessary to determine whether the right to compensation for "unreasonable" interference is a separate issue for the jury or an element to be considered by the jury in determining damages under G.S. 136-112.

The judgment appealed from is

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. JIMMY RAY WARREN

No. 8210SC248

(Filed 2 November 1982)

1. **Searches and Seizures § 15— standing to challenge lawfulness of search**

Defendant had the requisite expectation of privacy so as to challenge the search of a car which was owned by defendant's sister and which was parked in front of defendant's apartment when he was arrested.

2. **Searches and Seizures § 20— search of vehicle—sufficiency of warrant**

The search warrant which was used to search a vehicle was sufficient where (1) the affidavit upon which the warrant was based was not stated in conclusory terms but stated facts to allow the magistrate to make a finding of probable cause independent of the affiant's statements, (2) it was issued by a mutual and detached magistrate, and (3) the warrant described with reasonable certainty the place to be searched and the items to be seized.

3. **Searches and Seizures § 4— chemical tests performed on impounded car—after search warrant returned—results admissible**

Chemical tests performed on a car while it was impounded at a local garage after a search pursuant to a valid warrant, and after the search warrant had been returned, were admissible since (1) sufficient evidence to prove defendant's guilt beyond a reasonable doubt was obtained in the first valid search, and (2) cases have allowed "second looks" at items which have already been seen and they are not considered another search subject to Fourth Amendment proscriptions.

4. **Crime Against Nature § 4— crime against nature as lesser included offense of second-degree sexual offense—indictment as supporting lesser offense**

An indictment which stated that defendant "feloniously commit[ted] a sexual offense . . . by forcing the victim to perform fellatio, in violation of G.S. 14-27.4," supported submission of crime against nature as a lesser included offense of second-degree sexual offense to the jury since definitions of fellatio could be read as requiring some penetration into the mouth or, at least, stimulation orally or by the mouth area.

APPEAL by defendant from *Smith, Judge*. Judgment entered 27 May 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 24 September 1982.

Defendant was indicted by the grand jury for murdering and committing a sexual offense on Byron Clarke on Saturday, 29 November 1980. He pled not guilty.

The State presented thirteen witnesses. Roy Lee Bost testified that he, the defendant, and the defendant's brother

Charles had been drinking on the day in question. They were riding through Raleigh in the defendant's car with Charles driving when they stopped and defendant persuaded Clarke to get in the car. When Clarke got in the car, defendant began rubbing his breast.

They then went to the dead end of Raleigh Beach Road where Clarke gave "samples" of sex to the defendant and Charles. With his gun drawn, defendant ordered Clarke out of the car. After Clarke tried to get a pair of scissors out of his pocketbook, defendant made him get on his knees.

Clarke then performed oral sex on Charles, at the same time begging not to be shot. Bost heard the defendant tell Clarke that he knew too much. The defendant was clicking the gun at Clarke's head while he was on his knees. After the gun discharged, Clarke fell over and defendant began kicking him and hitting him with the gun.

After leaving the scene of the crime, the men went to Bost's house. Defendant asked Bost's wife for a trash bag and then went outside for a brief time. Defendant later threw the bag in a trash can at Watkins Grill.

On cross-examination, Bost admitted that he dozed off during these events, and that he was in the front seat while the events were taking place at the rear of the car. Bost told the police about the crime on Sunday night following the Saturday on which it was committed.

Pathologist Dewey Pate, who did an autopsy on Clarke's body, testified that the cause of death was a gunshot wound, with contributing factors being additional injuries to the head and neck.

Two detectives of the Wake County Sheriff's Department testified that the defendant gave a statement in which he said that he did not mean to shoot Clarke, but that he had been clicking the gun at him without knowledge that it was loaded.

A pair of tan fishnet shoes was seized from the defendant's apartment during a search on 1 December 1980. Forensic serologist William Weis testified that there were bloodstains on the right shoe but that he could not determine the blood group.

Bost had earlier testified that the defendant was wearing light fishnet shoes at the time of the crime and that they had blood all over them.

Weis further stated that semen samples on a coat found near Clarke's body could have originated with the defendant and his brother Charles. But his tests also revealed no sperm present in Clarke's saliva. Tests in the defendant's car on 15 December 1980 showed the presence of human blood.

Steven Carpenter, a State Bureau of Investigation firearms and tool mark identification expert, testified that the bullet taken from Clarke's body was a .38 caliber lead, non-jacketed bullet. It was so badly deformed that it could not be used for comparison to determine the weapon from which it had been fired. Two bullets taken from defendant's car were the same type, but the spent cartridge found in the cylinder of the gun did not match the two cartridges seized from defendant's car.

The defendant was the primary witness of seven witnesses for the defense. He testified that when the men were driving through Raleigh that Bost told him to stop at the corner where Clarke was standing. Defendant observed that Clarke was a "faggot" but Bost disagreed. Clarke got in the car, defendant drove to Raleigh Beach Road and stopped the car.

Defendant got out of the car. He looked in the back seat a few minutes later and saw Clarke performing oral sex on Charles, who was asleep. Defendant pulled Clarke out of the car and a struggle ensued. He reached in the car and grabbed a gun, which he claims was not his and that he only had noticed after he got in the car. Defendant hit Clarke in the face or head with the gun and then stomped on his back. Defendant stated that the gun discharged only when he was struggling with Clarke. He admitted pointing the gun at Clarke's head while Clarke begged him not to shoot, but said that the gun was empty and that he clicked the gun once at his own head.

The defendant denied throwing anything in a trash can at Watkins Grill, or that he had sex with Clarke or made Clarke have sex with Charles. Other witnesses for the defendant corroborated his version of the facts.

The jury found defendant guilty of second degree murder and crime against nature. He was sentenced to a minimum of seventy-five years and a maximum of life for the second degree murder and to a minimum and maximum of ten years on the crime against nature conviction. From the verdicts and the sentences imposed, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for the defendant.

ARNOLD, Judge.

Defendant first attacks the trial court's refusal to suppress the results of a visual search and chemical tests performed on bloodstains in his car. He argues that the search warrant was deficient because it did not specify items that were seized and was not based on probable cause. It is also averred that the second search of the car a few days later was not justified by the warrant because it had already been returned to the magistrate.

[1] Before examining the sufficiency of the warrant in this case, we first determine that defendant had standing to object to the search of the car. To have such standing defendant must have a legitimate expectation of privacy in the thing to be searched. *Rakas v. Illinois*, 439 U.S. 128 (1978), *reh. denied*, 439 U.S. 1122 (1979). The burden of proof of showing this expectation is on the defendant. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980).

The record shows that the car involved in this crime was owned by the defendant's sister. The car was parked in front of the defendant's apartment when he was arrested on 1 December 1980. Because of these facts, we find that defendant did have the requisite expectation of privacy so as to challenge the search of the car.

Rakas is distinguishable on the facts because the defendants there were only passengers in a car driven by the owner. There is evidence here that the defendant was driving the car that was searched. The fact that the car belonged to his sister strengthens his expectation of privacy. It is also important that defendant possessed the car before, during and after the crime, since posses-

sion is one factor to be considered in the expectation decision. *See State v. Jones*, 299 N.C. 298, 306, 261 S.E. 2d 860, 865 (1979). The possession was "legitimate" here, unlike that in *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979), where the court found no reasonable expectation of privacy because the vehicle was stolen.

[2] We disagree, however, with defendant that the search warrant was illegal here. As the Supreme Court noted in *Cardwell v. Lewis*, 417 U.S. 583 (1974), "Generally, less stringent warrant requirements have been applied to vehicles." 417 U.S. at 589-90. *Cardwell* went on to state that:

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view.

417 U.S. at 590.

An affidavit upon which a search warrant is based must not be stated in conclusory terms but should state facts to allow the magistrate to make a finding of probable cause independent of the affiant's statements. *U.S. v. Ventresca*, 380 U.S. 102 (1965). "[W]hen these [underlying] circumstances are detailed, where reasons for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense manner." 380 U.S. at 109. Deputy Sheriff Dodd's application for a search warrant here meets the *Ventresca* test because it gives sufficient facts to allow the magistrate to draw his own conclusions. It also meets the factors stated in G.S. 15A-244 for a valid application for a search warrant.

A second requirement for a valid search warrant is that it must be issued by a neutral and detached magistrate. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The magistrate who issued this warrant meets this standard and properly acted within his county of appointment as required by G.S. 7A-273(4).

Finally, the warrant must describe with reasonable certainty the place to be searched and the items to be seized. *See Stanford*

v. Texas, 379 U.S. 476 (1965); G.S. 15A-246(4). According to *Stanford*, the evil sought to be avoided by the Fourth Amendment is the "general warrant." 379 U.S. at 480. General warrants are also prohibited by N.C. Const. art. I, § 20, which describes them as "dangerous to liberty."

We find that the warrant in this case is sufficient in its description of the car to be searched, and the property to be seized, since it refers specifically to the application for search warrant on the reverse side of the search warrant that contains this information. The application was sufficient because it supplied "reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *Jones*, 299 N.C. at 303, 261 S.E. 2d at 864, quoting *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976), *reh. denied* 293 N.C. 261, 247 S.E. 2d 234 (1977).

[3] Having found that the first search of the car on 1 December 1980 was proper, we also determine that the chemical tests performed on the car while it was impounded at a local garage after the first search and, after the search warrant had been returned, were admissible. While it is true that the second search occurred after the effectiveness of the warrant had expired, we find no error on this point. Sufficient evidence to prove defendant's guilt beyond a reasonable doubt was obtained in the first valid search. Even though these facts do not fit one of the exceptions to the search warrant requirement, "the error was harmless beyond a reasonable doubt," as the Supreme Court observed in *Chambers v. Maroney*, 399 U.S. 42, 53 (1970), the case that the defendant cites as authoritative on this point.

We also find *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied* 446 U.S. 929 (1980), to be persuasive here. *Nelson* allowed a second look by the authorities at evidence seized from the defendant three days after the original valid search. According to the court, "The cases generally hold that these kinds of 'second looks' at items already once seen are not another search subject to Fourth Amendment proscriptions." 298 N.C. at 583, 260 S.E. 2d at 638.

[4] Defendant's second major assignment of error is that the trial judge should not have submitted crime against nature as a lesser included offense of second-degree sexual offense to the jury, because the indictment did not support the lesser offense. The indictment stated that the defendant

> unlawfully and wilfully did feloniously commit a sexual offense with Byron Montizel Clarke by force and against the victim's will by forcing the victim to perform fellatio, in violation of G.S. 14-27.4.

The defendant relies on *State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981), which concluded that penetration was a necessary element of crime against nature under G.S. 14-177. But *Ludlum* specifically did not hold that penetration was a necessary element of fellatio or cunnilingus, which are "sexual act[s]" under G.S. 14-27.1(4), and the latter of which the defendant in that case was charged in violation of G.S. 14-27.4.

Since a crime is a lesser included offense of another crime only if the greater crime contains all the elements of the lesser crime, *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1980), defendant concludes that crime against nature is not a lesser included offense of second degree sexual offense. He argues that since *Ludlum* did not require penetration for first degree sexual offense, it is not required for second degree sexual offense and thus the greater offense does not contain a necessary element of the lesser offense.

In deciding if penetration is a necessary element of fellatio under G.S. 14-27.1(4), which defines sexual act, we consider legislature intent as in *Ludlum*. But *Ludlum* only decided that penetration is not a necessary element of cunnilingus as that term is defined in G.S. 14-27.1(4). Fellatio is the alleged act here.

The reasoning process used in *Ludlum* to ascertain legislative intent is persuasive. First, we look at the ordinary meaning of the word fellatio. It is proper for a court to look to dictionaries for a definition. *Ludlum*, 303 N.C. at 671, 281 S.E. 2d at 162; *State v. Lee*, 277 N.C. 242, 176 S.E. 2d 772 (1970); *State v. Martin*, 7 N.C. App. 532, 173 S.E. 2d 47 (1970).

Fellatio is defined by *Webster's New Collegiate Dictionary* (8th ed. 1974) (hereinafter *Webster's*) as "oral stimulation of the

penis." *Dorland's Illustrated Medical Dictionary* (26th ed. 1981) defines the term as "oral stimulation or manipulation of the penis." *Webster's* defines oral as "of, given through, or affecting the mouth."

Thus, these definitions could be read as requiring some penetration into the mouth or at least, stimulation orally or by the mouth area. As a result, we find that crime against nature was properly submitted here as a lesser included offense of second degree sexual offense.

In reaching this holding, we are aware that fellatio could occur in remote cases without a technical penetration but we will not speculate on the anatomical variations of the prohibited act. It is inconceivable that the General Assembly meant for us to engage in such a pointless exercise. We will not "saddle the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof." *Ludlum*, 303 N.C. at 672, 281 S.E. 2d at 162. As that opinion concluded, "Once the victim of one of these acts has been forced against his or her will to submit, the degradation to his or her person, the real evil against which the statutes speak, has been accomplished." 303 N.C. at 673, 281 S.E. 2d at 163.

We have carefully considered defendant's other five assignments of error and find that they were correctly decided by the trial court.

No error.

Judges MARTIN and WHICHARD concur.

ANGOLA FARM SUPPLY & EQUIPMENT COMPANY (A CORPORATION) v. FMC CORPORATION, SPARTAN EQUIPMENT COMPANY (A CORPORATION) AND INDFOR EQUIPMENT, LTD. (A CORPORATION)

No. 813SC1248

(Filed 2 November 1982)

1. **Uniform Commercial Code § 15— exclusion of implied warranty of merchantability**

The requirements of G.S. 25-2-316(2) for the exclusion of an implied warranty of merchantability were met where the manufacturer's written warranty specifically, in boldface, all capital print, excluded such warranty. G.S. 25-2-314; G.S. 25-1-201(10).

2. **Uniform Commercial Code § 13— no implied warranty of fitness by manufacturer or non-selling distributor**

There was no implied warranty of fitness of logging equipment by either the manufacturer or by a non-selling distributor who serviced the equipment where plaintiff purchased the equipment from another distributor, and neither the manufacturer nor the non-selling distributor could have known of the particular purpose for which plaintiff was purchasing the equipment. G.S. 25-2-315.

3. **Uniform Commercial Code § 15— express warranty voided by purchaser's actions**

Plaintiff's unauthorized repairs of logging equipment voided the manufacturer's written warranty which, by its own terms, did "not apply to any product which has been subjected to . . . adjustment, or repair performed by anyone other than [the manufacturer] or a designated authorized agent."

4. **Unfair Competition § 1— refusal to supply parts list—no illegal restraint of trade**

Refusal by defendant manufacturer and defendant distributor to provide plaintiff with a list showing the names, identification, manufacturer, and fair market value of parts for logging machines purchased by plaintiff did not constitute an illegal restraint of trade in violation of G.S. Ch. 75.

APPEAL by plaintiff from *Reid, Judge.* Judgment entered 12 June 1981, in Superior Court, CRAVEN County. Heard in the Court of Appeals 14 September 1982.

Plaintiff brought this action against defendants for breach of warranties, breach of contract, and illegal restraint of trade, all of which were related to the sale by defendant Indfor Equipment, Ltd. (Indfor) and service by defendant Spartan Equipment Company (Spartan) of two log forwarders manufactured by defendant FMC Corporation (FMC). The complaint alleged that, on 15 Oc-

tober 1977, plaintiff purchased from defendant Indfor, a Canadian corporation, a new FMC log forwarder for $85,208 and a demonstrator FMC log forwarder for $40,000. With the purchase of the log forwarders, plaintiff received a written warranty by FMC:

> FMC warrants that, if maintenance is performed in accordance with the FMC Woodlands Equipment Operation and Maintenance Manuals, which have been furnished with each machine, products manufactured by it will be free from defects in material and workmanship for a period of SIX (6) MONTHS FROM THE DATE PLACED IN SERVICE or twelve (12) months from the date of factory shipment, whichever occurs first. THIS WARRANTY IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THOSE OF MERCHANTABILITY AND FITNESS OF ANY PRODUCT FOR A PARTICULAR PURPOSE NOT EXPRESSLY SET FORTH HEREIN. . . . FMC's warranty does not apply to any product which has been subjected to misuse, misapplication, neglect (including but not limited to improper maintenance), accident, improper installation, modification (including but not limited to use of unauthorized parts or attachments), adjustment, or repair performed by anyone other than FMC or a designated authorized agent.
>
> Limitation of remedies
>
> FMC's liability (whether under the theories of breach of warranty, negligence, strict liability, or contract) for its products shall be limited to repairing or replacing parts found by FMC to be defective, or at FMC's option, to refunding purchase price of such products or parts. At FMC's request, buyer will send, at buyer's expense, any allegedly defective parts to the FMC plant which manufactured them. FMC will not be liable for any incidental or consequential damages including without limitation the loss of use, income, profit, or production, or increased cost of operation, or spoilage of, or damage to material, arising in connection with the sale, installation, use of, inability to use, or the repair or replacement of, FMC's products.
>
> Any claim by buyer with reference to the goods sold hereunder shall be deemed waived by the buyer unless sub-

mitted to FMC in writing within ten (10) days from the date buyer discovered, or by reasonable inspection should have discovered, any claimed breach of the foregoing warranty. Any cause of action for breach of the foregoing warranty shall be brought within one year from the date the alleged breach was discovered or should have been discovered, whichever occurs first.

The provisions of the foregoing warranty and limitation of remedies are severable. If any provision shall be unenforceable for any reason, the other provisions shall remain effective.

After the purchase, according to plaintiff's complaint, (1) the log forwarders overheated and could not withstand the rigors of transporting logs in unimproved woodlands; (2) the torsion bars, the tracks and the road arms broke; and (3) other parts and materials were defective. Plaintiff alleged that defendant FMC breached its written warranty and its implied warranty of fitness for a particular purpose; that Spartan breached its contract with FMC (of which plaintiff was a third party beneficiary) by failing to repair the log forwarders; and finally, that, by refusing to provide it with a parts list for the log forwarders, both defendant FMC and defendant Spartan illegally restrained trade in violation of Chapter 75 of the North Carolina General Statutes.[1] Plaintiff sought various sets of damages including compensatory, incidental, and consequential.

In its answer, FMC admitted Indfor's sale of the log forwarders to plaintiff and admitted its written warranty. It set forth, however, several defenses to each of plaintiff's claims against it. First it alleged that the two pieces of equipment had been shipped by FMC to Indfor on 18 December 1974, and were, therefore, out of warranty at the time plaintiff purchased them. Second, FMC asserted that plaintiff had misused, improperly maintained, and neglected both log forwarders, thereby voiding any warranty. Third, FMC noted that, even if the equipment were under warranty, plaintiff had failed to notify FMC in writing within ten days of the breach as provided by the warranty.

1. Default judgment was entered against defendant Indfor when it failed to enter an answer to plaintiff's complaint. Plaintiff's allegations against Indfor are not considered in this appeal.

Fourth, under the warranty, FMC's payment of damages excluded incidental and consequential damages. FMC also asserted its belief that Spartan, as an accommodation to it, agreed gratuitously to provide warranty service to the plaintiff's log forwarders, that plaintiff and Spartan expressly understood that, because plaintiff had withheld money from the purchase price paid to Indfor, plaintiff was to pay for services and parts except for those parts which FMC accepted as defective. According to FMC, Spartan provided service to plaintiff's log forwarders until plaintiff withheld payment for services rendered.

The record on appeal contains no answer filed by defendant Spartan. Both defendant FMC and Spartan, however, filed motions for summary judgment. In conjunction with the motions, several affidavits and one deposition were filed. The deposition of plaintiff's president and principal stockholder John Taylor indicated that the two log forwarders had broken down and that defendants FMC and Spartan had failed to replace and repair damaged parts. Taylor acknowledged that FMC had sent a field service representative and Spartan, located in Charlotte, had sent repairmen to work on plaintiff's equipment in New Bern. Originally, plaintiff had paid for warranty service with money ($1,600) withheld from Indfor on the purchase price of the equipment. Taylor also admitted that one of the log forwarders about which he complained had never even been used and that, when Spartan put it on a cash basis, plaintiff, through its employees, had taken parts from it as well as from an old, burned machine to repair the other log forwarder.

An affidavit by the president of Spartan (Pfaff) stated that its agreement with FMC was contained in a Distributor Agreement of which plaintiff was not a third party beneficiary. The Distributor Agreement provides that, when FMC requests, a distributor who does not sell an FMC product must nevertheless perform delivery service and/or warranty service on FMC products sold within the distributor's territory. The affidavit of Pfaff denied that FMC had ever directed Spartan to perform warranty service on the log forwarders. Pfaff attached to his affidavit a letter written by John Taylor requesting that Spartan perform the thirty-day inspection service at plaintiff's expense. Because plaintiff refused to make full payment for its service, Spartan discon-

tinued its work. Spartan denied preventing plaintiff from obtaining information about FMC parts.

An affidavit by Taylor stated that neither FMC nor Spartan told him that plaintiff had to put its complaints in writing. He denied misuse of the equipment but admitted the possibility of skipping a maintenance call because Spartan wrongfully charged plaintiff for warranty work.

Based on the pleadings, affidavits, and deposition, the trial court entered an order finding no genuine issue of material fact and entering summary judgment for the two defendants. Plaintiff appealed.

Henderson and Baxter, by Carl D. Lee and B. Hunt Baxter, Jr., for plaintiff-appellant.

Ward, Ward, Willey & Ward, by A. D. Ward and Joshua W. Willey, Jr., for defendant-appellee FMC Corporation.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Christian R. Troy, for defendant-appellee Spartan Equipment Company, Inc.

HEDRICK, Judge.

Plaintiff brings forward six assignments of error, many of which are interrelated and all of which pertain to the propriety of summary judgment.

The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of trial when it can be readily determined that no material facts are in issue. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). This rule provides a drastic remedy, and must be used with due regard to its purposes and with a cautious observance of its requirements so that no person shall be deprived of a trial on a genuine disputed factual issue. *Id.* G.S. § 1A-1, Rule 56(c) establishes the standard for determining a motion for summary judgment:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Plaintiff's first argument is that summary judgment was improper because there was a genuine issue as to whether plaintiff was damaged by defendants' breach of (1) the implied warranty of merchantability, (2) the implied warranty of fitness for a particular purpose, and (3) the express warranty given by defendant FMC to the plaintiff. This argument, as well as three other arguments brought forward by plaintiff, overlooks the material facts as to which there were no genuine issues and which were the grounds for the summary judgment: (1) there was no implied warranty of merchantability; (2) neither defendant implied a warranty of fitness for a particular purpose; and (3) the express warranty made by defendant FMC had been voided by plaintiff's actions with regard to the two log forwarders.

[1] Under G.S. § 25-2-314, a warranty that goods are merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. "Merchantable goods" is defined in G.S. § 25-2-314(2). An implied warranty of merchantability may be excluded or modified, G.S. § 25-2-314, if done in accordance with the provisions of G.S. § 25-2-316. That statute requires that language excluding or modifying the implied warranty of merchantability "must mention merchantability and in case of a writing must be conspicuous." G.S. § 25-2-316(2). Under G.S. § 25-1-201(10), "conspicuous" is defined as that which is "so written that a reasonable person against whom it is to operate ought to have noticed it." Determination of whether writing is conspicuous is a question of law for the court. *Billings v. Harris Co.*, 27 N.C. App. 689, 220 S.E. 2d 361 (1975), *aff'd*, 290 N.C. 502, 226 S.E. 2d 321 (1976). In the present case, FMC's written warranty specifically, in boldface, all capital print, excluded the implied warranty of merchantability. We believe that this satisfied the requirements for exclusion under G.S. § 25-2-316(2) and that there was, therefore, never any implied warranty of merchantability as to the two log forwarders.

[2] Plaintiff's claim that there was an implied warranty of fitness for a particular purpose is rejected for different reasons. Under G.S. § 25-2-315, there is a warranty of fitness for a particular purpose "[w]here the seller at the time of contracting has reason to

know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods. . . ." It is obvious from the undisputed facts of this case that the plaintiff purchased the two log forwarders from Indfor. Neither FMC nor Spartan was involved in the purchase and, therefore, neither could have known of a particular purpose for which plaintiff was purchasing the goods. Likewise, plaintiff could not have relied upon the judgment of parties not involved in the sale of the logging equipment. There was, therefore, no warranty of fitness implied by either defendant FMC or Spartan. Additionally, even if there could have been an implied warranty of fitness by FMC, the written warranty clearly excluded such warranty in a manner acceptable under the provisions of G.S. § 25-2-316.

[3] Finally, as to the express warranty provided by FMC, we can find no dispute in the following material facts: FMC and Spartan originally provided warranty service on the equipment.[2] Spartan did this even though it was the non-selling distributor of the product. Under the terms of the Distributor Agreement, Spartan agreed, if requested by FMC, to provide service to FMC products which it did not sell but which were in its distributorship area. That agreement was clearly for the benefit of FMC and Spartan and was not enforceable against Spartan by plaintiff. Certainly Spartan was to be paid for such service since it had not received from the purchase price of the equipment an amount to cover the servicing costs. Through a letter to Spartan from plaintiff's president, plaintiff acknowledged this when it stated that it would be "responsible for paying for this [thirty day] service as I have made arrangements with Indfor to pay for these service inspections directly." When Spartan insisted on payment for service in advance, plaintiff, through its employees, made unauthorized repairs on one log forwarder by removing parts from other equipment including the second log forwarder purchased from Indfor. Unauthorized repairs voided the written warranty which, by its

2. It is also undisputed that, when plaintiff took possession of the two logging machines, the written warranty had expired by virtue of its clause limiting liability to a period of six months from the date placed in service or twelve months from the date of factory shipment. There is some dispute, however, as to whether defendant FMC, in a letter, extended the time period. The determination that the written warranty was no longer in effect is not, therefore, based on this fact.

own terms, did "not apply to any product which has been subjected to . . . adjustment, or repair performed by anyone other than FMC or a designated authorized agent." Based on these facts, we can find no genuine issue of material fact concerning plaintiff's voiding of the express warranty.

[4] Plaintiff also argues that summary judgment was inappropriate because there was a genuine issue as to whether defendants' actions in refusing to provide plaintiff with a parts list constituted an illegal restraint of trade under Chapter 75 of the North Carolina General Statutes. Plaintiff alleged in its complaint that the two defendants refused to provide it with a list showing the names, identification, manufacturer, and fair market value of parts for the logging machines. In its argument now, plaintiff alleges that "one of the factors that caused the defendant corporations to cease providing warranty service . . . was the questioning by . . . [the] president and principal stockholder of the plaintiff corporation of the arrangements between FMC and Spartan [the two defendants] relating to the pricing of parts." This action, according to plaintiff, amounted to defendants' unfair assertion of power. We disagree. There is nothing in Chapter 75 which would require equipment dealers or manufacturers to supply consumers with a list of parts such as plaintiff requested. There was, in the record of this case, no indication that either defendant prevented plaintiff from shopping elsewhere for parts for the equipment. In fact, plaintiff's president acknowledged that he had successfully gone to other suppliers for parts. We can find no illegal restraint of trade in defendants' refusal to supply the list requested by plaintiff.

Plaintiff's final argument is that the trial court erred in granting summary judgment for defendant Indfor. We do not read the final judgment "in favor of each defendant" to include Indfor, against whom a default judgment had already been entered.

Summary judgment against plaintiff is

Affirmed.

Judges VAUGHN and HILL concur.

DIXON, ODOM & COMPANY v. DAVID L. SLEDGE AND SLEDGE AND TRIVETTE, A GENERAL PARTNERSHIP

No. 8118SC1276

(Filed 2 November 1982)

1. **Partnership § 9— withdrawal of partner—division of fees from former clients —validity of agreement**

A contract providing for a division of fees which a partner withdrawing from a partnership of accountants would obtain from "former clients" of the partnership was not ambiguous and sufficiently described the intentions of the parties.

2. **Contracts § 7.2— withdrawal of partner—agreement for division of fees—no covenant not to compete**

An agreement between a partnership of accountants and a withdrawing partner setting forth the obligations of the parties with respect to the payment of salary, repurchase of the withdrawing partner's interest, cancellation of the withdrawing partner's debt to the partnership and a division of fees which the withdrawing partner obtained from "former clients" of the partnership did not constitute a covenant not to compete and thus was not governed by the rules applicable to such covenants.

3. **Partnership § 9— withdrawal of partner—division of fees in lieu of covenant not to compete—consideration**

An agreement between a partnership of accountants and a withdrawing partner setting forth the obligations of the parties with respect to the payment of salary, repurchase of the withdrawing partner's interest, cancellation of the withdrawing partner's debt to the partnership, and a division of fees which the withdrawing partner obtained from former clients of the partnership in lieu of a covenant not to compete contained in the original partnership agreement was supported by consideration.

4. **Accountants § 1; Partnership § 9— agreement for division of fees, examination of records—no unlawful disclosure of tax information—no violation of ethics code**

An agreement between a partnership of accountants and a withdrawing partner providing for a division of fees obtained by the withdrawing partner from "former clients" of the partnership and requiring the withdrawing partner to provide the partnership with a list of the former partnership clients served by him and the fees earned from the former clients and to allow his records to be examined by a member of the partnership did not violate statutes prohibiting the disclosure of any information furnished in connection with the preparation of a tax return, I.R.C. § 7216 and G.S. 75-28. Nor did the disclosure required by the agreement violate provisions of the CPA Code of Ethics prohibiting the disclosure of any confidential information obtained in the course of a professional engagement without the client's consent and prohibiting the payment or acceptance of a commission for client referrals.

5. Specific Performance § 3— inadequate remedy at law

Plaintiff partnership was entitled to specific performance of an agreement with defendant withdrawing partner providing for the division of fees obtained by defendant from former clients of the partnership where defendant had refused to comply with the agreement and had stated that he will not comply in the future, and the only way for plaintiff to determine the sums due to it was to obtain the list of clients called for under the agreement.

6. Costs § 4— deposition expenses as part of costs

Deposition expenses may be taxed as part of the costs in the discretion of the court pursuant to G.S. 6-20.

APPEAL by plaintiff and defendants from *Albright, Judge.* Judgment entered 25 August 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 September 1982.

The record reveals the following facts. In 1974, defendant, David L. Sledge, signed a partnership agreement with plaintiff, the accounting firm of Dixon, Odom & Company. On 7 January 1977, defendant Sledge gave notice of his withdrawal from the partnership and the plaintiff accepted his withdrawal on 8 January 1977. On 18 January 1977, plaintiff and defendant Sledge signed an agreement defining the respective rights, duties and responsibilities of each to the other in connection with Sledge's withdrawal from the firm.

In the agreement, plaintiff agreed to pay Sledge a salary through April 1977 and to cancel all debts due to the partnership from the defendant Sledge. The plaintiff also promised to pay to Sledge the sum of $12,000 by yearly payments of $1,200 through 1986 with 6% interest. (The plaintiff had the right to prepay the balance due in whole or in part.) The defendant agreed to provide to the plaintiff a list of clients anticipated to discontinue using plaintiff's professional services and become Sledge's clients. As for the defendant's obligations, the agreement contained the following:

> The Withdrawing Partner agrees to pay to the Partnership fifty percent (50%) of all fees earned by him, either directly or indirectly as a partner or employee, from clients who were formerly clients of the Partnership at any time after January 17, 1975, subject to the following terms and conditions:

(a) The Withdrawing Partner shall not pay to the Partnership any part of fees earned by him after January 17, 1987, and

(b) With respect to each client served by the Withdrawing Partner, the Withdrawing Partner shall not pay any part of fees earned by him from that client after he has paid to the Partnership fifty percent (50%) of fees earned by him from that client for a period of three (3) years, and

(c) With respect to each client served by the Withdrawing Partner in a bookkeeping capacity, the Withdrawing Partner shall not pay any part of fees earned by him from that client after he has paid one hundred fifty percent (150%) of the amount of fees earned by the Partnership from that client during its last year of service to that client, and

(d) The Withdrawing Partner shall give to the Partnership on November 15, 1977 and annually thereafter until November 15, 1987 a list of former clients of the Partnership which he has served directly or indirectly since he ceased to be a partner of the Partnership and since his last similar report, together with a list of the amount of fees earned by him from each such client and the amount of fees received by him from each client, excluding any clients which sub-parts (a), (b) or (c) of this provision shall eliminate from the list, together with his payment of 50% of the fees received by him directly or indirectly, and

. . .

(g) The Withdrawing Partner shall maintain records adequate to provide the information required by this provision and shall allow his records to be examined by a representative of the Partnership for purposes of verification at any reasonable time and place.

Even though Sledge denies having complied with this agreement during 1977, he did supply a list of clients to the plaintiff and pay $12,466.30 to the plaintiff. Also during 1977, plaintiff paid, and defendant Sledge accepted $9,791.67 in salary and $1,823.00 under the provision to pay $12,000 in yearly payments. Plaintiff also cancelled defendant Sledge's debt instruments. Again in 1978, Sledge supplied the plaintiff with a list of clients

and paid $7,341.39 to plaintiff and the plaintiff made its annual payment to Sledge. In 1979, Sledge failed to provide a list of clients, but paid $6,478 to plaintiff and the plaintiff fulfilled its financial obligation to Sledge. During 1980, Sledge refused to give plaintiff a list of clients and did not pay any money to plaintiff. Sledge also informed the plaintiff that he did not intend to comply with the agreement.

Plaintiff sued for an accounting of Sledge's earnings and for specific performance of the agreement and moved for summary judgment. The court granted summary judgment for the plaintiff and ordered Sledge to perform specifically his obligations under the agreement and to provide plaintiff with an accounting of earnings from 18 January 1977 to 15 November 1980 from plaintiff's former clients. The order also taxed costs of the action, including deposition expenses, against defendant Sledge. Defendants appealed. The court later amended the partial summary judgment to delete the portion taxing deposition expenses to defendant Sledge. Both plaintiff and defendants appealed the amended judgment.

Wyatt, Early, Harris, Wheeler & Hauser by William E. Wheeler for the plaintiff, appellee.

Robert A. Brinson for the defendants, appellants.

HEDRICK, Judge.

[1] Defendants first contend that summary judgment was improperly granted for the plaintiff because a genuine issue of material fact exists as to what constitutes a "former client" under the agreement. Defendants argue the term "former client" is ambiguous and does not describe the intentions of the contracting parties. One interpretation of "former clients" given by the defendants is that one of plaintiff's clients could change to a third, unrelated accounting firm and later change to defendant Sledge's firm. This, argues the defendants, was not a situation contemplated by the contracting parties when they entered into the agreement. Yet, a likely occurrence would come about where defendants advised potential clients, who were also former clients of the plaintiff, to use a third firm before moving their business to defendants in order to circumvent the agreement between plaintiff and defendants.

Nonetheless, this court need not entertain all the possible interpretations of "former clients" in order to decide this case. Where the provisions of a contract are plainly set out, the court is not free to disregard them and a party may not contend for a different interpretation on the ground that it does not truly express the intent of the parties. *Taylor v. Gibbs*, 268 N.C. 363, 150 S.E. 2d 506 (1966). We find the language of this agreement, made between professional men, who are deemed capable of guarding their own interest and remaining free from compulsion, is clear and unambiguous on its face. This finding obviates defendants' argument that "former clients" is not what the parties meant at the time of contracting. We note that the agreement contains seven subparagraphs below the provision setting out the obligations concerning "former clients." Furthermore, plaintiff's "Exhibit F" shows that defendant Sledge suggested that "fees be paid to cover *present or future clients* who become my client during a ten year period to end January 10, 1987." (Emphasis added.) Plaintiff's affidavits and exhibits further demonstrate that the original partnership agreement signed by defendant Sledge in 1974 contained certain covenants not to compete and that the agreement in dispute here was adopted in lieu of the original partnership agreement limiting a withdrawing partner's right to compete with the plaintiff partnership.

[2] Defendants contend that this agreement was an unreasonable and unenforceable covenant not to compete. We do not agree with defendants and find this was not a covenant not to compete. The contract simply describes the obligations of the parties with regard to payment of salary, repurchasing of Sledge's partnership interest, cancellation of Sledge's debt and division of fees which Sledge obtained from "former clients." The agreement did not restrict the area in which Sledge could practice accounting nor did it prohibit him from serving former clients of the plaintiff. By paying a portion of his fees to plaintiff, defendant contracted out of the covenant not to compete as contained in the partnership agreement. The subsequent agreement was simply a contract to settle the affairs of the parties concerned, and it was not a covenant not to compete. Therefore, the rules governing covenants not to compete do not apply.

[3] Defendants also contend the agreement fails for lack of consideration. We disagree. Both parties signed the agreement and

defendant Sledge received the right to compete with the plaintiff in High Point, an area that would have been off limits under the original partnership agreement. Likewise, plaintiff gave up the right to prevent defendant Sledge from competing in High Point and dissolved other obligations Sledge had under the 1974 partnership agreement. We find this adequate consideration as a matter of law.

[4] Defendants next argue that any disclosure of information under the agreement violates I.R.C. § 7216 (1954) or N.C.G.S. § 75-28. Each prohibits disclosure of any information furnished in connection with the preparation of a tax return. However, the agreement only calls for a list of defendants' clients, defendants' fees and reasonable examination of records for purposes of verification. The information Sledge agreed to disclose was not information furnished by a taxpayer in connection with the preparation of a tax return. Instead, it was information from defendants' own books and financial records. Information to be provided under the agreement did not have to denote a client as one employing defendants to prepare tax returns nor in any way divulge tax return information. A list of defendants' clients, fees and inspection of their bookkeeping records, especially where a withdrawing partner is buying out of a former agreement, has nothing to do with disclosure of confidential tax return information as controlled by these statutes. We find defendants' argument without merit.

Defendants also advance the argument that disclosures required by the agreement violate Section .0204 and Section .0302 of the Code of Ethics of the North Carolina State Board of Certified Public Accountants. Again, the defendants' position is not well founded. Section .0204(a) states that a CPA "shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client." Section .0302 bars the payment or acceptance of a commission for client referrals. Neither section applies to the facts at hand. First, the information for disclosure as required by the agreement is not confidential client information. It is simply a listing of clients and fees. Second, plaintiff is not referring clients to defendants and no commissions are involved. By paying plaintiff a percentage of his fees obtained from former clients of plaintiff, the defendants are simply purchasing the right to compete with plaintiff in a certain

geographic area, which was prohibited by the original partnership agreement. Therefore, we find these provisions of the CPA Code of Ethics inapplicable.

[5] In Assignment of Error No. 6, defendants contend plaintiff is not entitled to specific performance because there is an adequate remedy at law. Yet, defendants have refused to comply with the agreement and have said they will not comply in the future. The only way for plaintiff to determine the sums, if any, due to it is to obtain the list called for under the agreement. Any damages could not be ascertained without delivery of the client list. Therefore, the trial court properly granted specific performance to the plaintiff.

[6] The final question before this court is the propriety of the trial judge's amendment to the order deleting deposition expenses from the costs charged to the defendants or because "[c]ourt costs do not under applicable State law include deposition expenses and therefore are not properly taxed as part of the costs of this action. . . ." The applicable statute is G.S. § 6-20 which reads: "In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." Where the court has taxed costs in a discretionary manner its decision is not reviewable. *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E. 2d 326 (1963). However, in the instant case the trial court ruled as a matter of law to disallow the deposition expenses. As a general rule, recoverable costs may include deposition expenses unless it appears that the depositions were unnecessary. 20 Am. Jur. 2d *Costs* § 56 (1965). Even though deposition expenses do not appear expressly in the statutes they may be considered as part of "costs" and taxed in the trial court's discretion. Therefore, we remand the issue of costs to be determined at the trial court's discretion.

Summary judgment for the plaintiff is affirmed. The case is remanded for a determination of taxing of costs.

Affirmed in part; remanded in part.

Judges MARTIN (R. M.) and HILL concur.

STATE OF NORTH CAROLINA v. FRANKLIN J. SIMMONS

No. 828SC66

(Filed 2 November 1982)

1. **Searches and Seizures § 43— motion to suppress evidence on constitutional grounds—untimely**

G.S. 15A-975 requires that a motion to suppress evidence on constitutional grounds be made prior to trial unless certain specified exceptions apply; therefore, the trial judge correctly determined that defendant's motion to suppress was untimely made where the motion was made after the jury had been selected and empaneled and where defendant had not shown that any exceptions in G.S. 15A-975 applied to his case. Further, the motion to suppress was not in proper form since the motion was not accompanied by an affidavit containing facts supporting it.

2. **Gambling § 3— lottery—sufficiency of evidence**

Where the person who testified that he was dealing in lottery tickets at the time he was arrested stated that he would have paid the defendant if any one of the numbers shown on a torn piece of cardboard had been selected in the lottery and defendant had presented the piece of cardboard to him, the evidence was sufficient to be submitted to the jury on whether possession of the piece of cardboard came within the prohibition of G.S. 14-290.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 28 August 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 1 September 1982.

Defendant was charged with possession of a lottery ticket in violation of G.S. 14-290. He was convicted in District Court, and he appealed to Superior Court where he was tried before a jury.

State's evidence tended to show that on the afternoon of 18 February 1981 several law enforcement officers went to a snack bar located at 402 East Bright Street in Kinston to execute a search warrant for the building and the operator of that business. They found four men in the building, including the defendant who was then a police officer for the City of Kinston. The officers found numbers tickets and a numbers book in the building and on the person of Everette Mattocks, the operator of the snack bar. They asked the occupants of the building to empty their pockets, and the defendant produced a torn piece of cardboard paper with eight three-digit numbers written on it. Defendant was arrested. At the police station he was advised of his rights and asked if he wanted to make a statement. Defendant replied "when your hand

is caught in the cookie jar, you are caught." Defendant also said he would "take it [his punishment] like a man" if convicted. Defendant was then asked if they were dealing in numbers at the snack bar, and he replied that they were.

Everette Mattocks, testifying for the State, stated that he was dealing in lottery tickets at the time he was arrested, that he had sold numbers to the defendant on the day of the arrest, and that he would have paid the defendant if any one of the numbers shown on the torn piece of cardboard had been drawn in the lottery. Finally, the State called an S.B.I. agent to testify as an expert witness about the manner in which numbers lotteries are conducted. He testified that he had never before seen a piece of cardboard used as a lottery ticket, but that it is not surprising to find irregular types of lottery tickets.

The jury found defendant guilty as charged, and a suspended sentence was imposed. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for the State.

Calvin R. King for defendant appellee.

BECTON, Judge.

Contending that the warrantless search was illegal, the defendant, on 26 August 1981, the date on which trial began, filed and served on the District Attorney, a motion to suppress the piece of cardboard which contained eight numbers. The trial transcript indicates that after the jury had been selected and impaneled to try this case, defense counsel made his motion to suppress. The assistant district attorney argued that the motion was untimely, and the trial judge denied it without conducting a hearing. At the close of the State's evidence, defense counsel renewed his motion to suppress, and the judge then allowed him to present evidence on *voir dire*. The prosecutor again argued that the motion had not been made in a timely manner. The judge made findings of fact and conclusions of law and denied the motion. One of his conclusions was "that the motion to suppress [was] untimely."

[1] By the first argument in his brief, the defendant contends that his motion was properly made on the day trial began. De-

fendant has filed a motion for appropriate relief with this Court in which he addresses the merits of his motion to suppress.

The Legislature may impose reasonable prerequisites on motions to suppress evidence, and the failure to meet such requirements constitutes a waiver of the right to challenge the evidence on constitutional grounds. *State v. Detter*, 298 N.C. 604, 616, 260 S.E. 2d 567, 577 (1979). N.C. Gen. Stat. § 15A-975 requires that a motion to suppress evidence on constitutional grounds be made prior to trial unless certain specified exceptions apply. The exceptions are (1) when the defendant does not have a reasonable opportunity to make the motion before trial; (2) when the State does not give defendant sufficient advance notice of its intention to use the evidence and (3) when additional facts are discovered after a pre-trial motion has been denied that could not have been discovered with reasonable diligence before. G.S. § 15A-975; *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). The last sentence of the statute reads: "When a misdemeanor is appealed by the defendant for trial de novo in superior court, the State need not give the [advance] notice . . ." of its intention to use the evidence. The Official Commentary to the statute explains this provision as follows:

> The final sentence of the section was somewhat misplaced in the course of amendment in the General Assembly. It indicates that the advance notice in search and confession cases is not required when misdemeanors are tried de novo in superior court. Presumably the State would have already utilized, or have attempted to utilize, the evidence in the trial in district court, and notice would be unnecessary. Therefore, the general rule would apply: Any motion to suppress would have to be made before trial unless some other exception pertained in that case.

We agree with this interpretation. A defendant may move to suppress for the first time during trial if advance notice is required but not given. However, when a misdemeanor is tried *de novo* in superior court, no advance notice is required if the State has utilized the evidence in the trial in district court. Then the second exception listed above simply does not apply. In order for a defendant in such a case to make a motion to suppress at trial, he must come within one of the other exceptions.

The defendant has the burden of establishing that he made his motion to suppress in a timely manner and in proper form. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510; *State v. Drakeford*, 37 N.C. App. 340, 345, 246 S.E. 2d 55, 59 (1978). The defendant herein has not shown that any exception applies to his case. G.S. 15A-975 therefore required that his motion to suppress be made "prior to trial," *i.e.*, prior to the attachment of jeopardy. *State v. Tate*, 300 N.C. 180, 265 S.E. 2d 223 (1980). The record on appeal does not show such to be the case herein.

We conclude that the trial judge was correct in denying the motion without a hearing and in subsequently concluding that the motion was untimely. Thus, we need not consider the constitutional issues raised by defendant's motion to suppress since an alternative ground exists upon which the case may properly be decided and since the trial court invoked this alternative ground in ruling on the motion. *Cf. Detter*, 298 N.C. 604, 260 S.E. 2d 567, in which our Supreme Court found it necessary to reach the constitutional issue presented even though the motion had not been timely made since the trial court had not overruled the motion on that basis.

In addition to being timely, a motion to suppress evidence must also be in proper form. "[A] motion to suppress made at trial, whether oral or written, should state the legal ground upon which it is made and should be accompanied by an affidavit containing facts supporting the motion." 300 N.C. at 625, 268 S.E. 2d at 514. A motion without such a supporting affidavit may be summarily denied. *Id.* The record in this case does not contain an affidavit. The failure to file a "supporting" affidavit provides an additional and sufficient ground for upholding the trial court's ruling. Defendant's first argument on appeal is overruled, and his motion for appropriate relief is denied.

In his second argument on appeal, the defendant contends that the trial judge improperly limited his right to cross-examine the State's witnesses. He cites five exceptions. We summarily reject defendant's second argument. Indeed, in most instances the record fails to show what the witnesses' answers would have been had defendant's cross-examination been allowed. In another instance the witness answered defense counsel's question, and there was no motion to strike.

By his third argument the defendant contends that the State was allowed to present evidence of prior misconduct on his part. However, the exceptions cited do not support such an argument. The exceptions are to testimony by Everette Mattocks to the effect that Mattocks was dealing in a lottery, that there were two drawings per day in the lottery, that Mattocks would have paid defendant had any one of the numbers shown on the piece of cardboard been drawn in the lottery, and that defendant would have won $225 on a $50 bet. This testimony was relevant and was properly admitted. The testimony does not tend to show any prior misconduct on the part of defendant, and this argument is overruled.

Defendant's fourth argument concerns the testimony of the expert witness, J. G. Berrier, as to the manner in which lotteries are conducted. Defendant contends that such testimony was irrelevant and could not assist the jury. We disagree. The jury had to decide whether the defendant possessed a ticket used in the operation of a lottery. Evidence concerning the operation of a lottery was therefore relevant. Berrier's testimony was properly admitted.

[2] Finally, the defendant argues that the charge should have been dismissed since the State's evidence was insufficient to show that the torn piece of cardboard was a lottery ticket. He notes that this piece of cardboard was unlike the other lottery tickets seized during the search. We find the evidence sufficient to warrant submission of the case to the jury.

N.C. Gen. Stat. § 14-290 defines more than one violation of the law. Defendant was charged under the sentence that provides, "Any person who shall have in his possession any tickets, certificates or orders used in the operation of any lottery shall be held liable under this section, and the mere possession of such tickets shall be prima facie evidence of the violation of this section." The first clause of this sentence creates a separate offense that is applicable to those participating in a lottery as well as to those conducting the lottery. This offense comprises the possession of tickets, certificates or orders that are used in the operation of a lottery. A lottery is "any scheme for the distribution of prizes, by lot or chance, by which one, on paying money or giving any other thing of value to another, obtains a token which entitles

him to receive a larger or smaller value, or nothing, as some formula of chance may determine." *State v. Lipkin*, 169 N.C. 265, 271, 84 S.E. 340, 342 (1915). A lottery ticket entitles the holder to demand and receive one of the prizes awarded. *See* 54 C.J.S., *Lotteries* § 1 (1948). It "is a thing which is the holder's means of making good his rights. The essence of it is that it is in the hands of the other party to the contract with the lottery as a document of title." *Francis v. United States*, 188 U.S. 375, 377-78, 47 L.Ed. 508, 510, 23 S.Ct. 334, 335 (1903). In the present case Mattocks testified that he would have paid the defendant if any one of the numbers shown on the piece of cardboard had been selected in the lottery and defendant had presented the piece of cardboard to him. The evidence was therefore sufficient to be submitted to the jury as to whether possession of the piece of cardboard came within the prohibition of G.S. 14-290.

In defendant's trial, we find

No error.

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

BEN J. THREATTE, SR., INDIVIDUALLY AND BEN J. THREATTE, SR. AS ADMINISTRATOR OF THE ESTATE OF RANCE K. THREATTE, DECEASED v. BEVERLY ANN THREATTE

No. 8122SC1206

(Filed 2 November 1982)

1. **Banks and Banking § 4— signature card—joint account with right of survivorship**

A signature card which was signed by plaintiff and by the intestate and which contained language virtually identical to that of G.S. 41-2.1(g) created a joint account with right of survivorship in a money market savings certificate. G.S. 41-2.1(a).

2. **Banks and Banking § 4— joint savings certificate—ownership of renewal certificate issued only in name of intestate**

Where a money market savings certificate with a face value of $10,000.00 was issued in the joint names of plaintiff and the intestate, a signature card signed by plaintiff and the intestate created a joint account with right of survivorship, the number of the certificate was placed in the upper right-hand cor-

ner of the signature card, the intestate obtained a renewal certificate issued solely in his name with the $10,000.00 principal proceeds from the original certificate plus $8,300.00 of his own funds, the renewal certificate represented that the joint account originally created by the signature card contained $18,300.00, and the number of the renewal certificate was placed in the upper right-hand corner of the signature card, the signature card controlled disposition of the proceeds of the renewal certificate and plaintiff was entitled to the proceeds upon the intestate's death.

APPEAL by defendant from *Collier, Judge*. Judgment entered 2 September 1981 in Superior Court, IREDELL County. Heard in the Court of Appeals 1 September 1982.

Plaintiff, individually and as administrator of the estate of Rance K. Threatte, intestate, seeks a declaratory judgment to determine the disposition of proceeds of a Money Market Savings Certificate after Rance K. Threatte's death on 16 September 1980.

Plaintiff was the natural father of Rance K. Threatte. On 11 October 1979, plaintiff and intestate purchased with intestate's funds a Money Market Savings Certificate No. 83005104 at First Savings and Loan Association, Statesville, North Carolina, with face value of $10,000 maturing 10 April 1980. The Money Market Savings Certificate was issued in the name of "Rance K. Threatte or Ben J. Threatte, Sr." The number of this certificate, 83005104, was placed in the upper right-hand corner of a signature card signed by plaintiff and intestate on 11 October 1979. The signature card contained the following language:

> We the undersigned, hereby agree that all sums deposited at any time, including sums deposited prior to this date, in the
>
> FIRST SAVINGS AND LOAN ASSOCIATION
>
> in the joint account of the undersigned shall be held by us as co-owners with the right of survivorship, regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account.
>
> . . . This agreement is and shall be governed by the provisions of § 41-2.1 of the General Statutes of North Carolina and any successor or substitute provisions of said statute.

Money Market Savings Certificate No. 83005104 matured on 10 April 1980. On 11 April 1980, this certificate was renewed by purchase of a new Money Market Savings Certificate No. 8301194-1 in the amount of $18,300. This sum of $18,300 was a combination of the $10,000 principal proceeds of Money Market Savings Certificate No. 83005104 plus an additional $8,300 invested by intestate. The new certificate was issued solely in intestate's name and was to mature on 10 October 1980. The new certificate number, 8301194-1, was placed in the upper right-hand corner of the previously executed signature card.

Intestate died on 16 September 1980, after the issuance of the new Money Market Savings Certificate No. 8301194-1 but before its maturity date of 10 October 1980. He was then legally married to the defendant, Beverly Ann Threatte, but had been physically separated from her for several years prior to death. The parties had signed no documents by which defendant waived any right to participate in intestate's estate.

Upon these basic facts, both plaintiff and defendant entered motions for summary judgment. The trial court granted summary judgment for the plaintiff, denied the defendant's motion for summary judgment, and held the plaintiff to be the owner of account No. 8301194-1 at First Savings and Loan Association pursuant to G.S. 41-2.1(b)(3). Defendant appealed.

Raymer, Lewis, Eisele and Patterson, by Douglas G. Eisele, for plaintiff appellee.

Pope, McMillan, Gourley and Kutteh, by Robert H. Gourley, for defendant appellant.

MORRIS, Chief Judge.

Defendant's only assignment of error challenges the court's entry of summary judgment in favor of the plaintiff and against the defendant. We note at the outset that summary judgment is appropriate in a declaratory judgment action where there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972). The real controversy in this case concerns the legal significance of the facts, rather than the facts themselves.

[1] The first question before this Court is whether the signature card signed by both plaintiff and intestate on 11 October 1979 created a joint account with right of survivorship. G.S. 41-2.1(a) allows an account with right of survivorship to be established when both or all parties "have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship." The type of writing required by this statute to establish an incident of survivorship was considered by the Court in *O'Brien v. Reece*, 45 N.C. App. 610, 263 S.E. 2d 817 (1980). In *O'Brien*, the Court carefully examined the signature card executed by the decedent (O'Brien) and Reece. Both parties signed the card but the block on the signature card indicating an intention to create the right of survivorship had not been checked. The signature card was determined to be inadequate to establish a joint account with right of survivorship because there was no express provision for right of survivorship. The Court then proceeded to examine the certificate which was issued on the same date the signature card was executed. The certificate was issued in the name of "Albert M. O'Brien or Larry J. Reece as joint owners thereof with right of survivorship." The certificate, however, did not bear the signatures of Albert M. O'Brien or Larry J. Reece. The court concluded that Reece had no interest by survivorship because first, the signature card did not create the right of survivorship, the block for survivorship not having been checked and second, the certificate itself, not having been signed by both parties, was not a signed writing as contemplated by G.S. 41-2.1. The analysis by the Court in *O'Brien* indicates that either a properly executed signature card or a certificate signed by both parties and expressly providing for a right of survivorship would be sufficient to create a joint account with right of survivorship.

In this case, the signature card was signed by plaintiff and intestate on 11 October 1979 and expressly provided for the right of survivorship as required by G.S. 41-2.1(a). The form of the signature card is virtually identical to that of G.S. 41-2.1(g) which provides:

> A deposit account under subsection (a) of this section may be established by a written agreement in substantially the following form:

> "We, the undersigned, hereby agree that all sums deposited at any time, including sums deposited prior to this date, in the . . . . . (name of institution) in the joint account of the undersigned, shall be held by us as co-owners with the right of survivorship, regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account. This agreement is governed by the provisions of § 41-2.1 of the General Statutes of North Carolina."

A signature card containing this language is sufficient to create an incident of survivorship. *See Moore v. Galloway*, 35 N.C. App. 394, 241 S.E. 2d 386 (1978). Thus, a joint account with right of survivorship was created by the signature card executed on 11 October 1979.

[2] The second question before the court is whether the signature card controls disposition of the proceeds of Money Market Savings Certificate No. 8301194-1. We believe that it does. The *O'Brien* Court noted the importance of the signature card because it "constitutes the contract between the depositor of money, and the bank in which it is deposited, and it controls the terms and disposition of the account." *O'Brien* at 617, 263 S.E. 2d at 821.

On 11 October 1979, Certificate No. 83005104 was issued for $10,000 in joint names, and it represented that the joint account created by the signature card contained $10,000. Certificate No. 83005104 was placed in the upper right-hand corner of the signature card.

On 11 April 1980, intestate obtained renewal Certificate No. 8301194-1, issued solely in his name, with $10,000 principal proceeds from the original certificate plus $8,300 of his own funds. This second certificate represented that the joint account originally created by the signature card executed on 11 October 1979 contained $18,300. The fact that renewal Certificate No. 8301194-1 was placed in the upper right-hand corner of the signature card

supports the conclusion that disposition of the proceeds of Certificate No. 8301194-1 should be controlled by the signature card.

In addition, the depositions of the employees of the Savings and Loan giving the facts set out herein with respect to the signature card and deposits, and the affidavit of one Thomas Johnson was filed in support of the motion for summary judgment. Affiant stated that he was a close friend of decedent and that on several occasions decedent had made the statement to him that Ben J. Threatte, Sr., father of decedent, "would get everything I've got" after the death of Rance Threatte and further

> Rance K. Threatte told your affiant that his father, Ben J. Threatte, Sr., was not aware of it, but that all property theretofore owned by Rance K. Threatte individually, had been put either in his father's name or in the joint names of Rance K. Threatte and Ben J. Threatte, Sr.
>
> Before his death, Rance K. Threatte told your affiant that he had some certificates which he had put in his name and in his father's name; he did not tell your affiant any details about the certificates, including either the amounts of them or the institutions in which they were held.

There was nothing offered by defendant in opposition to the materials offered to support the motion for summary judgment. It is obvious that it was decedent's intention that the terms and disposition of the proceeds of Certificate No. 8301194-1 be controlled by the signature card executed by decedent and his father and upon which the number of the disputed certificate was placed.

The judgment appealed from is

Affirmed.

Judges MARTIN and BECTON concur.

STATE OF NORTH CAROLINA v. ROBERT LEROY WILHELM

No. 8219SC273

(Filed 2 November 1982)

1. **Criminal Law § 15.1— denial of change of venue—pretrial publicity—no error**

The trial court did not err in denying defendant's motion for change of venue or a special venire under G.S. 15A-957 where only two rather short newspaper articles were about the case and both articles were factual, not inflammatory.

2. **Criminal Law § 99.6— remarks by court following cross-examination of witness—not prejudicial**

The trial judge did not express an opinion as to the credibility of the evidence after several questions were asked on cross-examination of a witness where the court was merely sustaining an objection to a question that was already asked and answered, and indicating that he would allow defendant's attorney to go deeper in that line of questioning.

3. **Searches and Seizures § 1— motion to suppress evidence—no evidence to suppress—no findings of fact at conclusion of hearing**

Even if the judge had believed the testimony of defendant's witnesses that a nonconsensual search of defendant's cars and refrigerator had been made after SBI agents left to obtain a warrant, no evidence was found in the cars or refrigerator which could have been suppressed. Since there was no conflict over whether anything was obtained from an alleged illegal search, there was no material conflict in the evidence and there was no error in the court's failure to make findings of fact at the conclusion of the suppression hearing. G.S. 15A-977(d).

4. **Narcotics § 4— proof of possession of 5,000 tablets of methaqualone—only three tablets analyzed—sufficiency of evidence**

The trial court did not err in allowing exhibits to be introduced into evidence as units of methaqualone where only three tablets of 5,000 tablets were analyzed since when a random sample from a quantity of tablets or capsules identical in appearance is analyzed and is found to contain contraband, the entire quantity may be introduced as the contraband.

APPEAL by defendant from *Washington, Judge.* Judgments entered 29 October 1981 in Superior Court, ROWAN County. Heard in the Court of Appeals 12 October 1982.

Defendant was arrested without a warrant on 28 May 1981 for felonious possession of cocaine and felonious trafficking in methaqualone. On 27 July 1981, defendant was charged in two indictments for possession of cocaine and trafficking in methaqualone. Prior to trial, his motions for change of venue and to suppress evidence were denied.

The State's evidence tends to show that on 27 May 1981, SBI agent Mills bought some methaqualone (commonly known as Quaaludes or ludes) from Mr. Banakes. Banakes gave Mills samples of two kinds of Quaaludes so Mills could decide which pills he wanted. The next day, Mills had the samples analyzed in Raleigh. They were found to be methaqualone, and he was told to purchase 5,000 pills. At 5:00 p.m., Banakes called Mills and arranged to meet him at the China Grove rest stop on I-85 at 6:30 p.m. Mills went to the rest stop, accompanied by air and ground surveillance. He followed Banakes to an apartment building and waited outside. Banakes went into defendant's apartment. When he returned, he gave Mills a large plastic bag containing 5,000 white Quaaludes. Mills placed Banakes under arrest. SBI agents Nelson and Stout arrived within thirty seconds. Mills and Nelson went to defendant's apartment, yelled "SBI," and arrested defendant. They quickly checked the apartment to see if there were any other people in there.

Agent Nelson said after they arrested defendant, he checked the living room and closets to see if anyone else was in the apartment. He returned to the kitchen and saw two plastic bags on top of the refrigerator, in plain view. He asked defendant if they could search the apartment, but defendant consented to a search of the kitchen only. They did not search the kitchen, instead, Nelson and Mills went to a magistrate to get a search warrant. They returned with the search warrant at 10:00 p.m.

Agent Lane testified that he remained in his car in front of defendant's apartment while Nelson and Mills went to get the search warrant. He said that no one searched the apartment. From his car, Lane could see the kitchen through the sliding glass doors. He said that nobody disturbed the pills on top of the refrigerator. He was not sure if anyone searched defendant's cars before the warrant was obtained.

Randy Doby, a child present when defendant was arrested, said that he told the police that defendant put a gun behind his microwave oven.

Agent Nelson testified that when he returned with the search warrant the plastic bags on top of the refrigerator had not been moved. Agent Lane testified that after the search warrant was obtained, he took the plastic bags of pills from the top of the

refrigerator. He also found a bag of white powder in defendant's bedroom closet.

Defendant's evidence tends to show that his apartment and cars were searched while the SBI agents were obtaining a search warrant. Randy Doby, Geraldine Doby, and Katherine Upright said they saw men looking in defendant's refrigerator and in his cars. Mrs. Doby and Ms. Upright could see into defendant's kitchen from Mrs. Doby's kitchen.

Defendant was found guilty of felonious possession of cocaine and trafficking in methaqualone.

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Davis and Corriher, by James A. Corriher, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first argument is that the trial court erred in denying his motion for change of venue or a special venire.

> If, upon motion of the defendant, the court determines that there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, the court must either:
>
> (1) Transfer the proceeding to another county. . . , or
>
> (2) Order a special venire. . . .

G.S. 15A-957.

Defendant has the burden of proof on a motion for change of venue, and to prevail, he must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. *State v. McDougald*, 38 N.C. App. 244, 248 S.E. 2d 72 (1978), *review denied*, 296 N.C. 413, 251 S.E. 2d 472 (1979). A motion for change of venue is addressed to the sound discretion of the trial judge, absent a showing of abuse of discretion, the ruling will not be overturned. *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated*, 429 U.S. 809, 97 S.Ct. 46, 50 L.Ed. 2d 69 (1976).

In his brief, defendant contends that various articles published in the local newspaper were inflammatory and prejudicial. Of the twelve newspaper articles he introduced into evidence, ten were written in November 1979, and were about a different trial. Only two rather short articles were about this case. At trial, defendant admitted that the articles were factual, not inflammatory. News coverage which accurately reports the circumstances of the case is not so innately conducive to the inciting of local prejudices as to require a change of venue. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981); *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1046, 59 L.Ed. 2d 90 (1979).

[2] Defendant's second argument is that the trial judge expressed an opinion as to the credibility of the evidence after the following questions on cross-examination:

Q: [Mr. Corriher]: Mr. Neuner, did you do a physical count yourself of any of these pills?

A: No, sir, I did not.

Q: And did you check for latent fingerprints on the four or five plastic bags you testified about?

A: The five clear plastic bags.

Q: You didn't find any latent fingerprints of Mr. Robert Wilhelm on any of those bags, did you, sir?

A: Made no comparison. I found several fragmentary latent prints, but they did not contain a sufficient number of identifying characteristics to determine who they belonged to.

Q: You found no latent fingerprints of Robert Wilhelm on those bags, did you, sir?

MR. BOWERS: Your Honor, the State objects.

THE COURT: I think he answered that. Sustained. If you want him to testify to those he found to be identical or substantially similar to those of Mr. Wilhelm and those found not to be similar, I'll let him go into it if you want him to. Now, do you want him to go all the way into this?

MR. CORRIHER: No, sir.

THE COURT: Then the objection would be sustained.

"A trial judge may not express. . . , any opinion in the presence of the jury on any question of fact to be decided by the jury." G.S. 15A-1222. It is immaterial how the opinion is expressed, whether in the examination of a witness, in the rulings upon objections to evidence, or in any other manner. *State v. Freeman*, 280 N.C. 622, 187 S.E. 2d 59 (1972). The judge's comments should be considered in light of all the facts and circumstances. *State v. Brady*, 299 N.C. 547, 264 S.E. 2d 66 (1980).

In this case, it is clear that the trial judge's comments, taken in context, were not prejudicial. He was merely sustaining an objection to a question that was already asked and answered, and indicating that he would allow Mr. Corriher to go deeper in that line of questioning.

[3] Defendant's third argument is that the trial court erred in denying his motion to suppress the evidence seized by the police.

> It is a "basic principle of Fourth Amendment law" that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that . . . [t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.

Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980).

Defendant contends that a nonconsensual search was made in his apartment after the SBI agents left to obtain a warrant. Although the State's witnesses deny making an illegal search, defendant's witnesses said that they saw men looking into defendant's cars and refrigerator. Even if the judge had believed the testimony of defendant's witnesses, no evidence was found in the cars or refrigerator which could have been suppressed.

Defendant contends that the trial court erred by not making findings of fact at the conclusion of the suppression hearing. G.S. 15A-977(d) provides: "If the motion is not determined summarily the judge must make the determination after a hearing and find-

ing of facts. . . ." Section (f) provides: "The judge must set forth in the record his findings of facts and conclusions of law." Since there is no conflict over whether anything was obtained from the alleged illegal search, there was no material conflict in the evidence. Although it is a good practice to make findings of fact, if there is no material conflict in the evidence, it is not error to admit the evidence without making specific findings of fact. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980); *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976), *rehearing denied*, 293 N.C. 261, 247 S.E. 2d 234 (1977).

[4] Defendant's next argument is that the trial court erred in allowing State's exhibits 1, 2, and 3 to be introduced into evidence as 4855, 33, and 1106 units of methaqualone. Defendant contends that since only three tablets were analyzed, the State did not prove that he possessed more than 5,000 tablets.

Mr. McSwain, the forensic chemistry expert, testified that each bag contained uniform, identical tablets, although the tablets in Exhibit 2 were unlike the tablets in Exhibits 1 and 3. He testified that he randomly selected the tablets he tested, and they were methaqualone. When a random sample from a quantity of tablets or capsules identical in appearance is analyzed and is found to contain contraband, the entire quantity may be introduced as the contraband. For example, in *State v. Riera*, 276 N.C. 361, 172 S.E. 2d 535 (1970), the fact that several capsules, selected randomly out of more than 100 capsules, which were identical in appearance, were found to contain barbiturates, was sufficient evidence to establish that defendant possessed over 100 barbiturates.

We have carefully reviewed defendant's assignments of error and find no error.

No error.

Judges WEBB and WELLS concur.

Sharpe v. Quality Education, Inc.

JAMIE MICHELENE SHARPE, A MINOR, BY HER FATHER AND GUARDIAN, JAMES F. SHARPE, AND JAMES F. SHARPE, INDIVIDUALLY v. QUALITY EDUCATION, INC., T/A ONSLOW ACADEMY, AND BONNIE HOOD

No. 814SC1239

(Filed 2 November 1982)

1. **Negligence § 18— contributory negligence of minor**

The trial court erred in entering summary judgment for defendants on the ground of contributory negligence by the nine-year-old plaintiff where defendants presented no materials to rebut the presumption that a nine-year-old child is incapable of contributory negligence.

2. **Automobiles and Other Vehicles §§ 41.3, 92.3— assistance for private school bus—injury to child while crossing road—negligence of owner and driver of bus**

In an action to recover for injuries to a nine-year-old student who was struck by a car while crossing the highway to return to defendants' disabled bus after accompanying another student whom defendant driver had asked to telephone the corporate defendant for assistance, plaintiff's forecast of evidence was sufficient to present a material issue of fact as to the negligence of defendants in continuing to use a faulty bus that had a known history of stalling without repairing it, letting small children off the bus at an unsafe place other than the school or their homes, and improperly supervising the minor plaintiff's crossing of the highway.

3. **Automobiles and Other Vehicles § 87.5— summary judgment erroneous on ground of intervening negligence**

In an action to recover for injuries to a nine-year-old student who was struck by a car while crossing the highway to return to defendants' disabled bus after accompanying another student whom defendant driver had asked to telephone the corporate defendant for assistance, the trial court erred in entering summary judgment for defendants on the ground of intervening negligence based on plaintiff's stipulation that the owner of the car which struck the minor plaintiff had paid her $20,000.00 for her injuries where (1) there was no evidence of any negligence on the part of the driver of the car which struck the minor plaintiff, and (2) the evidence would permit a finding that the intervening act and resulting injury could reasonably have been foreseen by defendant bus driver.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 30 July 1981 in Superior Court, ONSLOW County. Heard in the Court of Appeals 13 September 1982.

This is a personal injury action, and the sole issue on appeal concerns the trial court's decision to grant summary judgment for defendants—Quality Education, Inc., trading as Onslow Academy, and Bonnie Hood, the corporate defendant's school bus driver.

On 21 October 1975, defendant Hood allowed the nine-year-old minor plaintiff, Jamie Sharpe, to depart the corporate defendant's disabled school bus and cross a four-lane highway. Jamie was accompanying another student whom Bonnie Hood had asked to cross the highway and telephone the corporate defendant for assistance. As she crossed the highway to return to the school bus, Jamie was struck by a car driven by a third party.

The Complaint alleges that Quality Education, Inc. violated its duty to use extreme care in the transportation of minors to and from Onslow Academy in that (1) Quality Education knew of the mechanical difficulties with the bus prior to the accident but continued to use the bus without making necessary repairs; (2) Quality Education knew or should have known that the school children riding its buses had previously been let off buses at places other than their destination; and (3) Quality Education and Bonnie Hood knew or should have known that to allow Jamie to cross the highway would create an unreasonably dangerous situation likely to lead to foreseeable injuries. In its Answer, defendants deny the material allegations of the Complaint and assert as defenses that Jamie was contributorily negligent and that any negligence of defendant Hood was insulated by the negligence of the third party whose vehicle struck Jamie.

After considering the pleadings, the stipulations of the parties, and the deposition of defendant Hood, the court entered summary judgment for both defendants.

Gene B. Gurganus for plaintiff appellant.

Warlick, Milsted, Dotson & McGlaughon, by Carl S. Milsted, for defendant appellees.

BECTON, Judge.

I

The summary of defendant Hood's deposition reveals the following: On 21 October 1975, Jamie was a student at Onslow Academy and a passenger on Quality Education's bus being driven by defendant Hood. Defendant Hood had experienced mechanical trouble with the bus prior to starting it that morning. She had called the headmaster of Onslow Academy and had indicated that she was afraid to drive the bus. The headmaster told

her to have the bus "jumped," reassuring her that once it was "jumped" it would work fine. (Plaintiff alleged in the Complaint that Quality Education knew that the bus had experienced mechanical difficulty prior to 21 October 1975 and that rather than effecting the repairs necessary for the bus's safe and efficient operation, Quality Education's solution was to furnish the bus with a set of jumper cables.)

On 21 October 1975, the bus stalled three times. After "jumping" the bus the second time, defendant Hood decided to go to school without picking up any more children. The bus, however, stalled again. Hood then sent David Hull, the oldest boy on the bus (he was either ten or eleven), across Highway #24 to telephone for help. Jamie asked a few times if she could go with David, and Hood told her she could not. Jamie got off the bus and started to go anyway, so defendant Hood "told David to stay with her, and to hold her hand and to make sure she got across okay." The children crossed the highway with no difficulty. As they were returning, they crossed the first two lanes and then stopped in the median. Defendant Hood specifically stated: "They stopped in the median together and I was watching traffic, and I believe I sort of waved them on—to come across, so that is when David came on and Jamie stood there. I don't know why but she didn't come on then." Hood further stated: "I am not sure whether David was across the road or not when Jamie started to leave the median" and that "as soon as she jumped off the median it seemed like the car was just there and hit her."

II

The stated grounds for defendants' motion for summary judgment were (a) Jamie's contributory negligence and (b) lack of proximate cause based on the intervening negligence of the driver of the vehicle which struck Jamie.

[1] A. Plaintiff first argues that a nine-year-old child is presumed incapable of contributory negligence and that, to the extent the trial court based its summary judgment on contributory negligence, the trial court erred. We agree.

Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56. The burden is on the moving party to establish the lack of triable issues of fact. In considering a motion for summary judgment, the court must look at the record in the light most favorable to the party opposing the motion. *Henson v. Jefferson*, 20 N.C. App. 204, 200 S.E. 2d 812 (1973).

Jamie clearly was not contributorily negligent as a matter of law. Defendants concede as much in their brief, but cite cases in which minor plaintiffs have been struck by oncoming automobiles and in which our appellate court affirmed the grants of nonsuit. Those cases are inapposite. They involve nonsuits, not summary judgments, and they were decided on the issue of negligence, not contributory negligence.

The presumption that a nine-year-old child is incapable of contributory negligence is rebuttable. *See Ennis v. Dupree*, 258 N.C. 141, 145, 128 S.E. 2d 231, 235 (1962). Here defendants presented nothing in support of their motion for summary judgment to rebut this presumption, and therefore there was an issue of fact to be resolved.

[2] B. With regard to defendants' argument that the negligence of defendants, if any, was not a proximate cause of plaintiff's injury, plaintiff contends that defendants breached their duty properly to transport and supervise minor plaintiff while she was under defendants' care by continuing to use a faulty bus that had a known history of stalling without repairing it, by letting small children off the bus at an unsafe place other than the school or their homes and at dangerous places, and by improperly supervising minor plaintiff's crossing the highway. Plaintiff finds support for its argument in *Colson v. Shaw*, 301 N.C. 677, 273 S.E. 2d 243 (1981). In *Colson*, the defendant allowed a five-year-old minor plaintiff to exit his car unattended, on a busy residential street after dark, knowing that it was necessary for the child to cross the street to reach his destination. The child was struck by another car as he attempted to cross the street. Reversing the trial court's judgment granting the defendant's motion to dismiss, our Supreme Court said:

> [T]he operator of an automobile has a duty to exercise that degree of care which a person of ordinary prudence would ex-

> ercise under similar circumstances to prevent injury to the invited occupants of his vehicle. [Citations omitted.] . . . It is generally established that the operator must at least allow his passengers to unload in a safe place and may not stop his car in a manner likely to create a hazard to those alighting. [Citations omitted.]
>
> . . . .
>
> Our determination in this case is also influenced by the rule that where the actions of children are at issue, the duty to exercise due care should be proportioned to the child's incapacity to adequately protect himself. [Citations omitted.]
>
> . . .
>
> After viewing plaintiffs' evidence in this case in the light most favorable to them, we hold that plaintiff [sic] presented enough evidence to enable a jury to find that defendant breached his duty to unload his passengers in a safe place.

Id. at 680-81, 243 S.E. 2d at 246. On the basis of *Colson* and the cited authority therein, we hold that the record in this case, when taken in the light most favorable to the plaintiff, clearly presents triable issues regarding whether (1) defendants breached a duty owed the plaintiff under the circumstances which existed and (2) whether defendants' negligence was a proximate cause of plaintiff's injuries.

[3] The trial court's order granting the motion of defendants for summary judgment was also based on plaintiff's stipulation that Jamie was struck by a 1973 Plymouth automobile owned by the U. S. Government and operated by William T. MacInnis; that Jamie walked or ran from the median of the highway into the lane of travel of the Government vehicle; and that the Government had paid Jamie $20,000.00 for injuries sustained by her. For the following reasons, the trial court erred.

First, there is no evidence of any negligence on the part of MacInnis, the driver of the car that struck Jamie. The only evidence concerning the operation of MacInnis' vehicle was given by defendant Bonnie Hood, who testified: The car that struck Jamie "was going rather slowly, not very fast. I am not really sure, but I don't think it was going fast at all . . . she was

knocked down but the car did not pass over her. The car stopped almost immediately." Second, the record does not show that the intervening act of the driver of the Plymouth insulated defendants as a matter of law. If the intervening act and resulting injury could have been reasonably foreseen, it cannot insulate prior negligence. *Brown v. R.R. Co. and Phillips v. R.R. Co.*, 276 N.C. 398, 404, 172 S.E. 2d 502, 506 (1970).

The record suggests that defendant Hood may have foreseen the danger. Not only was she fearful of driving the bus until it was fixed, but she also refused on at least three occasions to allow Jamie to accompany David Hull across the road. Even if defendant Hood had not foreseen the danger, however, the question is whether a reasonable person would have foreseen the danger. That question, and indeed, the questions of intervening negligence, is ordinarily for the determination of the jury. *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 608, 139 S.E. 2d 879, 884 (1965).

For the foregoing reason, the judgment below is

Reversed.

Chief Judge MORRIS and Judge JOHNSON concur.

BROWNLOW HOOPER v. PHOEBE HOOPER

No. 8129SC1355

(Filed 2 November 1982)

1. Deeds § 16.2— fee on condition subsequent

A deed conveying property to plaintiff and defendant, plaintiff's former wife, on the condition that the grantees "support, maintain, clothe, feed, provide, shelter and kindly care" for the grantors in a fair and reasonable manner for the remainder of their lives and providing that it was the intention of the parties to create a fee on condition subsequent with right of re-entry upon breach of the stated conditions did in fact create a fee simple on condition subsequent.

2. Deeds § 16.2— fee on condition subsequent—no breach of condition—waiver of breach

The grantees of property did not breach a fee on condition subsequent in a 1958 deed requiring them to support, maintain, clothe, feed, and provide

shelter to the grantors for the remainder of their lives where the evidence disclosed that the grantors had sufficient food, clothing and firewood whenever the grantees visited them, the grantors never asked the grantees for anything, the grantees did provide shelter to the grantors by allowing them to remain in the homeplace on the property and by paying the property taxes, and the grantors left the property in 1968 as a matter of convenience and not as a result of any refusal by the grantees to continue to provide shelter for them. Furthermore, the grantors waived any breach of the condition subsequent by living on the property for more than ten years and then voluntarily moving from the property without ever claiming a breach or seeking a rescission of the deed. Therefore, the grantors had no right to re-enter the property, and their execution of a deed in 1969 conveying the property to one grantee alone was without effect even if the execution of the deed could be considered an exercise of the right of re-entry.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 3 September 1981 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 23 September 1982.

In 1978 plaintiff instituted this action to be declared the owner in fee of a parcel of land free and clear of any interest of his former wife. Plaintiff alleged the property in question had been conveyed to him and the defendant by his parents in 1958. The deed from plaintiff's parents was made on condition that the grantees, plaintiff and defendant,

> . . . support, maintain, clothe, feed, provide, shelter and kindly care for H. H. Hooper and his wife, Julia E. Hooper in a fair, reasonable and sufficient manner for the natural lives of each of the parties of the first part and provide said parties of the first part with a decent Christian burial in the event of their death and to erect a suitable monument at each of the graves and said parties of the second part to pay for said burial and monument, . . .

The deed specifically provided that it was the intention of the grantors to create a fee on condition subsequent with right of re-entry in the grantors upon breach of the stated conditions.

Plaintiff further alleged that the right of re-entry was exercised by the grantors in 1969 when they conveyed the same property in fee simple to plaintiff alone. Plaintiff seeks to be declared full owner of the property pursuant to the latter deed.

In her answer, defendant denied that she had breached the conditions contained in the 1958 deed or that the grantors had ex-

ercised the right of re-entry and asked that she be declared owner of a one-half undivided interest in the property. The defendant moved for summary judgment. Defendant's motion for summary judgment was denied, and summary judgment for plaintiff was entered. Defendant appealed.

Ramsey, White, Cilley & Dalton, by William R. White, for plaintiff-appellee.

Potts & Welch, by Jack H. Potts, for defendant-appellant.

HEDRICK, Judge.

Defendant contends the court erred in entering summary judgment for plaintiff, and argues that summary judgment for her should have been entered. Defendant contends the uncontroverted facts disclose the condition was not breached, and that if it was, the grantors never exercised their right of re-entry.

[1] There is no question that the 1958 deed to plaintiff and defendant created a fee simple on condition subsequent. Not only did the grantors reserve a right to re-enter upon breach of the conditions, they further provided that the deed would be null and void upon such breach and stated their intention to create a fee simple on condition subsequent. *See Mattox v. State,* 280 N.C. 471, 186 S.E. 2d 378 (1972). The breach of a condition subsequent entitled the grantor, or his heirs, to cause a forfeiture of the grantee's estate by exercising the right of re-entry. 5 Strong's N.C. Index 3rd, *Deeds* § 16.2. The initial question for determination in this appeal, therefore, is whether, prior to 1969, there was a breach of the condition contained in the 1958 deed such that the grantors or their heirs could declare the estate created by the 1958 deed forfeited and exercise the right of re-entry, and thereafter convey the property to the plaintiff in fee free of any claim of the defendant, plaintiff's former wife.

[2] A review of the record reveals that plaintiff and defendant are in agreement as to all the facts concerning the two deeds and their actions vis-a-vis the grantors preceding the purported re-entry and reconveyance of the property by the grantors. Only a question of law remains as to whether those actions constitute a breach of the conditions subsequent contained in the 1958 deed. We hold that, as a matter of law, they do not.

The record discloses the following uncontroverted facts: the grantors continued to live on the property after conveying it to plaintiff and defendant in 1958. From 1958 to 1968, neither plaintiff nor defendant did anything to support or care for the grantors other than to pay the taxes and make some repairs on the property and visit occasionally. However, the grantors always appeared to plaintiff to have plenty of food, clothing and firewood and never asked him for anything. Plaintiff and defendant separated in 1968 and were divorced in 1969. The grantors executed the purported deed to plaintiff in 1969. The deed recites that, the conditions in the 1958 deed having been breached by both plaintiff and defendant, the grantors desired to convey the property in fee simple to plaintiff. One of the grantors, plaintiff's father, died in 1972. The remaining grantor paid his funeral expenses because, "I wanted to pay it myself. They would have paid it, but still I wanted to."

The evidence discloses that the grantors had sufficient food, clothing and firewood whenever plaintiff and defendant visited them and that the grantors never asked plaintiff or defendant for anything. Plaintiff and defendant did provide shelter to the grantors by allowing them to remain in the homeplace on the property and by paying the property taxes. The grantors left the property in 1968 as a matter of convenience, not as a result of any refusal by plaintiff or defendant to continue to provide shelter for them. As neither grantor had died at the time of the purported 1969 conveyance, plaintiff's and defendant's failure to pay the burial expenses of plaintiff's father is irrelevant.

These facts are similar to those in *Barkley v. Thomas*, 220 N.C. 341, 17 S.E. 2d 482 (1941), where the grantees under a deed conveying a fee on condition subsequent were required to support and provide a home for the grantor for the rest of his life. Immediately after the conveyance, the grantees took the grantor into their home for a year before placing him in a sanitorium for treatment of tuberculosis, paying thereafter only his monthly laundry bill, until he died two years later. Upon his death, the sanitorium presented a bill for its services to the grantor's administrator, who thereupon sought to rescind the deed to the grantees for breach of the condition subsequent. The court found no breach.

In our opinion, the facts in the present case merit a finding of compliance with the conditions subsequent more than those in *Barkley* because the terms of the conditions subsequent in this deed required only reasonable and sufficient support and there was no evidence that the grantors ever needed more than was given them by plaintiff and defendant. Even though the grantors attempted to rescind the deed for breach of the conditions, a factor not found in the *Barkley* case, this fact is not determinative where there has been no breach preceding the attempted rescission.

Further, had there been a breach, the facts revealed by the depositions and affidavits in this case clearly show a waiver of the breach by the grantors.

> A party, for whose benefit a condition subsequent is attached to a devise of land, being in possession at the time of the breach, is presumed to hold for the purpose of enforcing the forfeiture, though he may waive it. "The law will presume that a person who cannot make a formal entry upon the estate of another for condition broken, because he is already in possession, intends to hold possession to enforce all his legal rights, unless there be some indication that such was not his intention, by which the presumption of law may be rebutted. When the facts disclosed are inconsistent with a claim to hold for condition broken, the presumption will be rebutted, or the person entitled to make an entry will be considered as having waived a performance of the condition. Forfeitures are not favored by the law; and any acts of the party entitled to cause a forfeiture, clearly inconsistent with a claim to be the owner of the estate by forfeiture, must be regarded as proof that performance of the condition was not intended to be enforced for the purpose of creating a forfeiture." [Citation omitted.]

Brittain v. Taylor, 168 N.C. 271, 274-75, 84 S.E. 280, 282 (1915). Here, the grantors lived on the property for ten years, allowing the grantees to pay the taxes, and made repairs, without ever claiming a breach or seeking rescission of the deed, in spite of plaintiff's present contention that the conditions were never performed. To the contrary, the grantors moved off of the property without ever asserting that the conditions had not been fulfilled

and attempted to deed the property to plaintiff without any restrictions as to their support. These factors are inconsistent with a claim to hold for condition broken and operated to relieve the estate of the burden of the conditions subsequent. *See Bernard v. Bowen*, 214 N.C. 121, 198 S.E. 584 (1938); *Huntley v. McBrayer*, 172 N.C. 642, 90 S.E. 754 (1916).

No breach of the conditions subsequent having occurred prior to 1969, and any alleged breach having been waived by the grantors, we do not reach the issue of whether the execution of a deed to plaintiff alone constituted an exercise of the right of re-entry by the grantors.

The trial court erred in entering summary judgment for plaintiff. On the basis of the record before us, the court should have entered summary judgment for the defendant. *See Mattox v. State, supra; Agaliotis v. Agaliotis*, 38 N.C. App. 42, 247 S.E. 2d 28 (1978). The case is remanded to the Superior Court of Transylvania County with instructions that summary judgment be entered in favor of defendant in accordance with this opinion.

Reversed and remanded.

Judges MARTIN (R. M.) and WEBB concur.

HAZEL PRESNELL v. DAVID PRESNELL

No. 8120DC1423

(Filed 2 November 1982)

Reformation of Instruments § 7— rescission and reformation of instrument on theory of fraud—insufficient evidence

The trial court properly refused to rescind plaintiff's conveyance of a tract of land from herself as grantor to herself and defendant as grantees following a disputed marriage between the parties since plaintiff's action was based on fraud and the findings of fact, which were supported by the evidence, showed that plaintiff was a party to the fraud which led to the "marriage."

APPEAL by plaintiff from *Snow, Judge*. Judgment entered 28 August 1981 in District Court, HAYWOOD County. Heard in the Court of Appeals 14 October 1982.

Plaintiff, Hazel Presnell, brought this action to declare her marriage to defendant, David Presnell, void and to recover an interest in land which she had conveyed to defendant as her putative spouse. The case was tried before the District Court, without a jury. From judgment entered declaring the marriage void but denying plaintiff recovery of the disputed property interest, plaintiff appealed.

John I. Jay, for plaintiff-appellant.

Noland, Holt, Bonfoey & Davis, by Richlyn D. Holt, for defendant-appellee.

WELLS, Judge.

The sole question we consider is whether the trial court erred in refusing to rescind plaintiff's conveyance of a tract of land from plaintiff as grantor to herself and defendant as grantees following the disputed marriage between plaintiff and defendant.

Plaintiff bases her action for rescission and reformation on a theory of fraud. At trial, plaintiff sought to prove that defendant represented to her that he had a valid divorce from his first wife; that he then knew that the divorce had been obtained by false representation; that he made the representation to plaintiff in order to induce her to marry him and convey to him an interest in land; and that plaintiff did rely on defendant's representation and convey to defendant the interest.

With regard to the alleged fraud, the trial court made the following pertinent findings of fact:

> 1. That the Plaintiff and Defendant are citizens and residents of Haywood County . . .;
>
> . . .
>
> 6. That near the end of the year of 1977, the Plaintiff and the Defendant decided that they would like to get married and the Plaintiff learned from an associate at her place of employment that it might be possible [for defendant] to get a divorce [from his first wife] in Tennessee, even though the Defendant was not a resident of the State of Tennessee and

even though both the Plaintiff and the Defendant knew that the Defendant was not a resident of Tennessee;

7. That near the end of November of 1977, the Plaintiff and the Defendant went to Tennessee for the Defendant to see an attorney . . .;

8. That on or about the 7th day of December, 1977, the Plaintiff and the Defendant returned to Cooke County, Tennessee for the Defendant to sign the necessary papers to commence the divorce proceeding;

. . .

11. That on or about the 9th day of March, 1978, the Plaintiff and Defendant returned to Tennessee for the Defendant to participate in a divorce proceeding;

12. That the Plaintiff was present at the divorce proceeding and in Court at the time that the divorce of the Defendant was obtained and that at the time the divorce was obtained, both parties knew that the Defendant was not a resident of the State of Tennessee;

13. That the divorce was granted in the Court proceeding on the 9th day of March, 1978;

14. That on the 18th day of March, 1978, the Plaintiff and Defendant returned to Cooke County, Tennessee and a wedding ceremony was consummated between the parties;

15. That on or about the 13th day of April, 1978, the Plaintiff deeded to herself and to the Defendant the 1.577 acre tract of land which had been previously deeded to her by her parents and that the Plaintiff and Defendant then held said land jointly;

. . .

The parties stipulated that the Tennessee divorce was void for lack of jurisdiction. The court made the following conclusion based on its findings of fact:

That the Plaintiff was not defrauded, deceived, or tricked into conveying the 1.577 acre tract of land to herself and to the Defendant jointly in that she was aware of the

events leading up to the purported divorce of the Defendant in the State of Tennessee, and in that she was with the Defendant at the time that he obtained the divorce in the State of Tennessee.

The party seeking reformation of an instrument based on fraud must establish his case by clear, cogent and convincing proof. *Isley v. Brown*, 253 N.C. 791, 117 S.E. 2d 821 (1961). Whether the plaintiff has carried his burden is a question of fact. *Insurance Co. v. Lambeth*, 250 N.C. 1, 108 S.E. 2d 36 (1959).

In a nonjury trial, findings of fact made by the court are conclusive on appeal if there is evidence to support them. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). We have carefully reviewed the evidence in the present case and the above findings are clearly supported by the evidence. Both plaintiff and defendant acted together to misrepresent to the Tennessee court that defendant was a resident of Tennessee in order to enable defendant to get a divorce. The evidence shows, without dispute, that plaintiff gave to defendant the name of a Tennessee resident with whom defendant represented he lived in order to establish jurisdiction for the divorce in the Tennessee court.

The trial court properly refused to grant rescission or reformation to plaintiff. Plaintiff's action was based on fraud and the findings of fact show that plaintiff was a party to the fraud which led to the "marriage." Plaintiff has not shown that she reasonably relied on anything that defendant represented in entering into the "marriage." The evidence shows that the conveyance by plaintiff to herself and defendant was made of her own free will, not induced by any fraudulent act or representation by defendant to which plaintiff was not also a party. Reformation is an equitable remedy, and as such it will not be granted to a party with unclean hands. *See Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 211 S.E. 2d 327 (1975), and authorities cited therein.

Since the parties were never married, the conveyance by plaintiff to herself and defendant created in them a tenancy in common. *Grant v. Toatley*, 244 N.C. 463, 94 S.E. 2d 305 (1956); *Lawrence v. Heavner*, 232 N.C. 557, 61 S.E. 2d 697 (1950).

The judgment below is

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. GARY T. VAUGHAN

No. 8218SC185

(Filed 2 November 1982)

1. **Homicide § 28.3— self-defense—instruction on use of excessive force**

The trial court in a homicide case did not err in instructing on the fourth element of the perfect right of self-defense that defendant must not have used "excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time" without the additional phrase "to protect himself from death or great bodily harm."

2. **Homicide § 28.3— instructions on imperfect right of self-defense**

The trial court's instruction that "if the State proves beyond a reasonable doubt that the defendant, although otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter" was a sufficient instruction on the imperfect right of self-defense.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 23 July 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 21 September 1982.

Defendant was indicted for the murder of Paul Autry. He pleaded not guilty and was tried for second degree murder.

State's evidence tended to show that on the afternoon of 12 July 1980 the defendant got into an argument with someone at the Hilltop Lounge. Danny Smith, a member of the Rebel Rousers Motorcycle Club, interceded and told defendant "if he had anything to say to say it to me." The argument ended. The defendant got a shotgun out of his car trunk, laid it on the back seat, and drove away. That night Danny Smith, Paul Autry, and two other members of the motorcycle club went to another bar, the Pinwheel Lounge in Greensboro, North Carolina. The defendant arrived, and an argument began between defendant and Danny Smith. Autry, the sergeant-at-arms of the Rebel Rousers,

approached the two men and asked what was going on. He told defendant to "take it outside." The defendant pulled a gun and started shooting. Smith and several others wrestled defendant to the floor and disarmed him. Autry was shot, and he subsequently died from gunshot wounds to his chest.

The defendant's evidence tended to show that following the argument at the Hilltop Lounge, Danny Smith stated that he and the others were going to the Pinwheel Lounge to settle things with the defendant once and for all. Smith, Autry and the other club members were armed with guns and knives. Witnesses testified that they saw Autry reach behind his back just before the shooting as if he were reaching for a gun. A gun was subsequently found on the floor near Autry's body. Defendant also presented evidence that Autry had a reputation for violence.

Defendant was convicted of second degree murder and was sentenced. Defendant appeals the judgment entered against him.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Public Defender Wallace C. Harrelson, by Assistant Public Defender Hugh Davis North, for defendant-appellant.

HILL, Judge.

Defendant presents two arguments on appeal. Both concern the trial court's charge on the law of self-defense. Defendant relies upon *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981), in which Justice Huskins gave the following statement of the law in this area:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

(Citations omitted.) The existence of these four elements gives the defendant a *perfect right of self-defense* and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense*, having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter. (Citations omitted.)

303 N.C. at 530, 279 S.E. 2d at 572-73.

[1] Defendant's first argument relates to the charge on perfect self-defense. The trial court instructed on the four elements set forth in *Norris*. As to the fourth element, the court stated, "The fourth thing that applies to self-defense is that the defendant did not use excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time." Defendant argues that the judge should have defined excessive force as "more force than was necessary or reasonably appeared to him to be necessary under the circumstances *to protect himself from death or great bodily harm*." Specifically, defendant contends that by omitting the phrase in italics the judge reduced the State's burden of proof and deprived him of the full benefit of the law.

We cannot agree. There is no required formula for an instruction to the jury. *State v. Wilkins*, 34 N.C. App. 392, 399, 238 S.E. 2d 659, 664, *disc. rev. denied*, 294 N.C. 187, 241 S.E. 2d 516 (1977). The trial court is not required to adopt the very words used by an appellate opinion in setting forth the law on a particular subject. The charge is to be construed as a whole; and "[i]f, when so construed, it is sufficiently clear that no reasonable cause exists to believe that the jury was misled or misinformed, any exception to it will not be sustained even though the instruction could have been more aptly worded." *State v. Williams*, 299 N.C. 652, 660, 263 S.E. 2d 774, 779-80 (1980). In the present case, we find no error in the instruction on the fourth element of perfect self-defense. The importance of the fourth element is that the force used not be excessive, and we believe that the trial court's instruction adequately conveyed this meaning. The instruction is substantially as set forth in *Norris*, and we overrule this assignment of error.

[2] By his second argument, the defendant contends that the trial court failed to follow the guidelines of *Norris* in the charge on imperfect self-defense. Defendant particularly objects to the court's definition of voluntary manslaughter and argues that the judge should have instructed in the language of *Norris*. We have examined the instruction given by the court and find no error. The court herein instructed, "[I]f the State proves beyond a reasonable doubt that the defendant, although otherwise acting in self-defense, used excessive force or was the aggressor, though he had no murderous intent when he entered the fight, the defendant would be guilty of voluntary manslaughter." Our Supreme Court recently found this very language to be adequate in a case in which the defendant appellant relied on *Norris*. *State v. Cooke*, 306 N.C. 117, 291 S.E. 2d 649 (1982). In light of *Cooke*, we overrule this argument.

In the defendant's trial we find

No error.

Judges HEDRICK and ARNOLD concur.

IN RE: APA, A MINOR CHILD

No. 8122DC1359

(Filed 2 November 1982)

Parent and Child § 1— termination of father's parental rights—finding of neglect and abandonment supported by evidence

Where the record revealed that respondent lived apart from petitioner and far from his child since the child's birth; that although he suggested negotiation of a visitation and child support plan, he dropped the matter after petitioner agreed to negotiate; that his sole contribution to the child's support in the eleven years preceding the lawsuit was a bicycle he sent when the child was six years old, respondent's willful failure to support his child or to visit him during this period was sufficient to support the judge's finding of neglect. There was clear and convincing evidence that respondent willfully failed to provide his child with care and support and that he abandoned the child as contemplated by G.S. 7A-517(21). The judge's finding substantially tracked the statutory language of G.S. 7A-517(21) which defines a "neglected juvenile."

Judge HEDRICK concurs in the result.

Judge WEBB dissenting.

APPEAL by respondent from *Cathey, Judge.* Judgment entered 10 August 1981 in Juvenile Court, DAVIDSON County. Heard in the Court of Appeals 23 September 1982.

The respondent father appeals from an order terminating his parental rights in his minor son under the provisions of G.S. 7A-289.31 and G.S. 7A-289.32(2).

Brinkley, Walser, McGirt, Miller & Smith, by Gaither S. Walser and Stephen W. Coles, for respondent-appellant.

Stoner, Bowers & Gray, by Carl W. Gray, for petitioner-appellee.

HILL, Judge.

In the mother-petitioner's action to terminate the parental rights of John Thomas Apa, father of Marcus Alexander Apa, the trial judge found that respondent had neglected and abandoned his child, and entered judgment for petitioner.

Respondent presses three contentions: (1) no grounds exist for terminating respondent's parental rights because the evidence is insufficient to support the trial judge's finding of neglect;

(2) the findings of fact fail to support the conclusion that respondent neglected his child; (3) the evidence is insufficient to support the finding that respondent neglected and abandoned his child. Affirming, we hold that all the findings and conclusions are supported by clear and convincing evidence. Because the respondent's contentions overlap, we address them in the context of an appraisal of the judge's finding and conclusion of neglect.

Respondent excepts to the trial judge's finding that the respondent has "neglected and abandoned Marcus Alexander Apa in that he has failed to provide proper and necessary care, support and supervision for Marcus Alexander Apa . . . ." The record reveals that respondent has lived apart from petitioner and far from North Carolina since before his child's birth. Although he suggested negotiation of a visitation and child support plan, he dropped the matter after petitioner agreed to negotiate. Apparently, his sole contribution to the child's support in the eleven years preceding this lawsuit is a bicycle he sent when the child was six years old. Petitioner's endeavor to negotiate terms of visitation and support was, in effect, a demand for child support. We find that respondent's willful failure to support his child or to visit him during this period, nothing else appearing, is sufficient evidence to support the judge's finding of neglect.

Respondent further argues that the court erred in concluding that he neglected his child within the meaning of G.S. 7A-289.32(2), which states that the court may terminate parental rights upon a finding that:

> [t]he parent has abused or neglected the child. The child shall be deemed to be . . . a neglected child within the meaning of G.S. 7A-278(4).

G.S. 7A-278(4) was repealed in 1979 and replaced by G.S. 7A-517(21) of the recodified North Carolina Juvenile Code which defines a "neglected juvenile" as:

> [a] juvenile who does not receive proper care, supervision, or discipline from his parent . . . or who has been abandoned . . . .

See In re Smith, 56 N.C. App. 142, 287 S.E. 2d 440 (1982). The judge's finding substantially tracks the statutory language.

Here, the trial judge found that "John Thomas Apa has willfully failed to provide any financial support or assistance whatsoever for Marcus Alexander Apa, although he had the capability of doing so." The judge further found that, except for an abandoned attempt to negotiate visitation and support, respondent "made no other significant attempts to establish a relationship with Marcus Alexander Apa or obtain rights of visitation with Marcus Alexander Apa." Respondent failed to except to these findings of fact. They are, therefore, deemed to be supported by competent evidence and are conclusive on appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962); *In re Smith, supra.*

We find clear and convincing evidence that respondent willfully failed to provide his child with care and support and, furthermore, that he abandoned the child as contemplated by G.S. 7A-517(21).

> "abandonment imports any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child . . . .
>
> "Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental care and support. *It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child . . . .*"

In re Cardo, 41 N.C. App. 503, 507-08, 255 S.E. 2d 440, 443 (1979) (emphasis ours); *In re Smith*, 56 N.C. App. at 149, 287 S.E. 2d at 444.

Neglect may be manifested in ways less tangible than failure to provide physical necessities. Therefore, on the question of neglect, the trial judge may consider, in addition, a parent's complete failure to provide the personal contact, love, and affection that inheres in the parental relationship.

We note that terminating the father's parental rights in this case does not dissolve the family unit. It does not in any significant way disrupt the status quo. In fact, termination may

facilitate the growth of love and stability in the child's new family.

We hold the findings of fact are supported by clear, cogent, convincing and competent evidence. They are, therefore, conclusive upon appeal. *In re Smith, supra; Whitaker v. Everhardt,* 289 N.C. 260, 221 S.E. 2d 316 (1976). The findings support the conclusions of law and the judgment entered.

The judgment of the trial court is

Affirmed.

Judge HEDRICK concurs in result.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. The evidence shows the respondent and the petitioner were married but living apart at the time the child was born. They were later divorced and the petitioner was awarded custody of the child. The respondent was not ordered by the divorce decree or any other decree to provide support for the child. The respondent has always lived great distances from the child. On several occasions, the respondent has tried to make contact with the child, but such attempts have been unsuccessful. The respondent has never supported the child but on one occasion sent him a bicycle. The court made findings of fact based on this evidence.

I do not believe the evidence or findings of fact support a conclusion that the respondent has neglected the child so that his parental rights may be terminated. I vote to reverse.

STATE OF NORTH CAROLINA v. ROSA LEE DEYTON

No. 8225SC112

(Filed 2 November 1982)

1. **Burglary and Unlawful Breakings § 5.8; Criminal Law § 9.3— breaking and entering and larceny—conviction under principle of concerted action**

The State's evidence was sufficient to support defendant's conviction of breaking and entering and larceny under the principle of concerted action where it tended to show that defendant and two companions planned to break into a mobile home and take therefrom anything of value, including guns and money; in furtherance of their plan, defendant drove the two companions in her automobile to a point approximately one-tenth of a mile from the victim's residence where the two companions left the car and proceeded to the scene of the crime; defendant then drove to another residence within 100 yards of the victim's residence and watched and waited while the two companions broke into and stole from the victim's residence five guns and $220.00; and after the breaking and entering and larceny, defendant drove to another point approximately one-tenth of a mile on the other side of the victim's residence where the guns were placed in the trunk of defendant's car and the two companions were driven away by the defendant.

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

The trial court's instructions on acting in concert complied with prior decisions of the North Carolina Supreme Court.

APPEAL by defendant from *Grist, Judge.* Judgment entered 16 April 1981 in Superior Court, BURKE County. Heard in Court of Appeals 14 September 1982.

Defendant was charged in a proper bill of indictment with breaking or entering and larceny of five guns and $220 cash, totaling $870, the personal property of Ervin Cook.

The State's evidence at trial revealed the following facts. On or about 5 March 1980 defendant drove her car with four male passengers on a road where Ervin Cook lived in his trailer home. At the beginning of the road, two men, Jimmy Buff and Michael Hullette, got out of the car and entered the surrounding woods. With Rosa Lee Deyton driving her car, Roger Deyton and Kenneth Lister continued up the road to the home of Raymond Cook. At approximately 9:00 a.m., they entered Raymond Cook's house which was located about 100 yards from the victim's residence. Throughout their visit with Raymond Cook, the defendant and Kenneth Lister sat on a couch in the living room. Roger Deyton

played with his young daughter, who was Raymond Cook's great granddaughter, and moved from the kitchen to the living room looking out the windows toward Ervin Cook's trailer.

At approximately the time the defendant, Lister and Roger Deyton were visiting Raymond Cook, Jimmy Buff and Michael Hullette broke into the victim's home and stole five guns plus $220 cash. At about 9:30 defendant drove her car, with Lister and Roger Deyton as passengers, back down the road toward the home of Dicie Hildebran, who lived about a tenth of a mile from Raymond Cook. Hildebran testified she saw the car driven by defendant pull off beside the road and stop near the front of her house. One man got out of the car and unlocked the trunk. Two men emerged from the woods, placed something in the trunk, and got into the car. The defendant then drove the car away.

At approximately 12:45 p.m., Detective Steve Whisnant of the Burke County Sheriff's Department stopped the car driven by the defendant. Jimmy Buff and Michael Hullette were passengers in the car. When the officer searched the trunk, he found the five guns stolen from Ervin Cook's residence.

The defendant was found guilty of breaking or entering and larceny. From a judgment imposing a prison sentence of three to five years, the defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Kucharski for the State, appellee.

Appellate Defender Adam Stein, by Ann B. Petersen for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant first assigns error to the denial of her motion to dismiss as of nonsuit. Defendant argues the evidence was insufficient to require submission of the case to the jury because she was not physically present at the trailer which was broken into and from which the guns and money were stolen.

In the recent case of *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390, 395 (1979), our Supreme Court defined acting in concert as "to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." Although the

mere presence of a person at the scene of a crime is not sufficient to make him guilty of the crime, if two or more persons join in a plan to commit a crime each is guilty if the other commits the crime and both are *actually or constructively* present. *State v. Westbrook*, 279 N.C. 18, 41-42, 181 S.E. 2d 572, 586 (1971) *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed. 2d 761 (1972). Both are also guilty of any other crime committed as a consequence of or pursuant to the common plan. *Id. See also, State v. Oliver*, 302 N.C. 28, 55, 274 S.E. 2d 183, 200 (1981).

When the evidence in the present case is considered in the light most favorable to the State, it is sufficient to raise an inference that the defendant, Jimmy Buff and Michael Hullette planned and schemed to break into a trailer home of Ervin Cook and take therefrom anything of value including guns and money, and in furtherance of their plan and scheme and acting in concert, the defendant drove Buff and Hullette in her automobile to a point approximately one tenth of a mile from the victim's residence and that Buff and Hullette got out of the car and proceeded through the woods to the scene of the crime. The defendant drove to another residence within 100 yards of the trailer with Kenneth Lister and Roger Deyton and watched and waited while Buff and Hullette broke into and stole from the victim's house five guns and $220. The evidence will also permit the jury to find that, pursuant to the plan and scheme of the defendant, Buff, and Hullette, the defendant drove, after the breaking and entering and larceny, to another point approximately one tenth of a mile on the other side of the victim's house where the guns were placed in the trunk of defendant's car and Buff and Hullette were driven away by the defendant. The evidence, in our opinion, is sufficient to give rise to an inference that the defendant, Buff and Hullette planned and schemed to break into the trailer home of Ervin Cook, and that in furtherance of their plan the defendant, Buff and Hullette acted in concert to commit both the breaking and entering and larceny. The evidence is sufficient to require submission of the case to the jury and to support the verdict.

[2] The second and final assignment of error which defendant brings forward and argues in her brief is set out in the record as follows:

> 4. The trial court's instructions to the jury on acting in concert and vicarious liability were erroneous, on the

grounds that they were misleading and confusing and permitted the jury to convict the defendant without proof of or a finding that she shared the same criminal intent as the principals; thereby depriving the defendant of his rights to have the State prove all elements of the offense beyond a reasonable doubt, a trial by jury, and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Art. I, Sections 19 and 24 of the North Carolina Constitution.

This assignment of error purports to be based on two exceptions noted to the instructions to the jury. The portions of the instructions complained of are as follows:

> . . . and if two or more 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 the person is also guilty of any other crime committed by the person in pursuance of the common purpose, that is, the common plan to commit a crime, and is likewise guilty of any crime that results as a natural and probable consequence of the commission of said act or acts.
>
> Exception No. 3
>
> If two or more persons agree to act together with a common purpose to commit a crime and do commit a crime pursuant to said common purpose, each of them is held responsible for the acts of the other done in the commission of that particular crime.
>
> Exception No. 4

Defendant argues these instructions "are not consistent with or contained in the pattern jury instructions." The argument advanced by the defendant is not persuasive. The instructions complained of comport with the law set out in the above cited cases of *State v. Joyner*, *State v. Westbrook*, and *State v. Oliver*. The assignment of error is meritless.

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

No error.

Judges VAUGHN and HILL concur.

RICKEY LILES, EMPLOYEE-PLAINTIFF v. CHARLES LEE BYRD LOGGING COMPANY, EMPLOYER, SELF-INSURER (HEWITT, COLEMAN & ASSOCIATES, SERVICING AGENT), DEFENDANTS

No. 8110IC1422

(*Filed 2 November 1982*)

Master and Servant § 74— compensability of disfiguring knee injury

The Industrial Commission erred in awarding plaintiff compensation for permanent scars on plaintiff's leg. The injury was found compensable under the "serious bodily disfigurement" section of the act, G.S. 97-31(22), and injuries are compensable under that statute only when the injury is of such a nature that it may be fairly presumed that it causes to the injured employee a diminution in his future earning capacity. In this case, the evidence did not support a finding that the scars on the plaintiff's knee decreased his opportunity for employment or his future earning capacity.

APPEAL by defendants from order of North Carolina Industrial Commission entered 17 September 1981. Heard in the Court of Appeals 14 October 1982.

The defendants appeal from an opinion and award of the Industrial Commission awarding compensation to the plaintiff for scars around his knee. The evidence showed that the plaintiff was injured by an accident arising out of and in the course of his employment for the defendant logging company. He was out of work and received compensation for temporary total disability for one and six-sevenths weeks. The plaintiff returned to his job as a logger, performing the same duties and receiving the same wages as he had received before the accident. The plaintiff has an eleventh grade education with no special training for any type employment. In addition to his job as a logger, he has worked as a farmer, an electrician, a painter, and assembly line worker. He was twenty-five years old at the time of the hearing. The evidence also showed the accident had caused two permanent scars on the plaintiff's knee. The evidence showed the scars were unsightly but did not reduce the plaintiff's capacity to work. The

Hearing Commissioner found facts based on the evidence and awarded plaintiff $575.00 for permanent bodily disfigurement.

The defendants appealed to the Full Commission which affirmed the award of the Hearing Commissioner. The defendants appeal.

Narron, O'Hale, Whittington & Woodruff, by James W. Narron; and Robert L. Anderson, for plaintiff-appellee.

Hedrick, Feerick, Eatmon, Gardner & Kincheloe, by Scott M. Stevenson, for defendant-appellants.

HILL, Judge.

This appeal involves the question of whether permanent scars on the plaintiff's leg constitute "serious bodily disfigurement" which is compensable under G.S. 97-31(22) which provides in part:

> "(22) In case of serious bodily disfigurement for which no compensation is payable under any other subdivision of this section, but excluding the disfigurement resulting from permanent loss or permanent partial loss of use of any member of the body for which compensation is fixed in the schedule contained in this section, the Industrial Commission may award proper and equitable compensation not to exceed ten thousand dollars ($10,000)."

In interpreting this section of the statute, our courts have been guided by the principle that the Workers' Compensation Act deals with compensation for reduced capacity for work. A bodily disfigurement, other than facial or head disfigurements which are governed by G.S. 97-31(21), is serious and compensable under G.S. 97-31(22) only when it is of such a nature that it may be fairly presumed that it causes to the injured employee a diminution of his future earning capacity. *See Wilhite v. Veneer Co.*, 303 N.C. 281, 278 S.E. 2d 234 (1981) and *Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943). In the instant case, we do not believe the evidence supports a finding that the scars on the plaintiff's knee decreased his opportunities for employment or his future earning capacity. He returned to the same job he had before the accident at the same wages. We do not believe there has been

any showing that the scars would handicap the plaintiff in obtaining or performing any job for which he is otherwise qualified. *See Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942).

The plaintiff relies on *Thompson v. Ix and Sons*, 33 N.C. App. 350, 235 S.E. 2d 250 (1977), *aff'd per curiam*, 294 N.C. 358, 240 S.E. 2d 783 (1978) and *Cates v. Hunt Construction Co.*, 267 N.C. 560, 148 S.E. 2d 604 (1966). We do not believe either of these cases is helpful to the plaintiff. In *Thompson* the issue was whether compensation to the plaintiff for permanent partial disability to his hand precluded recovery for disfigurement to his forearm. It was held that it did not. The Court did not address the issue of whether disfigurement of the forearm diminished the future earning capacity of the plaintiff. In *Cates* it was held that a scar on the plaintiff's abdomen could hurt his future earning capacity since it resulted from the removal of a kidney which diminished the plaintiff's capacity for work. The Court said that the presence of the scar could call attention to the fact his kidney had been removed and this could make it more difficult for him to obtain employment. In the instant case, the scars around the plaintiff's knee are not accompanied by any other disability to work.

We hold that the scars around the plaintiff's knee are not a serious bodily disfigurement within the meaning of G.S. 97-31(22).

Reversed.

Judges ARNOLD and WELLS concur.

IN THE MATTER OF NOTICE OF ATTACHMENT AND GARNISHMENT ISSUED BY CATAWBA COUNTY TAX COLLECTOR AGAINST NUZUM-CROSS CHEVROLET, INC., TAXPAYER UNDER G.S. 105-366 AND 105-368

No. 8125SC1342

(Filed 2 November 1982)

Taxation § 25— ad valorem taxes—clerical error by tax supervisor's office—immaterial irregularity

A clerical error by a tax supervisor's office in transposing numbers from an ad valorem taxpayer's listing to the total summary sheet was an immaterial

irregularity under G.S. 105-394 which did not invalidate the additional taxes levied on the property for past years to correct the error.

APPEAL by taxpayer from *Ferrell, Judge.* Judgment entered 10 September 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 22 September 1982.

For the years 1976, 1977 and 1978, taxpayer listed its business personal property on time and in accordance with accepted practice with the Catawba County Tax Supervisor. Instead of listing the total on the face of the abstract in the designated column, the taxpayer attached a typewritten sheet of paper with the figures itemized.

Due to an error by the Tax Department in transposing the figures from the attached sheet to a total summary sheet, the taxpayer was taxed on a lower figure than it should have been. This error occurred in 1976, 1977 and 1978.

The Tax Supervisor discovered the error in September, 1978 and discussed it with the taxpayer's president. The Supervisor declined the president's offer to pay the additional 1978 tax only, and sent the taxpayer a bill for the unpaid taxes.

On 6 June 1980, the Tax Collector issued a notice of attachment and garnishment upon the taxpayer and the garnishee, First National Bank of Catawba County. The notice attached and garnished the taxpayer's funds on deposit with the garnishee in the amount of $5,087.67, the amount of the additional taxes plus penalty and interest.

After a hearing on 13 July 1981, the trial judge issued an order directing the garnishee to remit the total due minus any penalty and interest. The taxpayer appealed to this Court.

Sigmon & Sigmon, by W. Gene Sigmon, for appellee Catawba County Tax Collector.

Corne, Pitts, Corne & Grant, by Larry W. Pitts, for appellant taxpayer.

ARNOLD, Judge.

The narrow question presented by this appeal is whether a clerical error by a tax supervisor's office is an immaterial ir-

regularity under G.S. 105-394 so as not to invalidate the tax levied on the property. We hold that it is.

G.S. 105-394 contains a broad statement that is intended to cover cases like the one before us where there is no dispute that but for the clerical error, the tax would have been valid. The statute reads in part:

> Immaterial irregularities in the listing, appraisal, or assessment of property for taxation or in the levy or collection of the property tax or in any other proceeding or requirement of this Subchapter shall not invalidate the tax imposed upon any property or any process of listing, appraisal, assessment, levy, collection, or any other proceeding under this Subchapter.

Examples of immaterial irregularities are listed including "(11) Any other immaterial informality, omission or defect on the part of any person in any proceeding or requirement of this Subchapter." We hold that the transposing error in this case is an "immaterial irregularity" within the meaning of the statute.

Although our holding means that the county will be able to go back two years (from 1978 to 1976) to correct its own error, it should be remembered that under the Machinery Act, G.S. 105-271 to -395, all property is subject to taxation unless subject to an exemption. *See* G.S. 105-274(a). "Exemption from taxation is exceptional. It needs no citation from reiterated precedents that such exemptions should be strictly construed. . . ." *United Brethren v. Commissioners of Forsyth County,* 115 N.C. 489, 497, 20 S.E. 626, 627 (1894).

The taxpayer is correct when he cites *Winston-Salem Joint Venture v. City of Winston-Salem,* 54 N.C. App. 202, 282 S.E. 2d 509 (1981), *disc. rev. denied,* 304 N.C. 728, 288 S.E. 2d 803 (1982), for the proposition that tax statutes are to be strictly construed against the taxing authority. But that is only when the statute is susceptible of two constructions, unlike this case where G.S. 105-394 is clear and uncomplicated.

We are not persuaded by the cases cited by the taxpayer because they deal with fact situations which are distinguishable from the case before us.

The argument that a taxpayer who deliberately attempts to hide his property is in a better position than the victim of a clerical error, since the taxing authority can only go back five years under the "discovery statute" G.S. 105-312(g), is not for us to decide. If a time limit is to be put on the assertion of immaterial irregularities by taxing authorities under G.S. 105-394, that is a task for the General Assembly and not this Court.

Affirmed.

Judges MARTIN and WHICHARD concur.

STATE OF NORTH CAROLINA v. GAIL CHRISTOPHER BRILEY

No. 8225SC323

(Filed 2 November 1982)

Appeal and Error § 45; Criminal Law §§ 159.1, 166— failure to follow Rules 9(c)(1), 9(b)(3) and 10(b)(1)—dismissal of appeal

Where defendant failed to follow either App. Rule 9(c)(1), App. Rule 9(b)(3), or App. Rule 28(b)(4) when he filed a record on appeal which contained a verbatim reproduction of the trial transcript, and where one of defendant's assignments of error did not appear to be based on any exceptions as provided by App. Rules 10(b)(1) and 10(a), his appeal was subject to dismissal.

APPEAL by defendant from *McConnell, Judge.* Judgment entered 15 October 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 14 October 1982.

Defendant was indicted for the felonious breaking and entering of a building occupied by the General Electric Company. On his plea of not guilty to the charges, defendant was convicted of felonious breaking or entering. From judgment entered imposing an active sentence of imprisonment, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Lentz, Ball, and Kelley, P.A., by Phillip G. Kelley, for defendant-appellant.

WELLS, Judge.

The record on appeal contains a verbatim reproduction of the trial transcript. This is not a complete stenographic transcript as is allowed as an alternative to narrating the evidence by Rule 9(c)(1) of the Rules of Appellate Procedure; the parties have caused the transcript to be copied into the record. When making evidence a part of the record on appeal under the alternative chosen by the parties in this case, Rule 9(c)(1) provides that generally evidence is to be set out in narrative form. Evidence may only be reproduced in question and answer form when those questions and answers are the subject of an assignment of error dealing with admission or exclusion of evidence or when the narrative form might not fairly reflect the true sense of the evidence received. The record in the present case represents a clear violation of Rule 9(c)(1). The testimonial evidence therein is exclusively in question and answer form; no attempt has been made to narrate the evidence. Rule 9(c)(1) further provides that the parties are expected to present the necessary evidence concisely, at a minimum of expense. Rule 9(b)(3) provides that the record shall contain only so much of the evidence as is necessary for understanding the errors assigned. These provisions have also been violated. As stated, the record contains what appears to be the whole trial transcript, much of which is irrelevant to the questions raised by appellant. We note that Rule 9(c)(1) now allows the parties to an appeal to choose to file a stenographic transcript of all the evidence in the trial tribunal as an alternative to having to narrate the evidence. But at the same time that Rule 9(c)(1) was so amended, Rule 28(b)(4) was enacted requiring any appellant who chooses to utilize such a stenographic transcript to append to his brief a reproduction of such parts of the transcript as are necessary to understand the questions presented. Thus, Rule 28(b)(4) serves the same function that Rule 9(c)(1) serves with respect to records filed wherein the evidence is narrated; it assures that this Court will have before it the evidence necessary to answer the questions presented, and that such evidence is in a condensed and readily available form. Neither the record nor the briefs in the present case have condensed the mass of evidence which was before the jury at trial and this Court has been left with the task of separating the evidence which is relevant to this appeal from that which is irrelevant.

In his brief, defendant raises five assignments of error based on five exceptions. One of defendant's assignments of error does not appear to be based on any exceptions.

Rule 10(b)(1) of the Rules of Appellate Procedure, in pertinent part, provides:

> Each exception shall be set out immediately following the record of judicial action to which it is addressed and shall identify the action, without any statement of grounds or argumentation, by any clear means of reference. Exceptions set out in the record on appeal shall be numbered consecutively in order of their appearance.

Rule 10(a) provides that an appellant may not make an exception not properly set out the basis of an assignment of error. Exceptions must be "set out" in the record in order "to provide a visible reference point in the record on appeal for the reviewing court to locate the particular judicial action assigned as error." Drafting Committee Note and Commentary to Rule 9, North Carolina Rules of Court Pamphlet (1982).

In violation of the above rules, defendant has failed to set out in the record any of the exceptions on which he bases his assignments of error; the objectionable evidence and rulings are not bracketed, isolated, underlined, labeled, or otherwise identified in the record. Of course, the record contains no numbering of the assignments.

Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of an appeal. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977); *State v. Wilson*, 58 N.C. App. 819, 294 S.E. 2d 780 (1982).

For defendant's failure to comply with the requirements of Rules 9(b)(3), 9(c)(1), 10(a) and 10(b)(1), this appeal is

Dismissed.

Judges VAUGHN and WEBB concur.

IN THE MATTER OF: TALTON GALLIMORE, JR. RESENTENCING HEARING

No. 8222SC145

(Filed 2 November 1982)

1. **Criminal Law § 139— minimum and maximum terms—statute in effect at resentencing**

The statute in effect at the time of defendant's resentencing, G.S. 15A-1351(b), applied to defendant's resentencing rather than the statute in effect at the time the crimes were committed, former G.S. 148-42.

2. **Criminal Law § 139— same maximum and minimum terms—sentences not improper**

Sentences of "ten years nor more than ten years" and "forty to forty years" were proper under G.S. 15A-1351(b) since the statute requires only the imposition of a maximum term with a minimum term being optional, and the fact that the two terms in each sentence are equal is acceptable as the judge could have seen them as both the minimum and maximum.

3. **Criminal Law § 138— refusal to continue resentencing hearing—no abuse of discretion**

The trial court did not abuse its discretion in refusing to grant a continuance of defendant's resentencing hearing to permit defendant to obtain the testimony of the warden of Central Prison where defendant had the benefit of an affidavit by the deputy warden which showed that his prison record had been good and that he was in poor health, and the warden's affidavit would not have added information important enough to warrant a continuance. G.S. 15A-1334(a).

4. **Criminal Law § 138.11— resentence similar to original sentence**

The fact that defendant's resentence was similar to his original sentence was not error where the resentence was authorized by law. G.S. 15A-1331(a)(3).

APPEAL by defendant from *Mills, Judge.* Sentence entered 28 August 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 15 September 1982.

Defendant was convicted in 1967 of (1) conspiracy to commit larceny and (2) breaking and entering and larceny. He was sentenced to 7 to 10 years on the conspiracy charge and given a consecutive sentence of 7 to 10 years on the other charge. In 1968, he was convicted of conspiracy to commit murder, damaging an auto by the use of high explosives and damaging an occupied dwelling house by use of high explosives. He was given consecutive terms of 10, 20 and 40 years, respectively. The Supreme

Court later reversed the conviction for damage to an auto. *See State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969).

Pursuant to a petition by defendant to the United States District Court for the Middle District of North Carolina, Russell A. Eliason, United States Magistrate, on 2 June 1981 vacated the 1967 and 1968 sentences and ordered that defendant be resentenced. Defendant was resentenced on 28 August 1981 after evidence was received and arguments of both counsel heard.

Under his new sentences, defendant was given 7 to 10 years on the 1967 convictions, a concurrent sentence of "ten nor more than ten years" for the conspiracy to commit murder conviction and a sentence of "forty to forty years" on the damage to an occupied dwelling conviction, which would begin to run at the end of the conspiracy to commit murder conviction. He was given credit for time served minus the time that he was out on escape.

From the new sentences, defendant appealed.

Attorney General Edmisten, by Associate Attorney Walter M. Smith, for the State.

Barnes, Grimes and Bunce, by Jerry B. Grimes, for defendant-appellant.

ARNOLD, Judge.

Defendant first attacks the sentence on the grounds that it was an indefinite indeterminate sentence and that there was no difference between the minimum and maximum periods. An indeterminate sentence is one where the court does not fix duration but only fixes maximum and minimum limits. Black's Law Dictionary 694 (5th ed. 1979).

Under G.S. 148-42, which was in effect at defendant's original sentencing, trial judges were "authorized in their discretion in sentencing prisoners to imprisonment to commit the prisoner to the custody of the Commissioner of Correction for a minimum and maximum term."

[1] But G.S. 148-42 was repealed in 1977. See, 1977 N.C. Sess. Laws Ch. 711, § 33. The law that replaced it was enacted that same year and was effective when defendant was resentenced in

1981. As a result, G.S. 15A-1351(b), and not G.S. 148-42, governed the resentence.

Application of the more recent statute in effect when defendant was resentenced is not unlike the facts and reasoning of *State v. Mitchell*, 6 N.C. App. 534, 170 S.E. 2d 355 (1969). In *Mitchell*, the court held that a defendant was entitled to be sentenced under an amended statute as it read at the time of sentencing, even though the crime was committed prior to the effective date of the amendment. Although *Mitchell* is not directly on point with this case, we find enough similarities to apply G.S. 15A-1351(b) to this case.

G.S. 15A-1351(b) requires only the imposition of a maximum term, with the statement of a minimum term as optional. The sentencing judge may also state that a term constitutes both the minimum and maximum terms.

[2] The sentences imposed in this case are correct under G.S. 15A-1351(b). They both contain a maximum term which is required. Even if they do not contain a minimum term it is not error. Finally, the fact that the two terms in each sentence are equal is acceptable as the judge could have seen them as both the minimum and maximum.

[3] On defendant's second assignment of error, we agree with the State that the court correctly refused to grant a continuance to allow the defendant to obtain the testimony of Central Prison Warden Sam Garrison. Before a continuance of the sentencing hearing will be granted the defendant must show "good cause." G.S. 15A-1334(a). That determination is within the trial judge's discretion. *State v. McLaurin*, 41 N.C. App. 552, 255 S.E. 2d 299 (1979), *cert. denied*, 300 N.C. 560, 270 S.E. 2d 113 (1980).

We find no abuse of discretion here where defendant had the benefit of an affidavit by the deputy warden. That affidavit showed that his prison record had been good, and that he was in poor health. Garrison's affidavit would not have added information important enough to warrant a continuance.

[4] Finally, defendant finds error in that the 1981 resentence was similar to his original sentence. We find no error on this point because the resentence was within G.S. 15A-1331(a)(3), which applies no matter when a defendant's guilt was determined. It

states "[t]he criminal judgment against a person . . . may . . . include a sentence in accordance with the provisions of this Article to one or a combination of the following alternatives . . . [o]ther punishment authorized or required by law." There is no error since the resentence was authorized by law.

Affirmed.

Judges MARTIN and WHICHARD concur.

IN THE MATTER OF: EARL D. COLLINS, JR., CLAIMANT-APPELLANT v. B&G PIE COMPANY, INC., EMPLOYER-APPELLEE, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLEE

No. 8121SC1394

(Filed 2 November 1982)

Master and Servant § 108.1— absence from employment in violation of work rules — incarceration — misconduct connected with work — unemployment compensation properly denied

Claimant was properly denied unemployment compensation where he was discharged for misconduct connected with his work, G.S. 96-14, in that he had more than seven unexcused absences from work within a 180 day period in violation of an employer's work rule, when he was incarcerated for a willful or legally unexcused probation violation.

APPEAL by claimant from *Helms, Judge.* Judgment entered 3 September 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 12 October 1982.

Claimant, Earl D. Collins, Jr., sought unemployment compensation benefits after being terminated by his employer, B&G Pie Company, Inc. (B&G). Claimant was discharged from his employment for having more than seven unexcused absences from work within a 180 day period, in violation of a B&G work rule. Claimant was absent from work for two months due to his incarceration which resulted from the activation of a suspended sentence when he violated a condition of his probation. Defendant's probation violation consisted of his failure to make restitution payments ordered upon his conviction of failure to return rental property. The Employment Security Commission denied benefits to claim-

ant upon a determination that claimant had been fired for misconduct connected with his work. Claimant appealed to the superior court. From judgment of the superior court affirming the decision of the Commission, claimant appealed.

Legal Aid Society of Northwest North Carolina, Inc., by Thomas A. Harris, for claimant-appellant.

Jack E. Ruby, for employer-appellee.

C. Coleman Billingsley, Jr., for appellee.

WELLS, Judge.

The sole question we address is whether absence from employment in violation of a work rule due to incarceration for a willful or legally unexcused probation violation amounts to "misconduct" in the context of N.C.G.S. 96-14. We hold that it does.

G.S. 96-14, in part, provides:

> An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work.

In G.S. 96-2 the General Assembly set out the public policy underlying the Employment Security Law, providing guidance in interpretation of that act. That section provides, in part, that the funds collected under the act are "to be used for the benefit of persons unemployed through no fault of their own." Citing this section, the Supreme Court in *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1, 35 A.L.R. 3d 1114 (1968) stated that the act is intended to provide benefits "to one who becomes involuntarily unemployed" and cannot find work "through no fault of his own."

Our Supreme Court has defined "misconduct" under the statute to be conduct showing wanton or willful disregard for the employer's interest, deliberate violation of the employer's work rules, or a wrongful intent. *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982). While the mere violation of a work rule is not disqualifying misconduct where the evidence shows that the employee's actions were reasonable and were taken with good cause, *Id., citing In re Collingsworth*, 17

N.C. App. 340, 194 S.E. 2d 210 (1973), deliberate violation or disregard of standards of behavior which an employer has a right to expect of his employee, or carelessness or negligence manifesting equal culpability may constitute misconduct in connection with one's employment sufficient to disqualify the employee to receive unemployment benefits. *In re Collingsworth, supra, quoting with approval, Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636 (1941). Although the question before us has not been addressed by our courts, the courts of several other states have addressed it, and we find that we are in accord with the majority view. *See, Annot.*, 58 A.L.R. 3d 674, 791.

In the present case, claimant's acts which resulted in his violation of a work rule were without legal excuse. In order to activate his suspended sentence, the court had to believe that claimant was able to pay his debt but did not; a suspended sentence may not be activated for failure to comply with a term of probation unless the defendant's failure to comply is willful or without lawful excuse. *See State v. Smith*, 43 N.C. App. 727, 259 S.E. 2d 805 (1979) and cases discussed therein. Claimant's failure to comply with the conditions of his probation caused him to become incarcerated and claimant missed work in willful disregard of his employer's work rules. Under these circumstances, claimant's resulting unemployment was not through no fault of his own.

We hold that claimant's discharge was for misconduct connected with his work, and that claimant was properly denied unemployment compensation.

The judgment of the Superior Court is

Affirmed.

Judges VAUGHN and WEBB concur.

DEPARTMENT OF TRANSPORTATION v. FRANK BRAGG AND WIFE, JO ANNE BRAGG; ORVILLE D. COWARD, TRUSTEE; AND DON D. COGDILL AND WIFE, CLEM H. COGDILL

No. 8130SC1408

(Filed 2 November 1982)

Eminent Domain § 6.4— highway right-of-way—damages to remaining land resulting from construction

In an action to condemn land for a highway right-of-way, evidence of damages resulting from water seepage caused by construction of the highway was inadmissible to establish severance damages to the remaining portions of defendant landowners' property since compensation must be determined as of the date of the taking.

APPEAL by defendants from *Sitton, Judge.* Judgment entered 22 June 1981 in Superior Court, JACKSON County. Heard in the Court of Appeals 14 October 1982.

Defendants appeal the allowance of a motion *in limine* barring receipt of evidence regarding disturbance of the flow of surface or underground water that occurred after the State Department of Transportation took a right of way to facilitate widening of U.S. Highway 441 in Jackson County.

Attorney General Edmisten, by Assistant Attorney General Frank P. Graham, for the State.

Coward, Coward & Dillard, P.A., and Brown, Ward & Haynes, P.A., by H. H. Ward, Jr., for defendant-appellants.

HILL, Judge.

Defendants Frank Bragg and his wife, Jo Anne Bragg, own a motel and 1.34 acres of land abutting U.S. Highway 441 on the easterly margin. The other defendants' interest in the land arises from a deed of trust on the premises.

On 28 March 1978, the State brought this condemnation action for a right of way on the east side of Highway 441. As part of its road-widening project, the Department of Transportation subsequently excavated a spring located within its right of way on the west side of Highway 441 and then filled and compacted the area for a roadbed. The spring formerly had drained into Shoal Creek via a pipe running east under Highway 441 and

across defendants' property. Apparently, this pipeline was disconnected in the course of excavation. As a result, water began seeping into defendants' motel and surrounding lands, particularly when heavy traffic traversed the highway.

The State made an oral motion *in limine* requesting exclusion of any evidence of water damage. The trial court concluded that any damages resulting from water seepage arose after the taking and therefore could not be considered in assessing damages in this condemnation proceeding. Assuming the order of the trial court is interlocutory and not appealable, we treat this appeal as a petition for a writ of certiorari and allow the writ in order to dispose of the matter on its merits. *See Plumbing Co. v. Associates*, 37 N.C. App. 149, 245 S.E. 2d 555, *disc. rev. denied*, 295 N.C. 648, 248 S.E. 2d 250 (1978).

Defendants contend the trial judge erred in allowing plaintiff's motion *in limine*. They argue that evidence of water seepage should be admitted to establish severance damages to the remaining portions of their land.

Plaintiff urges that defendants are limited to the measure of damages prescribed in G.S. 136-112(1):

> Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes.

Clearly, the foregoing formula contemplates a particular date; that is, the date of taking. It does not contemplate consideration of damages that might later arise during construction. The filing of the complaint and declaration of taking, together with payment of any deposit into court, vests title and right of possession in the condemning authority as of the date of filing. G.S. 136-104; *State v. Johnson*, 278 N.C. 126, 179 S.E. 2d 371 (1971).

This Court addressed the question in *City of Greensboro v. Sparger*, 23 N.C. App. 81, 208 S.E. 2d 230 (1974), in which landowners sought to present evidence of water damage that occurred

after the city had condemned a sewer line right of way. Chief Judge Morris stated:

> Compensation must be determined as of the time of the taking. (Citations omitted.) Occurrences or events which may affect the value of the property after the date of the taking are not cognizable in an assessment of damages in an eminent domain proceeding. . . .
>
> Additionally, only damages proximately and directly caused by the taking at the time of the taking are recoverable. Any damages which respondents seek, as a result of improper, unlawful, or negligent construction of the sewer line *after* the taking, must be sought in a separate action.

23 N.C. App. at 82-83, 208 S.E. 2d at 231. *See also Charlotte v. Spratt*, 263 N.C. 656, 140 S.E. 2d 341 (1965); *Highway Commission v. Black*, 239 N.C. 198, 79 S.E. 2d 778 (1954); and *Debruhl v. Highway Commission*, 247 N.C. 671, 102 S.E. 2d 229 (1958).

Severance damages are limited to the value of the land as of the date of taking. Defendant's claim of water damage may be considered in a future inverse condemnation proceeding.

The trial court properly allowed the motion *in limine*. The decision of the trial court is

Affirmed.

Judges HEDRICK and WHICHARD concur.

WALTER W. SIGMAN, JR. v. R. R. TYDINGS, INC., A CORPORATION

No. 815DC1428

(Filed 2 November 1982)

Appeal and Error § 6.1; Rules of Civil Procedure § 12— challenges to sufficiency of service of process—premature appeal

An appeal from the denial of defendant's Rule 12(b) motion to dismiss for insufficient service and lack of jurisdiction over the person was interlocutory and not immediately appealable. The issues on appeal were whether an alias

and pluries summons may be issued when there was no attempt to serve the original summons, and whether a complaint may be amended before it is served, and under the decision in *Love v. Moore*, 305 N.C. 575 (1982) the appeal must be dismissed as interlocutory "even though the question of appealability [was] not raised by the parties themselves." G.S. 1-277(b).

APPEAL by defendant from *Rice, Judge.* Judgment filed 30 October 1981 in District Court, NEW HANOVER County. Heard in the Court of Appeals 19 October 1982.

Stevens, McGhee, Morgan & Lennon, by Robert A. O'Quinn, for defendant appellant.

Block & Trask, by Franklin L. Block, for plaintiff appellee.

BECTON, Judge.

This is an appeal from the denial of defendant's Rule 12(b) motion to dismiss for insufficient service and lack of jurisdiction over the person. The issues on appeal are whether an alias and pluries summons may be issued when there was no attempt to serve the original summons, and whether a complaint may be amended before it is served.

Being bound by our Supreme Court's decision in *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982), which was decided after the case *sub judice* was filed in this Court, we dismiss the appeal as interlocutory "even though the question of appealability has not been raised by the parties themselves." *Love*, 305 N.C. at 577-78, 291 S.E. 2d at 144.

It is true that G.S. 1-277(b) allows an immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of defendant. In this case, however, as in the *Love* case, the "[d]efendant's motion, although denominated as one challenging the court's jurisdiction over the person . . . , in reality challenges the sufficiency of the service as contemplated by Rule 12(b)(5) and the sufficiency of the process as contemplated by Rule 12(b)(4)." *Love*, 305 N.C. at 579, 291 S.E. 2d at 145. The following language from *Love* seems dispositive of this appeal:

> A challenge to the court's jurisdiction over the person, Rule 12(b)(2), concerns whether the court has power, *assuming it is properly invoked*, to require the defendant to come into court

> to adjudicate the claim, a test which has come to be known as 'minimum contacts.' Challenges to sufficiency of process and service do not concern the state's fundamental power to bring a defendant before its courts for trial; instead they concern the means by which a court gives notice to the defendant and asserts jurisdiction over him. C. Wright & A. Miller [*Federal Practice and Procedure*] § 1353. G.S. 1-277(b) applies to the state's authority to bring a defendant before its courts, not to technical questions concerned only with whether that authority was properly invoked from a procedural standpoint. This is not a mere technical distinction; it has far-reaching substantive effect. If the court has no personal jurisdiction over the defendant, it has no right to require the defendant to come into court. A trial court determination concerning such an important fundamental question is made immediately appealable by G.S. 1-277(b). However, if the court has the jurisdictional power to require that the party defend and the challenge is merely to the process of service used to bring the party before the court, G.S. 1-277(b) does not apply.

Id. at 579-80, 291 S.E. 2d at 145 (1982).

Considering the pleadings, and specifically defendant's motion to dismiss, we hold, on the authority of *Love v. Moore*, that defendant's appeal is interlocutory and not immediately appealable. The case is therefore remanded for the appropriate proceedings.

Dismissed.

Judge HEDRICK and Judge WEBB concur.

DUKE POWER COMPANY v. J. W. FLINCHEM, MINNIE FLINCHEM, JOHN FLINCHEM, HELEN FLINCHEM

No. 8123SC1363

(Filed 2 November 1982)

Appeal and Error § 41.1— failure to follow Rules of Appellate Procedure—appeal dismissed

Appeal is dismissed for failure of appellants to comply with the Rules of Appellate Procedure where items constituting the record on appeal were not arranged in the order in which they occurred or were filed in the trial division in violation of App. R. 9(b)(4); the evidence was not narrated as required by App. R. 9(c)(1); appellants failed properly to identify and set out their assignments of error in violation of App. R. 10(c); appellants have included in the record on appeal hundreds of exceptions which were not properly preserved for review at trial in violation of App. R. 10(b); and appellants' brief, in form and content, was in repeated violation of the requirements of App. R. 28.

APPEAL by respondents from *Long, Judge*. Judgment entered 11 May 1981 in WILKES County Superior Court. Heard in the Court of Appeals 23 September 1982.

Petitioner Duke Power Company (Duke) initiated proceedings to acquire a right-of-way over respondents' land for electric transmission lines. Proceedings before the Clerk of Superior Court resulted in an order of the Clerk, finding that Duke has the right to acquire the right-of-way by power of eminent domain; that Duke could not obtain its needed right-of-way by contract or agreement; and that the right-of-way sought by Duke was necessary for the operation of Duke's system. The Clerk ordered that Duke was empowered to condemn respondents' land and appointed commissioners to determine the compensation due respondents for the easement sought by Duke. The Commissioners assessed respondents' damages. The Clerk affirmed the Commissioners' report. On appeal, the matter was tried before Judge Long and a jury. From judgment entered on the jury's verdict, respondents have appealed.

McElwee, McElwee, Cannon & Warden by William H. McElwee, III and William C. Warden, Jr., for appellee.

J. W. Flinchem, Minnie Flinchem, John Flinchem, and Helen Flinchem, pro se.

WELLS, Judge.

Respondents' appeal violates a number of the Rules of Appellate Procedure. First, in violation of Rule 9(b)(4), the items constituting the record on appeal are not arranged in the order in which they occurred or were filed in the trial division, but are scattered in random fashion throughout the record. Second, there has been no attempt whatsoever to narrate the evidence as required by Rule 9(c)(1). Instead, respondents have simply included in the record the total record of evidence, consisting of the testimony of nineteen witnesses and comprising approximately 180 pages of the record on appeal, in question and answer form. Third, in violation of Rule 10(c), respondents have failed to properly identify and set out their assignments of error. Fourth, in violation of Rule 10(b), respondents have included in the record on appeal hundreds of exceptions which were not properly preserved for our review by action of counsel taken during the course of the trial. Finally, respondents' brief, in form and content, is in repeated violation of the requirements of Rule 28. In short, the manner in which the appeal has been filed does not allow effective appellate review.

Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of the appeal. *See Britt v. Allen*, 291 N.C. 630, 231 S.E. 2d 607 (1977).

For the reasons stated, the appeal in this case must be and is

Dismissed.

Judges VAUGHN and WEBB concur.

RICHARD M. BUCHANAN AND WIFE, SHARON S. BUCHANAN v. THOMAS L. ROSE AND WIFE, ELIZABETH S. ROSE AND ONE-STOP SHOP, INC.

No. 811SC1312

(Filed 2 November 1982)

Appeal and Error § 6.2— denial of motion to amend pleadings—not immediately appealable

An order of the trial judge which refused to allow the defendants to amend their answer was an interlocutory order, and was not immediately appealable. G.S. 1A-1, Rule 15(a) and G.S. 7A-27(d).

APPEAL by defendants from *Small, Judge.* Order entered 26 August 1981 in Superior Court, CAMDEN County. Heard in the Court of Appeals 17 September 1982.

Based on a business dispute between the parties, plaintiffs filed a complaint on 28 August 1980 seeking damages for breach of contract or in the alternative, a one-third ownership in the business, and damages for fraud. After an extension of time was granted, defendants answered on 27 October 1980. They denied that any contract to convey part of the business to the plaintiffs ever existed and counterclaimed for $1,000 that they loaned to one of the plaintiffs.

On 20 July 1981, defendants moved to amend their answer pursuant to G.S. 1A-1, Rule 15(a) and, in a separate motion, for leave to grant interrogatories. The plaintiffs filed motions in opposition to defendants' motions on 24 July 1981.

The defendants again moved to amend their answer on 29 July 1981 to add the Statute of Frauds as a defense. Plaintiffs filed opposition motions on 31 July 1981.

At a hearing on 17 August 1981, the trial court denied the motions to amend and allowed some discovery. An order to that effect was entered on 26 August 1981. From that order, defendants gave timely notice of appeal.

O. C. Abbott for plaintiff-appellees.

Walker, Romm & Flora, by John J. Flora, III, for defendant-appellants.

ARNOLD, Judge.

Defendants attack the refusal of the trial judge to allow them to amend their answer. Under G.S. 1A-1, Rule 15(a), amendment of a pleading after the time for pleading has expired is "only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires." But an order denying a motion to amend pleadings is an interlocutory order, and is not immediately appealable. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E. 2d 484, 488 (1972). *See also, O'Neill v. Bank*, 40 N.C. App. 227, 230, 252 S.E. 2d 231, 234 (1979).

Although this appeal is not from a final order, G.S. 7A-27(d) allows appeal as a matter of right from an interlocutory order which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial.

This statute should be strictly construed for "the purpose of eliminating the unnecessary delay and expense of fragmented appeals and of presenting the whole case for determination in a single appeal from a final judgment." *Funderburk v. Justice*, 25 N.C. App. 655, 656, 214 S.E. 2d 310, 311 (1975).

We do not find that a substantial right of the defendants will be irreparably damaged if we do not allow this appeal. This case is not like *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E. 2d 119, *disc. rev. denied*, 294 N.C. 736, 244 S.E. 2d 154 (1978), where it was held that denial of a motion to amend an answer to assert a compulsory counterclaim affected a substantial right. The court in *Hudspeth* found that failure to assert a compulsory counterclaim will ordinarily bar future action on the claim. Here, the case can proceed to trial with the loser there having a right of appeal to this Court. None of the other three exceptions in G.S. 7A-27(d) is applicable here.

As a result, we dismiss this appeal as interlocutory.

Dismissed.

Judges MARTIN and WHICHARD concur.

LOUISE MAROSITES v. T. G. PROCTOR, JR., AND MARY C. HOLT AND ROBERT R. CLARK

No. 8111SC1325

(Filed 2 November 1982)

Contracts § 14.1; Wills § 1.1— third party beneficiary to contract—vesting of right after death of contracting party—will not required

Where a contract for the sale of real property provided that the seller would deed the property to plaintiff in case of the death of the buyer before execution of the deed, plaintiff was a third party beneficiary of the contract, and the fact that plaintiff's right to the property did not become fully vested until the buyer's death did not mean that the buyer had to execute an instrument which complied with the requirements of a will in order to vest this right. Therefore, plaintiff could enforce the contract upon the death of the buyer before delivery of the deed.

APPEAL by intervenor defendants from *Farmer, Judge.* Judgment entered 8 July 1981 in Superior Court, LEE County. Heard in the Court of Appeals 21 September 1982.

This action was brought seeking specific performance. The defendant T. G. Proctor, Jr. executed on 26 November 1976 a contract with Robert R. Clark which provided as follows:

> "THIS IS to verify that ROBERT CLARK has paid me, T. G. PROCTOR, JR., for the property described as follows:
>
> [The agreement set forth a full description of the property]
>
> IN CASE of the death of ROBERT CLARK before execution of the deed, the above described property will be deeded to LOUISE MAROSITES."

Robert Clark died on 21 August 1979 before a deed to the property was delivered to him by T. G. Proctor, Jr. Mary C. Holt and Robert R. Clark, the devisees and heirs at law of Robert Clark, intervened as defendants. The Superior Court ordered T. G. Proctor, Jr. to convey the real estate to the plaintiff.

The intervening defendants appealed.

Staton, Perkinson, West and Doster, by W. Woods Doster and William W. Staton, for plaintiff appellee.

Kenneth R. Hoyle for defendant appellants.

WEBB, Judge.

We affirm the judgment of the Superior Court. We believe the plaintiff is a third party beneficiary to a contract between Robert Clark and T. G. Proctor, Jr. The principles governing third party beneficiary contracts are discussed in *Vogel v. Supply Company*, 277 N.C. 119, 177 S.E. 2d 273 (1970). *See also Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E. 2d 233 (1955) and *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981). The intention of the parties, as expressed in the contract, is that in the event of the death of Robert Clark without the property being conveyed to Mr. Clark, the original defendant would convey the property to the plaintiff. We hold that the contract was intended for the direct benefit of the plaintiff and is enforceable by her.

The appellants contend the agreement may not be enforced because the plaintiff did not receive her right to have the property conveyed to her until the death of Robert Clark. The appellants argue that Robert Clark has attempted to leave this property to plaintiff by a will which was not executed in accordance with the requirements for testamentary disposition. We do not believe the plaintiff's right to the property was given to her by will. At the time of the execution of the agreement, she had a right. The fact that this right did not become fully vested until Mr. Clark's death does not mean that Mr. Clark had to execute an instrument that complies with the requirements for a will in order to vest this right. There are other third party beneficiary contracts which may be enforced by the beneficiary after the death of a contracting party. Life insurance contracts are examples.

Affirmed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. JOHN HAYWOOD STUCKEY

No. 8223SC268

(Filed 2 November 1982)

Criminal Law § 88.2— impeachment—refusal to admit recording of preliminary hearing

Even if the testimony of two witnesses at the preliminary hearing and at trial was inconsistent, the trial court did not err in refusing to permit defendant to play before the jury for impeachment purposes a tape recording of testimony of the witnesses at the preliminary hearing where defendant was given the full opportunity at trial to impeach the witnesses through questions concerning the prior inconsistent statements.

APPEAL by defendant from *Davis, Judge.* Judgment entered 19 November 1981 in Superior Court, WILKES County. Heard in the Court of Appeals 12 October 1982.

Defendant was charged in a proper bill of indictment with felonious breaking or entering. He pleaded not guilty. The jury found defendant guilty as charged and the court entered a judgment imposing a prison sentence of not less than seven nor more than ten years. Defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas G. Meacham, Jr., for the State.

Ted West Professional Association, by Davis S. Lackey and Ted G. West, for the defendant, appellant.

HEDRICK, Judge.

Defendant brings forward one assignment of error on appeal. He argues that the trial judge committed prejudicial error in denying his motions to play, in the presence of the jury, a tape recording of testimony from his preliminary hearing for the purpose of impeachment. We do not agree.

The tape recording in question contained testimony of two witnesses from the prior proceeding which defendant contends placed him in a certain pawn shop on 3 April 1981, a date for which he was able to offer an alibi. At trial, the evidence from these witnesses was that defendant pawned certain stolen goods at 4:40 p.m. on the date of the robbery, 2 April 1981. During an in-

tensive cross examination by defendant's counsel, both witnesses explained that any discrepancy in the dates was due to a bookkeeping procedure in which after 4:00 p.m. on 2 April the pawn ticket would have been "turned over" to reflect a transaction on the next day, 3 April. Even were we to concede for the sake of argument that the testimony of these witnesses at the preliminary hearing and at trial was entirely inconsistent, there has been no prejudice to the defendant in the denial of his request to play the tape recording before the jury. Where a defendant is given full opportunity to impeach a witness on the witness stand through questions concerning contradictory statements made on another occasion, he may not object to the court's denial of a request to further embellish his cross examination by means of a recording device. *State v. Yoes and Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Brackett*, 55 N.C. App. 410, 285 S.E. 2d 852 (1982). We also note that defendant made no attempt to introduce the tape recording for impeachment purposes when he was presenting his own evidence. *Id.*

We hold the defendant had a fair trial free of prejudicial error.

No error.

Judges WELLS and HILL concur.

STATE OF NORTH CAROLINA v. RICHARD LEE HICKERSON

No. 828SC399

(Filed 2 November 1982)

Criminal Law § 158— failure of record to indicate superior court's jurisdiction—no jurisdiction in appellate court

Where there was nothing in the record to indicate that the superior court had jurisdiction to rule on a defendant's motion to quash a count of his bill of indictment, a misdemeanor, the Court of Appeals had no jurisdiction to hear the appeal.

APPEAL by State from *Stevens, Judge.* Order entered 5 April 1982 in Superior Court, WAYNE County. Heard in Court of Appeals 20 October 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Jane P. Gray and Deputy Attorney General William W. Melvin, for the State, appellant.

Duke and Brown, by John E. Duke, for the defendant, appellee.

HEDRICK, Judge.

The defendant was charged in a four-count bill of indictment in the Superior Court with felonious possession of marijuana, carrying a concealed weapon, a misdemeanor, driving under the influence, a misdemeanor, and driving under the influence a second offense, a misdemeanor. All four offenses allegedly occurred on 12 February 1982.

Defendant made a motion in the Superior Court "to quash" Count IV of the bill of indictment, and the State appealed from an order dismissing Count IV.

There is absolutely nothing in this record to indicate that the Superior Court had jurisdiction to rule on the defendant's motion to quash Count IV of the bill of indictment, a misdemeanor. Thus, we have no jurisdiction to hear the appeal.

Appeal dismissed.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. CHARLES RAY SHACKLEFORD

No. 828SC393

(Filed 2 November 1982)

Criminal Law § 98— defendant's right to be present at jury selection

A defendant charged with felonious breaking and entering and larceny had a right to be present for selection of the jury unless he personally waived that right, and defendant did not waive such right where his absence was caused by misinformation he received from his attorney and from the prosecutor's office as to when his case was to be called.

State v. Shackleford

APPEAL by defendant from *Bruce, Judge.* Judgment entered 6 November 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 18 October 1982.

Defendant was convicted of one count of felonious larceny and of one count of breaking or entering. He appeals the judgment imposing a prison sentence and fine.

Attorney General Edmisten, by Associate Attorney Wilson Hayman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler and James R. Glover, for defendant-appellant.

HILL, Judge.

In this case, the defendant was not present for jury selection. The case was called on Wednesday afternoon, 4 November 1981. After giving preliminary instructions to the prospective jurors, the court explained defendant's absence, stating: "Now, Mr. Shackleford, as is apparent, is not in court due to some misinformation that he received from his attorney and from the District Attorney's office as to when his case was going to be called." Without comment or objection by defendant's counsel, the jury was selected. Trial resumed the following morning with defendant present.

In every criminal prosecution, the accused has the right to be present at every stage of the trial, unless he waives the right. *State v. Hayes,* 291 N.C. 293, 230 S.E. 2d 146 (1976). In non-capital felony cases, only defendant may waive the right. In misdemeanor cases, defendant may, in addition, waive his right through his counsel with the consent of the court. *State v. Ferebee,* 266 N.C. 606, 146 S.E. 2d 666 (1966).

Here, defendant was charged with felonious larceny and breaking or entering. Although his attorney selected the jury in defendant's absence, the defendant retained his right to be present. Therefore, defendant is entitled to a

New trial.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. JOSEPH THOMAS EDMONDS

No. 826SC411

(Filed 2 November 1982)

Appeal and Error § 45; Criminal Law §§ 159.1, 166— filing stenographic transcript of trial proceedings—dismissal for failure to follow rules

Because of defendant's failure to observe the requirements of G.S. 1A-1, Rule 9(c)(1) and G.S. 1A-1, Rule 28(b)(4) which deal with filing a stenographic transcript of the trial proceedings in lieu of a narration of the evidence, defendant's appeal was subject to dismissal.

APPEAL by defendant from *Tillery, Judge.* Judgment entered 4 June 1980 in Superior Court, HALIFAX County. Certiorari allowed by the Court of Appeals on 16 November 1981. Heard in the Court of Appeals 21 October 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of armed robbery.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

WHICHARD, Judge.

Pursuant to Rule 9(c)(1), Rules of Appellate Procedure, defendant chose to file a stenographic transcript of the trial proceedings in lieu of a narration of the evidence. The appendix attached to his brief contains none of the material from the transcript essential to an understanding of three of the four assignments of error brought forward. It is at least questionable whether the appendix material with regard to the remaining assignment suffices for a full understanding of the question presented.

Defendant thus has not complied with Rule 28(b)(4), Rules of Appellate Procedure, which provides that when the stenographic transcript is used in lieu of a narration of the evidence, "if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief . . . such verbatim portions of the transcript shall be attached as appendixes to the brief."

As we noted in *State v. Greene*, 59 N.C. App. 360, 361, 296 S.E. 2d 802 (1982): "Failure to observe the requirements of Rule 28(b)(4) constitutes a substantial impediment to the capacity of this Court to perform its functions. 'Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of the appeal.' " *See also State v. Nickerson*, 59 N.C. App. 236, 296 S.E. 2d 298 (1982); *State v. Wilson*, 58 N.C. App. 818, 294 S.E. 2d 780 (1982).

Because of defendant's failure to observe the requirements of Rule 9(c)(1) and Rule 28(b)(4), the appeal is dismissed.

Appeal dismissed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. MILES WILSON GREENE, JR.

No. 8217SC359

(Filed 2 November 1982)

Criminal Law §§ 159.1, 166— filing stenographic transcript—failure to attach portions of transcript as appendix to brief

Defendant's appeal is subject to dismissal where defendant filed the stenographic transcript of the evidence at trial in lieu of a narration of the evidence but failed to reproduce verbatim and attach as an appendix to his brief those portions of the transcript essential to an understanding of the questions presented as required by App. Rules 9(c)(1) and 28(b)(4).

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 12 November 1981 in Superior Court, SURRY County. Heard in the Court of Appeals 19 October 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of felonious breaking or entering and felonious larceny.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

WHICHARD, Judge.

Pursuant to Rule 9(c)(1), Rules of Appellate Procedure, defendant chose to file a stenographic transcript of the trial proceedings in lieu of a narration of the evidence. He did not, however, reproduce verbatim and attach as an appendix to his brief those portions of the transcript essential to an understanding of the questions presented, as required by Rule 28(b)(4), Rules of Appellate Procedure, when the stenographic transcript option is chosen.

Failure to observe the requirements of Rule 28(b)(4) constitutes a substantial impediment to the capacity of this Court to perform its functions. "Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of the appeal." *State v. Wilson*, 58 N.C. App. 818, 819, 294 S.E. 2d 780 (1982). *See also State v. Nickerson*, 59 N.C. App. 236, 296 S.E. 2d 298 (1982).

Because of defendant's failure to observe the requirements of Rule 9(c)(1) and Rule 28(b)(4), the appeal is dismissed.

Appeal dismissed.

Judges VAUGHN and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 NOVEMBER 1982

NAYLOR v. INGRAM No. 8210DC11	Wake (80CVD8163)	Affirmed
STATE v. BIRDSONG No. 823SC257	Craven (78CRS6344)	Affirmed
STATE v. DANCY & MOORE No. 827SC108	Nash (81CRS3699) (81CRS3704)	No Error
STATE v. GLENN No. 8226SC347	Mecklenburg (81CR34574)	No Error
STATE v. HARRIS No. 8226SC210	Mecklenburg (81CRS23353)	No Error
STATE v. JOHNSON No. 828SC172	Wayne (81CRS9075)	No Error
STATE v. PARKER & BEST No. 827SC308	Wilson (79CRS4615) (79CRS8894)	No Error
STATE v. SKIPPER No. 8219SC161	Randolph (79CRS8715)	No Error
WEBB v. WEBCO TANK, INC. No. 823SC32	Pitt (78CVS1334)	Dismissed

STATE OF NORTH CAROLINA v. ULLMAN LEE GINN

No. 828SC153

(Filed 16 November 1982)

1. **Constitutional Law § 30; Indictment and Warrant § 5— notice of return of indictment—effect on discovery rights**

G.S. 15A-630 did not require that a defendant represented by counsel or his counsel be served with notice of the return of a true bill of indictment, and failure of counsel to receive such notice did not prejudice defendant's discovery rights.

2. **Constitutional Law § 30; Criminal Law § 22— failure of record to show arraignment—no effect on discovery rights**

Failure of the record to show a formal arraignment prior to trial does not entitle the defendant to a new trial where the record indicates that defendant was tried as if he had been arraigned and had entered a plea of not guilty. Furthermore, the arraignment of defendant was totally unrelated to the exercise of his discovery rights. G.S. 15A-902(d).

3. **Bills of Discovery § 6; Constitutional Law § 30— State's witnesses—expected testimony—pretrial disclosure not required**

The State is not required to disclose the names of its prospective witnesses or the expected testimony from those witnesses.

4. **Constitutional Law § 30— exculpatory evidence—failure of prosecutor to disclose—absence of prejudice**

Even if the fact that a State's witness had been indicted in the same matter and granted a plea concession in return for his testimony was exculpatory so as to require the prosecutor voluntarily to disclose such fact to defense counsel, defendant was not prejudiced by the failure of the prosecutor to do so where a copy of the plea agreement was provided defense counsel at trial and the witness was cross-examined about the agreement.

5. **Bills of Discovery § 6; Constitutional Law § 30— failure to give advance notice of plea agreement with witness—absence of prejudice**

Failure of the State to give defense counsel advance written notice of a plea arrangement with an accomplice who testified for the State as required by G.S. 15A-1054(c) was not prejudicial to defendant where defense counsel waived the right to compel the granting of a recess as permitted by the statute, and where the State ultimately provided defense counsel with a written copy of the plea agreement which was used in cross-examining the accomplice.

6. **Constitutional Law § 48— effective assistance of counsel**

Defendant was not denied the effective assistance of counsel because his counsel failed to conduct pretrial discovery.

7. Constitutional Law § 28— due process—no knowing use of perjured testimony

In a prosecution for possession and sale of marijuana, there was no merit to defendant's contention that he was denied due process on the ground that the State used the perjured testimony of an accomplice because the accomplice falsely stated on cross-examination that he had not previously been convicted of any drug related offenses where any harm resulting from the accomplice's false statement was dispelled by his further testimony on cross-examination that he had pled guilty to felonious possession of marijuana pursuant to a plea arrangement with the State, and where a copy of such plea arrangement was then provided to defense counsel.

8. Narcotics § 4.2— possession of marijuana with intent to sell—sale of marijuana—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for possession of marijuana with the intent to sell and deliver and for the sale and delivery of marijuana where it tended to show that two undercover agents asked defendant's accomplice to obtain marijuana for them; the accomplice and defendant began to look for marijuana for the agents; the accomplice eventually arranged a drug buy; following the accomplice's instructions, the agents proceeded to a remote rural intersection where they met with the accomplice; the accomplice departed to check with his source of marijuana; in the interim the defendant drove up and asked the agents where the accomplice was; defendant was not known to the agents and had no apparent reason to know that they were waiting for or knew the accomplice; defendant left and the accomplice returned later to lead the agents to a remote trailer in the woods; the arrangement was that only the accomplice would transfer the marijuana while his source and his partner watched from a nearby Jeep; three bags of marijuana were then sold and delivered by the accomplice to the agents; and defendant and another person were arrested within 100 yards of the transaction.

9. Criminal Law § 143.8— probation revocation—evidence in trial for which conviction appealed

The trial court could properly revoke defendant's probation based upon evidence presented before the court in a trial in which defendant was convicted and appealed.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 21 November 1980 in Superior Court, GREENE County. Heard in the Court of Appeals 15 September 1982.

Defendant, Ullman Lee Ginn, was indicted for possession of more than one ounce of marijuana with intent to sell and deliver, and for the sale and delivery of more than one ounce of marijuana. Defendant was convicted of those offenses and given a consolidated sentence of one to five years in prison in Causes Nos. 80CrS85 and 80CrS86. Notice of appeal to the Court of Appeals

was given. A previous suspended sentence in Cause No. 79CrS265 was revoked on the basis of testimony in Causes Nos. 80CrS85 and 80CrS86. The sentence imposed in these latter two cases runs consecutively with the sentence imposed in 79CrS265. Notice of appeal was then given in open court. Defendant's trial counsel failed to perfect the appeal in apt time. The State moved to dismiss the appeal. A hearing was held on the State's motion, at which time defendant's counsel stated that defendant had abandoned appeal in 80CrS85 and 80CrS86. At this point, the appeal was dismissed.

Defendant obtained different counsel and filed a motion for appropriate relief in Superior Court, Greene County, seeking relief from the verdict and sentence on the ground that defendant failed to receive effective assistance of counsel. Defendant alleged that he believed at all times that the matter had been perfected and awaited determination by the North Carolina Court of Appeals. Defendant further alleged that he paid his trial counsel $250.00 for a transcript and other papers counsel claimed were necessary to perfect the appeal and that he was assured that the appeal had been perfected. The motion was denied without prejudice to file a proper motion in the Court of Appeals.

This Court granted defendant's motion for writ of certiorari. In addition to his appeal, defendant filed a motion for appropriate relief with this Court. The motion is based upon defendant's claim of ineffective assistance of counsel at trial and the denial of defendant's right of due process of law by the use of the "perjured" and "intentionally misleading" testimony of State's witness, Bobby Carraway. Defendant further contends this testimony constituted a fraud upon the courts of this state and prejudiced the entire trial.

Attorney General Edmisten, by Associate Attorney Blackwell M. Brogden, Jr., for the State.

Reginald L. Frazier and Bowen C. Tatum, Jr., for defendant appellant.

JOHNSON, Judge.

Defendant brings forward seven assignments of error and presents eleven arguments on appeal. These will be considered

together with the issues raised in defendant's motion for appropriate relief.

The State's case against defendant consisted primarily of testimony given by Bobby Carraway, an acquaintance of several years of defendant Ginn. Carraway was an accomplice in the marijuana sale in question and testified pursuant to a plea concession with the State.

The evidence tended to show that for some weeks, Bobby Carraway had been buying quinine for resale to a purchaser in New York City. Quinine is not a controlled substance, but it is used to cut heroin. Carraway was looking for quinine, and he was contacted by Drug Enforcement Agent (DEA) Grimes regarding a sale. The agent began supplying Carraway with quinine in early 1980. DEA Agent Grimes put Carraway in touch with SBI Agent Alcox. The agents asked Carraway if he could buy some marijuana for them. Carraway agreed.

Carraway testified that he went to defendant Ginn's house and discussed the purchase with Ginn on 13 January 1980. Carraway and Ginn then made trips to Goldsboro and to Wilmington without finding marijuana. Ginn and Carraway returned to Ginn's house in Snow Hill. Eventually, the deal was set up with Agent Alcox for 14 January 1980, at about 7:00 p.m., in Snow Hill. The marijuana was to be stashed behind a trailer home near Snow Hill, about a mile from Ginn's house.

Carraway met the agents at the designated locations and said there had been a delay. He left the agents and went to Ginn's house to investigate the delay. The arrangement was that only Carraway would transfer the marijuana while his source and his partner watched from a gray Jeep parked up the road. While Carraway was investigating the delay, Ginn and another man, Kenneth Claude Howell, Jr., drove up to the agents in a gray Jeep Cherokee and asked where Carraway was. SBI Agent Overton told them that, "Bobby went to the house." Ginn replied, "We will be right back."

At about 2:10 p.m., Carraway returned to where Alcox and Overton were waiting, and Carraway motioned with his hand for the agents to follow him. They did so and were escorted to a remote trailer or mobile home off a rural road. Agent Alcox

followed Carraway to the rear of the trailer where three bags of marijuana were lying on the ground. Alcox weighed the bags and contents and began to pay Carraway, but interrupted payment to arrest Carraway. Ginn and his companion, Howell, were in the gray Jeep Cherokee within sight of the transaction. They were arrested by another agent. The bags on the ground contained about 105 pounds of marijuana. The gray Jeep also contained traces of marijuana. Defendant Ginn's motion for dismissal was denied. He rested without presenting evidence and unsuccessfully renewed his motion.

I

Defendant makes a number of related assignments of error regarding the procedures by which he was tried and convicted. The issues raised are whether the defendant was prejudiced from the delay of the arraignment; whether the defendant's rights to discovery were violated; and whether the State was required to notify defendant of its intended use of an accomplice's testimony.

The following events at trial serve as the factual basis for a number of the issues raised by defendant. During the direct examination of the State's first witness, Bobby Carraway, counsel for the defendant and counsel for the co-defendant, Howell, requested that they be heard on *voir dire*. The court ascertained from the prosecutor that the witness had been indicted for his participation in the crimes for which the defendant was charged and had entered a plea.

The court then asked if there was a motion for the defendant Ginn. Mr. Roland Braswell, counsel for the defendant stated his motion. Braswell sought to exclude from evidence any "alleged conversation" between his client and the witness on the grounds that the defendant had not been arraigned and that the State had not disclosed that Carraway had been a co-defendant who would testify. In essence, defendant's counsel objected to the failure of the State to provide discovery. However, Mr. Braswell did admit that he knew the witness would testify but not that Carraway had been a co-defendant.

Mr. Roland Braswell further stated that he had never requested voluntary discovery because "nobody has ever served me with a bill of indictment. And I know that that clicks the rule."

Counsel for the defendant and the Assistant District Attorney disagreed as to whether the defendant was arraigned prior to trial. Mr. Roland Braswell found, in his *personal* file, an original and copy of a waiver of arraignment in the case. No record of arraignment appeared in the court file. A discussion was held about the aborted attempt to enter a plea at the 12 August 1980 session of Superior Court in Greene County, that had resulted in a continuance at the request of the defendant when Judge Small found the plea unsatisfactory.

The Assistant District Attorney argued that the absence of a record of formal arraignment simply meant the defendant pled not guilty but admitted he might be quoting "some of Judge Small's law." The Clerk stated that some judges did not require that an order of arraignment be filled out. Judge Bruce stated, "I want to go by this in this green book," an obvious reference to the printed General Statutes, and ordered the defendant Ginn arraigned.

Counsel for the defendant replied:

> "Your Honor, I don't know exactly what I should do at this point, I am going to state quite frankly to the Court. So what I am going to do is say nothing and if the Court wants to invoke that provision of the statute which has been read by Mr. Heath and proceed on the theory that that is a not guilty plea under that statute, I can do so and then that way I have not waived any rights that my client might have by being caught in the mess we are now caught in."

The Court ordered that the record reflect the defendant had pled not guilty. The Court then inquired of counsel for defendant what requirement there was that the State furnish him written or oral statements the defendant might have made before being taken into custody. Mr. Roland Braswell stated that he had been furnished such information in other cases and had never been advised that the State's witness had been a co-defendant. Mr. Braswell further admitted he knew Carraway would testify six months ago but never that he was a co-defendant.

The Court then ruled that the State was not obliged to furnish a copy of any statement of the defendant. The Court further ruled that the rule in *Bruton v. U.S.*, 391 U.S. 123, 20 L.Ed. 2d

476, 88 S.Ct. 1620 (1968) did not apply to operative statements in connection with the crime charged. After a brief colloquy on the *Bruton* rule, the Court inquired, "anything else?," and received no response from the defendant's attorney. The Court further directed that the arraignment of the defendant relate back to the time that the jury was empaneled.

A

The defendant contends that the discovery provisions of G.S., Chap. 15A, Art. 48, in particular G.S. 15A-907, and the Sixth and Fourteenth Amendments of the United States Constitution were violated by the pre-trial and trial procedures outlined above. In related arguments, defendant asserts that his rights to full discovery were also violated by the State's failure to comply with the notice provisions of G.S. 15A-1054(c) and that the State's failure to arraign the defendant pursuant to G.S. 15A-941 violated the due process and equal protection provisions of the Fourteenth Amendment and "North Carolina's prohibition against trial by ambush." The gist of defendant's argument is that defendant's trial counsel, Mr. Roland R. Braswell, was handicapped in his defense due to lack of notice of the charges pending against Ginn, lack of notice that an alleged co-defendant would testify as State's witness, and lack of notice of the precise nature of that testimony. Defendant asserts that the State thereby conducted a prejudicial "trial by ambush" in violation of the State's affirmative duty to provide discovery. Defendant's eleventh argument maintains that in addition to the prejudice to defendant's case resulting from the State's conduct in the foregoing matters, defendant's counsel Braswell was ineffective in all phases of defendant's trial due to inadequate investigation and preparation of the case. We do not agree.

[1] On *voir dire*, defendant's counsel stated that he had not requested voluntary discovery because *he* was never served with a bill of indictment. The record indicates that defendant Ginn was personally served with a bill of indictment on 4 June 1980.

G.S. 15A-630 does not require that *counsel* be served with notice of the return of a true bill of indictment. The notice provisions of G.S. 15A-630 are applicable to defendants *unless* they are

then represented by counsel of record.[1] A defendant who is represented by counsel at the time, as was the case of Ginn, is not entitled to the benefits of the notice requirement. *State v. Miller*, 42 N.C. App. 342, 256 S.E. 2d 512 (1979). Thus, counsel's failure to receive notice did not prejudice defendant's discovery rights.

[2] Defendant next argues that the arraignment process utilized in this case violated his constitutional rights and "North Carolina's prohibition against trial by ambush." Specifically, defendant refers to G.S. 15A-941.[2]

The record reflects that the requirements of G.S. 15A-941 have been met. The transcript contains the following statement by the trial court:

> "Ladies and gentlemen, this is a case of the State of North Carolina versus Ullman Lee Ginn and the State of North Carolina versus Kenneth Claude Howell, Jr. They are criminal proceedings wherein both of the defendants stand charged with two counts. The first count of the indictment charges each of the defendants with the felonious possession of a controlled substance, to wit, marijuana, with the intent to sell and deliver the marijuana. And the second count of each indictment charges each of the defendants with the felonious sale of the controlled substance, marijuana. The defendants, in each of these cases, have each entered pleas of not guilty as to both of the charges. The fact they are indicted is not evidence of guilt. When a defendant pleads not

1. G.S. 15A-630. Upon the return of a bill of indictment as a true bill the presiding judge must immediately cause notice of the indictment to be mailed or otherwise given to the defendant unless he is then represented by counsel of record. The notice must inform the defendant of the time limitations upon his right to discovery under Article 48 of this Chapter, Discovery in the Superior Court, and a copy of the indictment must be attached to the notice. If the judge directs that the indictment be sealed as provided in G.S. 15A-623(f), he may defer the giving of notice under this section for a reasonable length of time.

2. G.S. 15A-941. Arraignment consists of bringing a defendant in open court before a judge having jurisdiction to try the offense, advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.

guilty the burden is on the State of North Carolina to satisfy you of the guilt of the defendant by the evidence and beyond a reasonable doubt."

The procedure utilized by the trial court in this case adequately complied with the requirements of due process and equal protection of law and in no way constituted "trial by ambush." The failure of the record to show a formal arraignment prior to trial does not entitle the defendant to a new trial where the record indicates that the defendant was tried as if he had been arraigned and had entered a plea of not guilty, as in the situation here. *State v. Benfield*, 55 N.C. App. 380, 285 S.E. 2d 299 (1982); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980); *State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975). In addition, while the official record is silent, Mr. Braswell's *personal* file of the case contained a waiver of arraignment. Counsel was not unaware of the nature of the charges against defendant. That Mr. Braswell was in fact fully apprised of the charges against defendant Ginn is further evidenced by Braswell's having tendered a negotiated plea to Judge Herbert Small at the August 12th term of court in Greene County. In any event, arraignment does not affect the time for discovery for a defendant represented by counsel. Under G.S. 15A-902(d) and the facts of this case, when the defendant waived his probable cause hearing, upon the consent of counsel on 22 February 1980, the ten days in which discovery should be commenced had ended on or about 4 March 1980.[3] The arraignment of defendant was totally unrelated to the exercise of his discovery rights.

B

[3] Contrary to defendant's contentions, the State has no initial duty to disclose the names of witnesses. In North Carolina a de-

3. G.S. 15A-902(d). If a defendant is represented by counsel, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after either the probable-cause hearing or the date he waives the hearing. If a defendant is not represented by counsel, or is indicted or consents to the filing of a bill of information before he has been afforded or waived a probable-cause hearing, he may as a matter of right request voluntary discovery from the State under subsection (a) above not later than the tenth working day after (1) The defendant's consent to be tried upon a bill of information, or the service of notice upon him that a true bill of indictment has been found by the grand jury, or (2) The appointment of counsel—whichever is later.

fendant does not have the right to discover in advance of trial the names and addresses of the State's prospective witnesses. *State v. Myers*, 299 N.C. 671, 263 S.E. 2d 768 (1980), *citing*, *State v. Dollar*, 292 N.C. 344, 233 S.E. 2d 521 (1977); *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1976).

> "No right of discovery in criminal cases existed at common law. *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972). No right to discover the names and addresses of State's witnesses exists by statute in North Carolina. Neither former G.S. 15-155.4 nor G.S. 15A-903 requires the State to furnish the accused with a list of witnesses who are to testify against him. *See State v. Hoffman*, 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Peele*, 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970)."

State v. Smith, 291 N.C. at 523, 231 S.E. 2d at 674-675.

Defendant urges that *State v. Myers, supra*, be overruled and that, in addition to the matters covered by G.S., Chap. 15A, Art. 48, and G.S. 15A-1054(c), the prosecution be required to disclose, in advance of trial, the names of the State's prospective witnesses and a summary of expected testimony from those witnesses. He contends that *Myers* is a "court established rule" out of step with modern trends. In light of the specific requirements of G.S., Chap. 15A, it would appear to be the province of the General Assembly to impose such requirements on the prosecution. Moreover, in this case, defendant's counsel admitted that he knew for some six months prior to trial that Carraway would testify.

The record does not reveal that defendant at any time requested voluntary discovery nor filed a motion before the court for discovery. Therefore, defendant's contention that the State violated its *continuing* duty to provide disclosure and discovery pursuant to G.S. 15A-907 is without merit.[4]

Defendant relies upon *State v. Hatfield, W.Va.*, 286 S.E. 2d 402 (1982), to establish both a constitutional and statutory duty

4. G.S. 15A-907. If a party, *subject to compliance with an order issued pursuant to this Article, discovers prior to or during trial additional evidence* or decides to use additional evidence, and the evidence is or may be subject to discovery or inspection under this Article, he must promptly notify the attorney for the other party of the existence of the additional evidence. (Emphasis added.)

upon the State to disclose evidence regardless of defense counsel's lack of demand.

[4] However, the *Hatfield* court correctly noted that the State's affirmative duty of voluntary disclosure applies to evidence that is *exculpatory* from a constitutional standpoint. *Id.* at 411, *citing, United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S.Ct. 2392 (1976). The evidence defendant Ginn complains of—the fact that Carraway had been indicted in the same matter and granted a plea concession in return for his testimony—is material only to the issue of Carraway's credibility as a witness. In *United States v. Agurs, supra*, the Supreme Court announced the following standard for evaluating whether the failure to disclose evidence would reach a constitutional dimension such that the prosecutor would be required to disclose it absent a request:

> "It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

427 U.S. at 112-13, 49 L.Ed. 2d at 355, 96 S.Ct. at 2402.

We need not reach the issue of whether the credibility evidence was exculpatory from a constitutional standpoint in this case, as the record reveals that it was *not omitted* from defendant Ginn's trial. A copy of the plea agreement was provided defense counsel at trial, and witness Carraway was cross-examined regarding the matter. Therefore, the verdict returned already reflected the impact of the "additional" evidence regarding Carraway's credibility, and defendant was not prejudiced by the prosecutor's failure to voluntarily disclose the evidence.

The court in *State v. Hatfield, supra*, stated that the relevant inquiry under a statutory disclosure duty is "prejudice to the defendant resulting from either surprise on a material issue or where the non-disclosure hampers the preparation and presentation of the defendant's case." 286 S.E. 2d at 412.

[5] Defendant contends that the State's failure to comply with the notice provisions of G.S. 15A-1054(c) regarding advance notice that Carraway had been a co-defendant in the same matter, prejudiced his discovery rights, his rights to effective assistance of counsel, and denied that defendant's right to test the credibility of witness Bobby Carraway.[5]

The defendant correctly contends that advance notice of the State's plea arrangement with Carraway should have been provided to defense counsel pursuant to G.S. 15A-1054(c). The failure on the part of the State to so provide constitutes a violation of defendant's statutory discovery rights. However, while defense counsel may have been surprised, the failure was not prejudicial to the defendant under the facts of this case.

We note at the outset that the remedy for failure to give advance notice on the part of the prosecution is for defendant or his counsel to compel the granting of a recess. G.S. 15A-1054(c). Defense counsel remained silent when the time came for him to claim this relief, not wanting to prejudice any rights his client may have acquired by the breach of statutory duty. The State ultimately provided defense counsel a written copy of the transcript of the plea agreement with Carraway which was used in the cross-examination.

Any rights under G.S. 15A-1054 have either been waived or adequately protected by actual production of the transcript of the plea and the opportunity seized upon by defense counsel to cross-examine the witness concerning the plea.

The cross and recross-examinations of Carraway and of the SBI Agents Alcox and McLeod clearly elicited the negotiated plea of Carraway, inconsistent statements between Carraway's testimony and the statements he made to the SBI Agents during the course of the investigation prior to his arrest, and Carraway's

5. G.S. 15A-1054(c). When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

history of dealings with persons in the heroin trade in New York City.

In view of the damaging cross-examinations conducted, the defendant cannot claim to have been deprived of any benefits that might reasonably have been expected from the advance written disclosure required by G.S. 15A-1054. The defendant waived any right to the recess allowed by statute to apprise himself of the material contained in the plea agreement. The record contains no errors prejudicial to the defendant regarding arraignment and discovery.

C

[6] The foregoing discussion of defense counsel Braswell's pretrial and trial conduct in this case amply demonstrates that defendant Ginn's counsel conducted an active and thorough defense at the trial. However, defendant's appellate counsel argues that defendant's trial counsel failed to adequately represent the defendant's interests by failing to conduct pretrial discovery, not making adequate investigation prior to trial, waiving an opening statement at the empaneling of the jury and failing to perfect an appeal. Defendant's most serious contentions relate to inadequate discovery and pre-trial preparation, resulting in defense counsel's entering a contested trial "ignorant of the prosecution's evidence."

> "The test of effective assistance has been expressed two ways by this Court. Traditionally, the formulation has been whether 'the 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). Recently, however, we have employed the *McMann* standard and the ABA Standards without mention of the 'farce and mockery' standard in reviewing an ineffective assistance of counsel claim in a case in which the defendant had not pleaded guilty. *State v. Milano, supra*, 297 N.C. at 494, 256 S.E. 2d at 159. Under either of these tests defendant has failed to meet the 'stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation.'"

State v. Misenheimer, 304 N.C. 108, 121, 282 S.E. 2d 791, 799-800 (1981). (Footnotes omitted.)

As in *State v. Misenheimer*, the defendant here is unable to meet the burden imposed upon him by either test of the denial of "constitutionally effective counsel." *McMann v. Richardson*, 397 U.S. 759, 771, 25 L.Ed. 2d 763, 773, 90 S.Ct. 1441, 1449 (1970) required only that counsel advising a guilty plea do so "within the range of competence demanded of attorneys in criminal cases."

The absence of pretrial motions or discovery must be viewed in light of the entire transcript of the trial, especially the portions connected with the testimony of Bobby Carraway. Mr. Roland Braswell conducted a thorough and effective cross-examination of Carraway, utilizing the plea concessions provided him at trial. It cannot be said that Braswell's performance on cross-examination was not reasonably competent under *McMann*.

The foregoing discussions of the events at trial concerning arraignment and discovery reveal that Braswell was fully aware of the charges against Ginn and the fact that Carraway would testify for the State.

Braswell made a tactical decision to "say nothing" at the time Judge Bruce ordered defendant to be arraigned at trial and a plea of not guilty entered. Braswell's stated reason for this decision being: "I can do so and then that way I have not waived any rights that my client might have by being caught in the mess we are now caught in."

A reading of the transcript as a whole shows that counsel was attempting to build a record for appeal and wanted to avoid waiving any rights or curing any prejudice. Defendant's counsel performed a creditable cross-examination which demonstrated knowledge of the case and the issues involved. No evidence is alleged to have been overlooked by Mr. Braswell to defendant's detriment. That Braswell chose one strategem over another in this matter does not render his assistance ineffective. Defendant has not demonstrated that Braswell's choices denied him the presentation of some matter that would have aided his defense. Defendant has not been denied his Sixth Amendment right to effective assistance of counsel.

D

[7] Defendant's motion for appropriate relief filed with this Court raises the issue of whether defendant Ginn was denied his right

of due process of law by the use of the perjured testimony of Bobby Carraway. Defendant argues that Carraway committed perjury and "perpetrated a fraud upon the courts of this State" during cross-examination.

Defendant's allegation is not supported by the record in this case. The purported perjury concerning Carraway's testimony was that his only prior convictions were a "D.U.I. charge and maybe one speeding ticket." At this point, defense counsel asked whether Carraway had "ever been convicted of any drug related offense prior to this occasion." To which Carraway replied, "No, sir."

Defendant contends this was perjury because Carraway had entered a plea of guilty in the same matter approximately six months prior to Ginn's trial. However, upon defense counsel's continued probing, Carraway admitted that he pled guilty and entered into a plea bargain with the State. After a recess, counsel was provided with a certified copy of Carraway's plea bargain with the State indicating that Carraway pled guilty to felonious possession of marijuana and was placed on unsupervised probation for a term of three years, which Carraway admitted having signed.

It is clear from the record that whatever harm was done defendant by Carraway's initial response regarding drug related offenses was effectively dispelled by Braswell's continued cross-examination. The statements of Carraway's cited by defendant simply do not rise to the level of fraud upon the court. Defendant's claim of prejudice resulting thereby to the entire trial is without merit.

II

[8] Defendant combines two assignments of error relating to the sufficiency of the State's evidence and argues that the State failed to prove each and every essential element of the crimes charged. In particular, defendant argues that the State's case of circumstantial evidence fails to connect the defendant with the actual placing of the marijuana behind the trailer.

> "It is elementary that a motion to nonsuit requires the trial court 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. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). Whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged had been committed and that defendant committed it, the motion to nonsuit should be overruled."

State v. Fletcher, 301 N.C. 515, 517, 271 S.E. 2d 913, 914 (1980).

The evidence shows that undercover agents had attempted to purchase marijuana. In those efforts they contacted one Bobby Carraway, known to be involved in the purchase for resale of legal ingredients used in the dilution of heroin for unlawful distribution. Carraway and Ginn began to look for marijuana for the agents. Carraway eventually arranged a drug "buy." Following Carraway's instructions, the agents proceeded to a remote rural intersection where they met with Carraway. Carraway departed to check with his "source." In the interim, the defendant Ginn drove up and asked the agents where Carraway was. Ginn was not known to the agents nor did he have any apparent reason to know that they were waiting for or knew Carraway. Ginn left and Carraway returned later to lead the agents to a remote trailer in the woods. The agents knew that Carraway's partner and source would be watching from a nearby Jeep. Contraband was then sold and delivered by Carraway to the agents. Ginn and another person were arrested within 100 yards of the transaction. Contraband was found in the vehicle under Ginn's control. Carraway identified Ginn as his accomplice in the transaction, testifying that each was to receive $1,500.00 profit from the sale. Considered in the light most favorable to the State, the State's evidence would support a finding that Ginn was directly involved in the illegal transaction. Denial of defendant's motions was proper.

Defendant also argues that "the entrapment question was ignored at trial. There was no instruction given on the law of entrapment." While not stated explicitly in defendant's brief, defendant apparently bases his argument on the theory that the evidence revealed entrapment as a matter of law and therefore the trial court was required to dismiss the charges as a matter of law.

"Like other defenses, entrapment is generally an issue for the jury to decide unless the court finds from the evidence presented that the police entrapped the defendant as a matter of law." *State v. Grier*, 51 N.C. App. 209, 212, 275 S.E. 2d 560, 562 (1981). The court can find entrapment as a matter of law only where the undisputed testimony and required inferences compel a finding that the defendant was lured by the officers into an action he was not predisposed to take. *State v. Stanley*, 288 N.C. 19, 32, 215 S.E. 2d 589, 597 (1975). *See also State v. Walker*, 295 N.C. 510, 513, 246 S.E. 2d 748, 750 (1978).

The defendant has failed to elicit evidence of entrapment in this case. Again, denial of these motions by the trial court was proper.

III

[9] Defendant's next argument is addressed to the revocation of probation in 79CrS265. Defendant contends that the trial court committed reversible error in revoking his probationary sentence in 79CrS265 before the adjudication of a final determination in 80CrS85 and 80CrS86 on the grounds that no criminal judgment is considered final until it has been affirmed or denied on appeal as provided by the Criminal Procedure Act of North Carolina. The probationary sentence in 79CrS265 was revoked on the basis of the testimony and evidence before the trial judge in the case on appeal. The court then imposed consecutive sentences. Defendant cites no case in support of his argument.

The trial court did not err in revoking probation based upon *evidence* presented before the court in a trial in which defendant was convicted and appealed. Revocation of probation is a matter of discretion with the trial court. In making the determination as to whether the conditions of probation have been violated the "evidence need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violated a valid condition on which the sentence was suspended." *State v. Freeman*, 47 N.C. App. 171, 266 S.E. 2d 723, *cert. denied*, 301 N.C. 99, 273 S.E. 2d 304 (1980).

Defendant's probation was revoked at the sentencing hearing held for the possession and sale of marijuana charge. This hearing occurred on the day following the return of the guilty verdict. A

report had been filed pursuant to G.S. 15A-1345 to revoke probation and put the suspended sentence into effect, alleging that Ginn violated the general condition of probation that "defendant shall not commit any criminal offense." The violation alleged was the offense of the sale and delivery of marijuana, which formed the basis of defendant's conviction the day before. The trial judge stated that he would consider all *evidence* introduced during the trial of the defendant just concluded, in the probation hearing. Finding a violation of a valid condition of probation, the trial judge ordered defendant's probation terminated and execution of the suspended sentence to commence immediately. The trial judge later ordered the execution of the active portion of the sentence imposed in the marijuana sale case to run consecutively.

A nearly identical set of facts was presented in *State v. Hill*, 266 N.C. 107, 145 S.E. 2d 349 (1965). There, the defendant was found guilty of assault. The solicitor then prayed for judgment activating a previously suspended sentence on the specific ground of defendant's conviction for assault. The revocation hearing was held before the same judge the day after defendant's assault trial. The issue on appeal was whether the trial judge based the revocation upon the evidence presented at that trial or upon evidence offered of other convictions of defendant. The Supreme Court held that the trial judge had actual knowledge as well as judicial notice of the trial, verdict, and judgment in the assault case and affirmed the revocation of probation based upon that judicial knowledge of the offense committed.

The trial judge had before him sufficient knowledge and notice of the commission of the acts leading up to defendant Ginn's conviction for the possession and sale of marijuana to have reasonably concluded that Ginn violated a valid condition of his probation. Significantly, defendant's probation was not revoked because of his conviction; rather, revocation was based upon the trial court's consideration of evidence that defendant possessed and sold marijuana. We conclude that defendant's probation in the 79CrS265 case was properly revoked.

We have carefully considered defendant's other assignments of error and find them to be without merit. The judgment pronounced in Causes Nos. 80CrS85 and 80CrS86 and the judgment activating the sentence in Cause No. 79CrS265 are

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

PATSY E. MEACHAM v. MONTGOMERY COUNTY BOARD OF EDUCATION

No. 8119SC1353

(Filed 16 November 1982)

Estoppel § 4.7; Schools § 13— career teacher status terminated by operation of law—estoppel of school board to deny career teacher status

The trial court erred in directing a verdict on the issue of equitable estoppel for defendant at the close of plaintiff's evidence where plaintiff's evidence tended to show that plaintiff began experiencing severe medical problems which interfered with her teaching; that she initially went on a medical leave of absence; that the school system finance officer recommended disability retirement, assuring plaintiff that "the retirement aspect was just a formality because the state regulations provide that the benefits stop automatically when one returns to work"; and that plaintiff would not have received disability retirement if she had known or suspected that it would affect her ability to return to work. The fact that the superintendent of schools and the finance officer did not know that plaintiff's application for disability retirement benefits would affect her career status did not defeat plaintiff's estoppel claim.

APPEAL by plaintiff from *Hariston, Judge.* Judgment entered 26 August 1981 in Superior Court, MONTGOMERY County. Heard in the Court of Appeals 22 September 1982.

The present appeal is the second appeal of this case to this Court. In *Meacham v. Board of Education,* 47 N.C. App. 271, 267 S.E. 2d 349 (1980), this Court affirmed summary judgment in favor of defendant, ruling that plaintiff's status as a "career teacher" under the Teacher Tenure Act, G.S. 115C-325 (Supp. 1981), terminated by operation of law upon her voluntary election to accept disability retirement benefits.[1] At the same time, this Court reversed the granting of summary judgment on the issue of estoppel. Having found the existence of disputed issues of material fact, the case was remanded for jury trial on the question whether defendant be estopped from denying plaintiff her status as a "career teacher." On remand, the trial court at the

1. Plaintiff's surname appears in the 1980 reported case as "Meachan."

close of plaintiff's evidence entered judgment directing a verdict for the defendant. From the judgment, plaintiff appeals.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, P.A., by James C. Fuller, Jr. and Leslie J. Winner, for plaintiff appellant.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding, for defendant appellee.

JOHNSON, Judge.

The sole question presented for review is whether the trial court erred in granting a directed verdict against the plaintiff. For the reasons set forth below, we find that the directed verdict was erroneously allowed.

In *Meacham v. Board of Education*, 47 N.C. App. 271, 267 S.E. 2d 349 (1980) (Meacham I), this Court found disputed issues of material fact as to whether defendant should be estopped from denying plaintiff her status as a "career teacher."

The following facts were found to raise a permissible inference that the elements of estoppel were present, and sufficiently so, to raise a question of fact for the jury to determine.

The plaintiff was experiencing severe medical problems which interfered with her teaching. She sought advice from defendant's agents, the superintendent of schools, John T. Jones, and the finance officer, James Woodruff, regarding her options during the time she would be receiving medical help. Initially, plaintiff went on a medical leave of absence. Ultimately, Woodruff recommended disability retirement, assuring plaintiff that "the retirement aspect was just a formality because the state regulations provide that the benefits stop automatically when one returns to work." Plaintiff's evidence further showed that she would not have pursued disability retirement if she had known or suspected that it would affect her ability to return to work.

Applying the principles of equitable estoppel defined by our Supreme Court in *Hawkins v. Finance Corp.*, 238 N.C. 174, 77 S.E. 2d 669 (1953), this Court found the following elements of estoppel to be presented by plaintiff's evidence:

> "The finance officer was an agent of defendant, and he is *chargeable with knowledge of the implications of a teacher's election to apply for disability retirement benefits.* Plaintiff's sworn statement is sufficient to raise the legitimate inference that the finance officer's representation was false, that it was reasonably calculated to convey the impression that plaintiff would not lose any status previously attained, and that such representation was calculated to and did induce plaintiff to act to her prejudice in electing disability retirement." (Emphasis added)

Meacham, 47 N.C. App. at 278-279, 267 S.E. 2d at 353. Defendant presented evidence in *Meacham I* regarding plaintiff's having the means of knowledge of the truth as to the effect of her election and her having continued to receive disability retirement benefits while seeking to claim the benefits of career status. This Court ruled that the continued receipt of benefits does not defeat plaintiff's claim of estoppel, but is merely a factor in the determination as to whether she is entitled to the benefits of equitable principles. As to the issue of plaintiff's lack of knowledge and means of knowledge, the court stated, "we do not agree that plaintiff was required to make extensive inquiry for herself after being advised that 'the retirement aspect was just a formality.'" *Id.* at 279, 267 S.E. 2d at 354. We discuss *Meacham I* at some length here because the defendant raised exactly the same arguments to support the directed verdict ruling now appealed from. Defendant again contends that Superintendent Jones made no promises to rehire plaintiff in the fall of 1977, that Finance Officer Woodruff made no specific statements regarding plaintiff's career status, that neither Jones nor Woodruff knew the effect of disability retirement upon career status, and that plaintiff had the means to discover this information for herself.

Our courts have consistently held that on motion by a defendant for a directed verdict in a jury trial, the court must consider all of the evidence in the light most favorable to the plaintiff, resolving all conflicts in plaintiff's favor and giving plaintiff the benefit of every inference that can reasonably be drawn in plaintiff's favor; that the court may then grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Husketh v. Convenience Systems, Inc.*, 295

N.C. 459, 245 S.E. 2d 507 (1978). The identical question is presented to the reviewing court, that is, whether the evidence, considered in the light most favorable to the plaintiff, was sufficient for submission to the jury. *Hunt v. Montgomery Ward & Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980).

Upon remand, plaintiff offered the same documentary evidence as before regarding her application for and receipt of disability retirement benefits. Plaintiff's testimony conveyed essentially the same information as her verified affidavit, albeit in expanded form. Plaintiff also offered into evidence the deposition testimony of defendant's agents, Superintendent Jones and Finance Officer Woodruff.

Taken as a whole, in the light most favorable to the plaintiff, the following evidence presented by plaintiff was sufficient for submission to the jury on the question of estoppel.

By November, 1976, plaintiff's health had deteriorated, causing a drastic change in her behavior and interfering with the performance of her teaching duties. Superintendent Jones told plaintiff that dismissal proceedings based upon her recent job performance could be circumvented if she would request a medical leave of absence for the rest of the 1976-1977 school year. Jones first mentioned the disability retirement option to plaintiff after she had written her request for the leave of absence in the following manner: "I explained the fact that a person would be eligible for disability retirement *during the time that they're disabled* if she wanted to apply for it." (Emphasis added)

Plaintiff met with the system's finance officer, James Woodruff, a short time later. Plaintiff told him of her potential financial problems. In response, Woodruff suggested that she apply for disability retirement. Plaintiff recalls being "assured that the retirement aspect was just a formality because the state regulations provide that the benefits stop automatically when one returns to work." Jones stated that a few days after plaintiff applied for the leave of absence, she applied for disability retirement. Jones called Woodruff into his office and Woodruff worked with plaintiff in filling out her forms.

Neither the finance officer nor the superintendent explained to plaintiff that her application and approval for disability retire-

ment could affect her position as a teacher in any way. The finance officer later admitted that he "didn't know it." The superintendent also said that he had no idea at the time that accepting disability retirement might affect plaintiff's coming back to work.

Plaintiff testified that no one had ever told her that the effect of her application would be to terminate her employment, or endanger her tenure or career status in any way. Rather, she had been assured by Finance Officer Woodruff that it would be a "formality" that would be discontinued in the fall of 1977 when she returned to work. Everything that school officials did and said led plaintiff to believe that they were helping her deal with short-term financial exigencies solely out of concern for her well-being. At plaintiff's initial meeting with Superintendent Jones on the matter, she was told that a replacement would be hired "on an interim basis until the end of this year and if you're all right we see no reason why you couldn't come back in the fall."

Therefore, on 3 December 1976, plaintiff submitted a request for a "medical leave of absence as of December 31st to the end of this school year (1976-77)." According to the superintendent, there was no discussion at that time about her resigning her job or terminating her position if she took the medical leave of absence. On 6 December the defendant Board granted plaintiff a medical leave of absence. Plaintiff then went on medical leave with permission.

Later, in February 1977 plaintiff's application for disability retirement, which had been signed by plaintiff, the finance officer, and the superintendent, was approved by the State with benefits retroactive to 1 January 1977, the day plaintiff's medical leave began. After undergoing neurological surgery in the spring of 1977, plaintiff successfully recovered from her illness. She advised the superintendent that her neurosurgeon had "declared me absolutely free of any restrictions" and affirmed that she would be "able to resume her teaching duties as of the 1st of August 1977."

In early August 1977 plaintiff met with Superintendent Jones to determine what steps she needed to take about returning to work. For the first time plaintiff was informed that disability retirement was tantamount to a resignation.

Our research reveals a number of slightly varying judicial formulations of the doctrine of estoppel. In *Yancey v. Watkins*, 2

N.C. App. 672, 674, 163 S.E. 2d 625, 626-27 (1968), the first element of estoppel is set forth as follows: "Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts," *citing Boddie v. Bond*, 154 N.C. 359, 70 S.E. 2d 824 (1911). In the earlier case of *Hawkins v. Finance Corp., supra*, the Supreme Court stated the elements of estoppel in a slightly different form, adding the following to the first element: "Conduct . . . at least, which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert."[2] *Id.*, 238 N.C. at 177, 77 S.E. 2d at 672. This additional form of conduct on the part of the party to be estopped is the form most relevant to the case under discussion.

The foregoing conduct on the part of defendant's agents Jones and Woodruff was reasonably calculated to convey the impression to plaintiff that filing for disability retirement benefits was one of several options to see her through the temporary financial problems that plaintiff anticipated experiencing while undergoing medical treatment during the remainder of the 1977 school term. This impression of the facts was wholly inconsistent with defendant's later assertion that acceptance of the benefits was tantamount to resignation. The conduct conveyed the impression that plaintiff would not lose any status previously obtained despite the lack of an affirmative promise that plaintiff would be rehired. It is undisputed that both plaintiff and defendant acted in good faith, yet this fact alone does not bar plaintiff's claim that defendant be estopped. It is sufficient that defendant's subsequent inconsistent position operated to injure the plaintiff.

2. "[T]he essential elements of an equitable estoppel as related to the party estopped are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least which is reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) intention or expectation that such conduct shall be acted upon by the other party, or conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action thereon of such a character as to change his position prejudicially." *Hawkins v. Finance Corp.*, 238 N.C. at 177-78, 77 S.E. 2d at 672, *cited in Meacham, supra*, 47 N.C. App. at 277-78, 267 S.E. 2d at 353.

In *Hamilton v. Hamilton*, 296 N.C. 574, 251 S.E. 2d 441 (1979) the Supreme Court allowed the plaintiff wife's claim of estoppel based upon the defendant's innocent, yet misleading representations and conduct. The court stated:

> "We do not mean to imply that the defendant intentionally or fraudulently misled the plaintiff or the trial court by his assertion that the parties had settled the matters in question. However, neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971)."

Id., at 576, 251 S.E. 2d at 443. The court then quoted the following passage on inconsistent positions with approval:

> "[A] party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. . . [T]he fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party." H. McClintock, Equity § 31 (2d ed. 1943).

Id., at 576-77, 251 S.E. 2d at 443.

There is ample evidence in the record that the representations and conduct involved were calculated to and did induce plaintiff to act to her detriment in electing disability retirement benefits.

Upon remand the trial court ruled that defendant was entitled to a directed verdict, in part, due to the lack of knowledge on the part of Jones and Woodruff of the action that defendant Board would take on plaintiff's applications and the effect of such action on plaintiff's career status. However, it is clear from *Hamilton, supra*, that where the estoppel is based upon a *subsequent inconsistent position*, it is not necessary that the party to be estopped be aware of the falsity of the representation *when made*. In plaintiff's case, defendant's agents conveyed the impression that her career status would not be affected by disability retirement, that "the retirement aspect was just a formality." Defendant's lack of knowledge of the falsity of this representation

when made does not defeat plaintiff's claim. As this Court ruled in *Meacham I, supra*, Finance Officer Woodruff was an agent of defendant, and he is *chargeable* with knowledge of the implications of a teacher's election to apply for disability retirement benefits.

> "The rule (estoppel) rests upon the broad equitable doctrine that where one of two equally innocent persons must suffer, he who has so conducted himself, by his negligence or otherwise, as to occasion the loss, must sustain it."

Hawkins v. Finance Corp., 238 N.C. at 179, 77 S.E. 2d at 673.

Plaintiff's evidence is wholly sufficient as related to the party claiming the estoppel. There is no dispute in the record as to plaintiff's prejudicial reliance upon the conduct of defendant's agents. Defendant made much at trial of the fact that plaintiff had been an English teacher and therefore should have understood that the word "retirement" is defined as "the state of being retired, withdrawal from one's position or occupation or from active working life." It is defendant's contention that plaintiff, therefore, had the means of knowledge of the truth, and cannot assert an estoppel against defendant.

Again, this Court addressed this precise issue in *Meacham I, supra*, where we stated that plaintiff was *not* required to make extensive inquiry for herself after being advised that "the retirement aspect was just a formality." Defendant's agents' conduct as a whole conveyed the impression that plaintiff's leave from work and her benefits would terminate when her *disability* terminated. This conduct conveyed the impression that the stress fell upon "disability," rather than "retirement," in the phrase "disability retirement."

In sum, plaintiff's evidence was amply sufficient to support *each and every* element of equitable estoppel.

We note that the trial court further relied upon plaintiff's continuing receipt of disability retirement benefits at the time she sought to claim the benefits of career status, in directing the verdict. Again, this Court ruled in *Meacham I*, that this fact alone "does not defeat her claim of estoppel; rather, it is merely a fac-

tor to be considered in determining whether she is entitled to the benefits of equitable principles." 47 N.C. App. at 279, 267 S.E. 2d at 354.

The trial court erred in granting a directed verdict against the plaintiff, as the plaintiff's evidence was sufficient to take the case to the jury on the issue of estoppel. *Hunt v. Montgomery Ward & Co., supra.* Whether plaintiff is ultimately entitled to the benefits of equitable principles is an issue for the jury. *See State Auto Mutual Ins. Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 206 S.E. 2d 210 (1974).

New trial.

Chief Judge MORRIS and Judge WELLS concur.

ALMA CHRISTINE BOYLES v. PAUL W. BOYLES

No. 8210SC10

(Filed 16 November 1982)

Constitutional Law § 26.1; Judgments § 51.1 — foreign judgment concerning alimony arrearages — no jurisdiction in foreign court — no entitlement to full faith and credit

Plaintiff's 1971 judgment for alimony arrearages was not entitled to full faith and credit where her "Exhibit of Service" was an envelope which indicated that two notices were left at the address on the envelope and that the letter was returned to the sender, marked "unclaimed." Under Florida authority, return of the "Exhibit of Service" which was returned marked "unclaimed" was not sufficient service.

Judge WEBB dissenting.

APPEAL by defendant from *Bailey, Judge.* Order filed 25 September 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1982.

In this civil action we must determine whether the Wake County Superior Court properly accorded full faith and credit to a 21 April 1971 Florida judgment for alimony arrearages.

In 1962, Paul Boyles, as plaintiff, instituted a divorce action against Alma Boyles in the Dade County, Florida Chancery Court

(No. 62C7612), and a final decree of divorce was entered on 19 October 1962. The divorce judgment required Paul Boyles to pay Alma Boyles, among other things, $200 per month as alimony so long as she remained unmarried.

In April, 1971, Alma Boyles filed a motion in the cause in the Florida action seeking a judgment for alimony arrearage in the amount of $10,800. On 21 April 1971, the Circuit Court of the Eleventh Judicial Circuit in Dade County, Florida, entered a judgment for Alma Boyles in the amount of $10,800 after specifically

> being advised that notice was sent to the plaintiff, Paul W. Boyles, advising him of the Motion for Money Judgment and the date of said hearing, said notice being provided timely and in accordance with the laws of the State of Florida, and the plaintiff, Paul W. Boyles, failing to appear at said hearing, and the court taking the testimony of the defendant, Alma Christine Boyles, and determining therefrom that plaintiff, Paul W. Boyles, is in arrears in alimony payments to the defendant in the amount of Ten Thousand Eight Hundred Dollars ($10,800) . . . .

Alleging that Paul W. Boyles has never paid any sum in satisfaction of the 1971 Florida judgment, Alma Boyles, in April, 1981, filed a Complaint in the Wake County Superior Court, seeking, among other things, an order granting full faith and credit to the Florida judgment for alimony arrearages. Paul Boyles, in his Answer, denied that he owed alimony arrearages and asserted (i) that he was not served with notice of the proceedings or copies of the pleadings or the judgment; (ii) that Alma Boyles' claims are barred by the statute of limitations; and (iii) that Alma Boyles waived her claim to alimony or is estopped to claim alimony arrearages.

Following a hearing, the Wake County Superior Court entered an order granting full faith and credit to the 21 April 1971 Florida judgment and further ordered that Alma Boyles recover judgment against Paul Boyles in the sum of $10,800 together with interest thereon at the rate of 8% from the 21st day of April 1971. From this order, defendant appeals.

Sanford, Adams, McCullough & Beard, by Charles H. Montgomery, and Cynthia Wittmer West, for defendant appellant.

Douglas F. DeBank for plaintiff appellee.

BECTON, Judge.

We conclude, on the facts of this case, that the Wake County Superior Court erred in according full faith and credit to the 21 April 1971 Florida judgment.

Consistent with the requirement of Article IV, Section I of the Constitution of the United States, which requires that full faith and credit be accorded to a judgment of a court of another state, our Courts indulge a presumption (until the contrary is shown) that courts of other states have jurisdiction to enter judgments consistent with their laws. Consequently, our Courts, in appropriate circumstances, treat foreign judgments the same as domestic judgments. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E. 2d 397 (1966).

However, the courts of North Carolina are under no obligation to give full faith and credit to a foreign judgment if the judgment is invalid in the state that rendered it. And to whose law do we look to determine the validity of a foreign judgment? The validity and effect of a judgment of another state must be determined by the laws of that state. *Dansby v. North Carolina Mutual Life Insurance Co.*, 209 N.C. 127, 183 S.E. 521 (1936). Further, "[t]he mere recital in the judgment that the court rendering it had jurisdiction is not conclusive; the court of another state, in which the judgment is asserted as a cause of action, or as a defense, may, within limits, make its own independent inquiry into the jurisdiction of the court which rendered the judgment." *Reisdorf and Jaffe v. Langhorne*, 28 N.C. App. 175, 176, 220 S.E. 2d 376, 377 (1975). *See also Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 204 S.E. 2d 834 (1974).

A fundamental requirement of due process "is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 873 (1950). Consequently, a defendant may challenge a foreign judg-

ment as violative of public policy and constitutional due process when he can show that he received no notice of the proceedings resulting in the judgment and was afforded no opportunity to appear and defend against the plaintiff's allegations. *Id. See, Reisdorf,* 28 N.C. App. 175, 220 S.E. 2d 376 (1975).

In the case *sub judice,* Paul Boyles states both in his Answer and his sworn affidavit before the Wake County Superior Court, that he was never notified of either Alma Boyles' Motion for Money Judgment or the Judgment filed 21 April 1971. In support of her Motion for Money Judgment, Alma Boyles produced an "Exhibit of Service" upon Paul Boyles. The "Exhibit of Service" is an envelope addressed to Paul Boyles at 205 Lenape Drive, Berwyn, Pennsylvania, which was apparently sent Certified Mail, Return Receipt Requested, by Alma Boyles' Florida attorney. The envelope indicates that two notices were left at the address on Lenape Drive (one on 18 March 1971 and another on 29 March 1971) and, that subsequently, the Certified letter was returned to the sender, marked "Unclaimed." The Return Receipt is blank and unsigned. Thus, Alma Boyles' "Exhibit of Service" affirmatively shows that Paul Boyles received *no actual notice* of the hearing which resulted in the judgment which the courts of this State have now been asked to accord "full faith and credit."

In determining whether the Circuit Court of the Eleventh Judicial Circuit in Dade County, Florida, had a sufficient basis for concluding that the notice to Paul Boyles was "provided timely and in accordance with the laws of the State of Florida, . . . " we look, as we must, to the laws of Florida to determine the validity of the Florida judgment. *Dansby,* 209 N.C. 127, 183 S.E. 2d 521 (1936). In a similar case involving an Indiana money judgment granted after the defendant therein "failed to claim" a Registered letter, we looked at the laws of the State of Indiana. In that case, our Supreme Court refused to give full faith and credit to the judgment because an Indiana statute required a "refusal," not merely a "failure," to claim the notice in order to validate service by Registered mail when the notice was not actually received by the party to be served. *Casey v. Barker,* 219 N.C. 465, 14 S.E. 2d 429 (1941).

In the case *sub judice,* the Certified letter was returned marked "Unclaimed," not "Refused." The distinction is meaningful

under Florida statutory and case law. Moreover, due process requires more than "a feint" when actual notice is the objective. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 315, 94 L.Ed. at 874 (1950).

Florida Rule of Civil Procedure, Fla. Stat. Ann. Rule 1.080(a) (West 1982) provides that every pleading subsequent to the initial pleading *shall* be served on each party.[1] Paul Boyles was not served. Actual notice was attempted, but it was never received. Realizing that actual service or notice is sometimes impossible, Florida, as do other states, provides for constructive service (service of process by publication, Fla. Stat. Ann. § 49.021 (West 1969)) and substitute service (service on non-residents by Certified Mail, Return Receipt Requested, Fla. Stat. Ann. § 48.161(1) (West 1982)) in certain types of cases. No alternative method of service of notice on Paul Boyles was attempted in this case.

Under Florida case law, notice and an opportunity to be heard must be afforded a party against whom a money judgment is sought. *Hilson v. Hilson*, 127 So. 2d 126 (1961). *See also Reichert v. Appel*, 74 So. 2d 674 (1954). In *Kosch v. Kosch*, 113 So. 2d 547 (1959), the Supreme Court of Florida held that parties to a divorce decree, entered with jurisdiction over the parties and the subject matter, could be brought before the court in a supplemental proceeding for modification of the alimony award and that the institution of a new proceeding based on formal service of process in order to modify the support award was not necessary. In *Kosch*, the husband was served notice by mail at his address in South Carolina advising him of the time and place of hearing on his wife's motion in the cause. The wife also sent a copy of the Notice to various attorneys allegedly representing the husband. Although neither Notice was sent Registered or Certified Mail, Return Receipt Requested, the husband received the Notice and entered a special appearance contesting the service of process. The *Kosch* Court specifically found merit in the wife's position

1. We are not here concerned with the service of original process since the Florida court had jurisdiction of the person and subject matter (the 21 April 1971 judgment was entered pursuant to a motion in the cause in the pending action); and since, pursuant to Fla. Stat. Ann. § 61.15 (West 1969) *repealed by* 1971 Fla. Laws ch. 71-241 § 22, effective 1 July 1971, and, in accordance with Paragraph 12 of the October 1962 original judgment, the Florida court retained continuing jurisdiction in the case to modify or enforce the original order.

that the husband could be brought before the trial court upon notice mailed to him, "so long as he was afforded *actual* notice and a reasonable opportunity to defend." 113 So. 2d at 549. Unlike the husband in *Kosch*, Paul Boyles had no actual notice in this case. Notice by regular mail was deemed sufficient and reasonable in *Kosch* because it afforded the husband an adequate opportunity to be heard.[2]

Lendsay v. Cotton, 123 So. 2d 745 (1960), which involved the attempted service of process under the Florida non-resident motorist statute, is also instructive because it involves a situation in which notice by mail was *not* received. In *Lendsay*, the Registered letter sent to the defendant was subsequently returned, marked "unclaimed." An affidavit of service was then filed with the trial court indicating that the defendant failed to claim the Registered letter, and the trial court ruled that service of process upon defendant was sufficient to give the court jurisdiction. The Florida Court of Appeals reversed the trial court, saying: "[t]he fact that the appellant did not claim the registered letter is susceptible not only to the inference that he refused to do so, but is also susceptible to the inference that he did not then live at the address to which the letter was directed."[3] *Id.* at 747. The *Lendsay* Court also suggested, relying on a Delaware case, *Paxson v. Crowson*, 47 Del. 114, 87 A. 2d 881 (1952), that the plaintiff could have caused another notice to be delivered or tendered to the defendant by sending it special delivery. As we suggested earlier, no alternative method reasonably calculated to provide defendant with actual notice of the proceedings was ever used by Alma Boyles. Further, no efforts were made to give Paul Boyles constructive notice of the proceedings.

Admittedly, the Wake County Superior Court may have been able to draw an inference that Paul Boyles refused to claim or

2. Significantly, the *Kosch* Court said that the supplemental proceedings "can be bottomed on reasonable notice which affords an opportunity to be heard. This notice may be by mail and its sufficiency in each particular instance should be tested by its reasonableness and by the adequacy of the opportunity afforded the opposing party to be heard and to defend himself or herself. . . ." 113 So. 2d at 550.

3. In our view, the facts suggest at least one other inference—that the appellant was on vacation or temporarily absent from the home at the time the notices were left.

accept the notice. For example, the record suggests that Paul Boyles had regularly sent child support payments, as opposed to alimony payments, to Alma Boyles, some of which presumably came from 205 Lenape Drive, Berwyn, Pennsylvania, during the time service was attempted. Further, Paul Boyles failed, in his Answer and in his affidavit filed with the Court, to deny that his correct mailing address in March and April of 1971 was 205 Lenape Drive, Berwyn, Pennsylvania. Still further is the following statement in defendant's affidavit, filed 16 September 1981, which suggests that Alma Boyles knew how to get in touch with him and correctly addressed the Certified letter to him: "My wife has harassed me with dozens of motions and complaints through the years."

The Wake County Superior Court, stacking inference upon inference and using negative inferences, could have concluded that Paul Boyles chose to ignore the Certified letter since he correctly surmised it was some legal notice of process. The problem, however, is that we must look to the bases the Florida Circuit Court judge had for determining that Paul Boyles had been timely served in accordance with the laws of Florida. All that was before the Circuit Court judge in Florida in 1971 was Alma Boyles' "Exhibit of Service" which was returned to her attorney marked "Unclaimed." Under the Florida authorities cited above, that was not sufficient. Paul Boyles was entitled to reasonable notice which afforded him an opportunity to be heard on Alma Boyles' motion in the cause. *Kosch*, 113 So. 2d 547 (1959). The record affirmatively shows that this did not occur, and the judgment sought to be enforced is not valid under Florida law.

For the reasons stated, the judgment below is

Reversed.

Judge HEDRICK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority because I do not believe that on this record we can hold there was not proper notice under the

law of Florida. The record shows that two letters were sent by certified mail to an address in Pennsylvania. The defendant has not denied that this was his correct address. The Circuit Court of the Eleventh Judicial Circuit in Dade County, Florida has ruled that notice was given in accordance with the law of Florida and I believe we should accept this ruling as to the law of Florida. The cases relied on by the majority are distinguishable. *Casey v. Barker*, 219 N.C. 465, 14 S.E. 2d 429 (1941) involved a question of service under Indiana law, not Florida law. *Kosch v. Kosch*, 113 So. 2d 547 (Fla. 1959) held that notice of a motion to modify alimony was sufficient if the party to be served actually received the notice by regular mail. The court in that case did not have before it the question in this case. *Lendsay v. Cotton*, 123 So. 2d 745 (Fla. Dist. Ct. App. 1960) dealt with service on a nonresident operator of a motor vehicle in the State of Florida. The Supreme Court of Florida said the statute allowing such service was in derogation of the common law and must be strictly construed. The service in this case was under another statute. After the Circuit Court in Florida has ruled that notice was properly given in this case, I do not believe we should overrule it.

I vote to affirm the judgment of the Superior Court.

STATE OF NORTH CAROLINA v. JERRY ROGERS McMILLIAN

No. 8226SC154

(Filed 16 November 1982)

1. Criminal Law § 87.1— leading questions—no prejudicial error

The trial court did not err in allowing leading questions which related to the type of car defendant was driving when he came to the prosecuting witness's apartment and information gained from the car search since these questions in no way affected the result of defendant's trial. Nor was it prejudicial error to ask on *voir dire* a leading question concerning the presence of a passenger in the car to be searched.

2. Criminal Law § 73.1— admission of hearsay statements—harmless error

The admission of certain hearsay statements was harmless error where either similar evidence was later admitted without objection or the jury was told to consider the evidence for corroborative purposes only.

3. Criminal Law § 42.1— articles connected with crime—proper foundation for introduction into evidence

A proper foundation was laid for the introduction of a yellow towel and gun where two witnesses testified that the articles were similar to the ones seen in defendant's presence, and where the objects were not introduced into evidence until after being identified by the officer who found them during the search of a vehicle in which the defendant had been seen riding.

4. Criminal Law § 34.4— admission of other offenses—proper to show disposition to commit crime

In a prosecution for assault with a deadly weapon, it was not error for a witness to relate incidents in which the defendant acted abusively toward her since they were relevant to show defendant's aggressive and abusive attitude immediately preceding the assault on the prosecuting witness and the chain of circumstances which led up to the incident for which defendant was charged.

5. Constitutional Law § 30— defendant's failure to comply with discovery procedures—no duty of State to tender names of potential witnesses

Where the record on appeal contained no indication that the defendant complied with the discovery procedures outlined in Article 48 of N.C. Gen. Stat. Chapter 15A, the State was under no duty to tender the names of two officers to defendant as potential witnesses.

6. Searches and Seizures § 13— warrantless search of vehicle—consent by driver

The trial court did not err in denying defendant's motion to suppress evidence of a yellow towel and a shotgun found in the search of a silver-blue station wagon where the evidence tended to show that a description of the car was given by the prosecuting witness to an officer as the vehicle in which defendant had recently been seen riding; that the officer stopped the vehicle and was told by the driver that defendant had been in the vehicle a short period of time before the officer had approached it; and that the operator of the vehicle voluntarily consented to a search of the car. There was probable cause to believe that the search would reveal evidence pertaining to the crime, and defendant had no ground to object to a search of the vehicle since the one who was in possession and control of the vehicle freely and voluntarily consented to the search.

7. Assault and Battery § 14.1— assault with a deadly weapon—sufficiency of evidence

In a prosecution for assault with a deadly weapon, the evidence was sufficient to be presented to the jury.

APPEAL by defendant from *Griffin, Judge.* Judgment entered 28 October 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 September 1982.

Defendant was tried for assault with a deadly weapon upon Barbara Miller. The jury returned a verdict of guilty as charged. From imposition of an active prison sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William F. Briley, for the State.

Donald Tepper for defendant appellant.

BECTON, Judge.

The State presented evidence that in June 1981 defendant began dating Queen Miller, the sister of Barbara Miller. Queen testified that initially her relationship with defendant was very good, but that later he began abusing her verbally and physically. On the 8th and 9th of July 1981 the defendant acted so strangely and abusively toward her that she became afraid to be in his presence. On 12 July 1981, a Sunday, defendant came to her house with a 16-inch pump sawed-off shotgun which she had seen the day before wrapped in a yellow towel. He forced her to stay that night with him at his mother's house. She stated that she was terrified.

Barbara Miller testified that she and her three-year-old son shared an apartment with her sister, Queen Miller. The defendant was frequently at their residence while dating Queen. On 13 July 1981, a Monday, Barbara saw defendant drive up to her apartment in a blue car. As he was coming up the steps, she observed that he was carrying a gun under a yellow towel. She tried to lock the screen door, but defendant snatched it open. He asked her the whereabouts of her sister. When she replied that her sister was not there, defendant put the gun against her head, cocked it, and told her that if she did not tell him where Queen was he would blow her head off. Defendant stayed at her apartment about two hours, during which time he theatened her and pointed the gun at her son. Defendant stated at one point that he had the gun with him because he was planning to rob a bank.

Later that day Queen and Barbara took out assault warrants on defendant. Queen told the police that defendant had been seen riding in a silver-blue station wagon with wood panels and in a maroon-over-black Monte Carlo. The next day a vehicle with the latter description was stopped by the police, and, minutes later, a silver-blue station wagon with wood panels pulled up. The police obtained permission from the driver to search the station wagon, and a shotgun wrapped in a yellow towel was found in the car. Defendant was arrested by the police later that day.

Defendant testified that on 13 July he went to the apartment, and Barbara Miller's niece let him in. Barbara told him that Queen was not there. Later the defendant and Barbara had an argument. She asked him to leave, and he did. Defendant denied having a gun with him or owning the gun described by Barbara Miller. He also denied ever pointing a gun at Barbara or threatening her.

I

The issues on appeal concern certain evidentiary rulings by the trial court, the admission of testimony by police officers whose names were not listed as potential witnesses, the denial of the defendant's motion to suppress evidence seized from the car, the denial of defendant's motions to dismiss the charge and for a directed verdict, and whether the trial court expressed an opinion in its charge. We have considered all the issues, and, for the reasons that follow, we find no error.

II

[1] Defendant first argues that the trial court erred by allowing the State to solicit testimony by use of leading questions. Defendant acknowledges the decision by a trial judge to allow a leading question is a matter of discretion which will not be disturbed on appeal in the absence of a showing of prejudice. *State v. Smith*, 291 N.C. 505, 519, 231 S.E. 2d 663, 672 (1977). Basically, the questions objected to by defendant, which can properly be classified as leading questions, relate to the type of car defendant was driving when he came to the apartment and information gained from the car search. These questions in no way affected the result of defendant's trial. The single other question objected to by defendant as leading was one posed on *voir dire* in which the witness was asked about the presence of a passenger in the car to be searched. Although the question was arguably improper in form, we find no prejudice. The rules of evidence are not as stringently applied in *voir dire* hearings as at full trials. *State v. Melvin*, 32 N.C. App. 772, 233 S.E. 2d 636 (1977). Further, since the same evidence was later admitted without objection, defendant lost the benefit of his objection. *Id.* at 774, 233 S.E. 2d at 638.

III

[2] Defendant next contends the trial court committed reversible error by allowing hearsay testimony into evidence. We do not

agree. Certain of the objections were to testimony by Barbara Miller that her son said, "Jerry's got a gun" and that her brother asked Jerry why he had a gun. The record is replete with evidence that defendant possessed a gun at this time, and similar evidence was later admitted without objection. Consequently, defendant loses the benefit of his objection on appeal. *Id.*

Testimony by a police officer concerning statements made to him by Queen Miller and Barbara Miller was not objectionable as hearsay in light of the trial court's instructions that the jury was to consider the evidence for corroborative purposes only. *State v. Montgomery*, 291 N.C. 91, 102, 229 S.E. 2d 572, 580 (1976). We also find no prejudice in hearsay evidence concerning the ownership of the vehicle searched by the police since the testimony occurred during the *voir dire* inquiry and similar evidence was later introduced without objection. *State v. Melvin*, 32 N.C. App. 772, 233 S.E. 2d 636 (1977).

IV

[3] Defendant argues that the yellow towel and gun found following the search of the station wagon were introduced without a proper foundation. A review of the record reveals that both objects were identified by Queen and Barbara Miller as being like or similar to the towel and gun seen in defendant's possession. The objects were not introduced into evidence until after being identified by the officer who found them during the search of the vehicle. He testified that they had been in the custody of the Property Control of the Charlotte Police Department until he personally brought them to the courtroom. We find this to be a proper foundation for the introduction of these objects into evidence.

V

[4] Defendant next assigns as error the admission of testimony by Queen Miller, corroborated by a police officer, which implicated defendant in a criminal offense separate and distinct from the offense for which he was charged. Queen related incidents in which the defendant acted abusively toward her by threatening to hit her in the head with a hammer, knocking a cigarette out of her hands, stating that he was going to "pull her eyes out," threatening to cut her face with a glass, and forcing

her to stay the night with him. These events began on Thursday, 9 July, and continued through the Sunday before the alleged assault on Barbara Miller on Monday, 13 July.

Defendant is correct that in a criminal trial the State cannot introduce evidence of other offenses if its only relevancy is to show the character of the accused or his disposition to commit the type of crime for which he is on trial. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). However, we find no error in the admission of this testimony since it was relevant to show defendant's aggressive and abusive attitude immediately preceding the assault on Barbara Miller, and the chain of circumstances which led up to the incident for which defendant was charged. *State v. Falk*, 33 N.C. App. 268, 270, 234 S.E. 2d 768, 770 (1977); *see State v. Harrill*, 35 N.C. App. 222, 241 S.E. 2d 94 (1978).

VI

[5] Defendant next contends that the witnesses, Officers E. R. Williams and K. D. Williams, should not have been allowed to testify since their names were not provided upon discovery. Since the record on appeal contains no indication that the defendant complied with the discovery procedures outlined in Article 48 of N.C. Gen. Stat. Chapter 15A, we hold that the State was under no duty to tender the names of these men to defendant as potential witnesses. *See, State v. Lang*, 46 N.C. App. 138, 264 S.E. 2d 821, *reversed on other grounds*, 301 N.C. 508, 272 S.E. 2d 123 (1980). This assignment of error is without merit.

VII

[6] Defendant also objects to the trial court's denial of his motion to suppress the evidence of the yellow towel and shotgun found in the search of the silver-blue station wagon. The trial judge held a *voir dire* and made, in pertinent part, the following findings of fact:

> (1) That on or about the fourteenth day of July, 1981, Officer K. D. Williams had information for the location of the defendant, Jerry Rogers McMillan, furnished to him, including that Jerry Rogers McMillan may be in a maroon over black Monte Carlo automobile or a silver blue station wagon.
>
> . . . .

(3) Within five minutes after locating said Chevrolet vehicle, a silver blue or blue or blue and brown Oldsmobile station wagon pulled up along side the Chevrolet vehicle, and Officer K. D. Williams then inquired of one Al Springs, the operator of said station wagon, as to the ownership of said vehicle.

. . . .

(5) Officer K. D. Williams further inquired of Mr. Al Springs if he had seen or been with the defendant, Jerry Rogers McMillan, and was informed by Mr. Al Springs that Mr. McMillan had been in the vehicle a short period of time before the officer had approached the station wagon.

(6) Officer K. D. Williams inquired of the operator of said vehicle, Mr. Al Springs, "Do you mind if we search the car?" to which Mr. Al Springs replied, "Okay."

(7) That pursuant to said search, Officer K. D. Williams found a bag in the rear portion of the station wagon in which he discovered a shotgun wrapped in a yellow towel.

(8) There is no evidence before the Court that the defendant, Jerry Rogers McMillan, had any possessory interest in the said Oldsmobile station wagon, nor did he have any right to the privacy of the contents of said station wagon, protected under the Constitution of the State of North Carolina or of the Constitution of the United States.

Based on the foregoing Findings of Fact, the Court concludes as a matter of law that Officer K. D. Williams had probable cause to search the Oldsmobile station wagon; (2) that the shotgun wrapped in a yellow towel discovered therein was obtained by a lawful search based upon probable cause and that the defendant's constitutional rights were not violated, either under the Constitution of the State of North Carolina or of the Constitution of the United States.

Contrary to defendant's argument, there was ample evidence in the record to support these findings. First, "[a] warrantless search of a vehicle is justified where the officer has probable cause to believe that the search will reveal evidence pertaining to the crime." *State v. Jefferies and State v. Person*, 41 N.C. App.

95, 99, 254 S.E. 2d 550, 554, *application for further review denied*, 297 N.C. 614, 257 S.E. 2d 438 (1979). Officer Williams conducted a search of the car fitting the description given him by Queen Miller. Further, Al Springs, the driver of the car, told Officer Williams that defendant had been in the car a short time before the search.

Second, it is well-settled that a defendant has no ground to object to a search of a vehicle when one who is in possession and control of the vehicle freely and voluntarily consents to the search. *State v. Hamilton*, 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. denied*, 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966). The consent to search given to the police officer by Al Springs obviated any ground for objection to the search by defendant. The items seized following the search were properly admitted into evidence.

VIII

[7] Defendant challenges, in his next assignment of error, the trial court's denial of his motion to dismiss the charge made at the conclusion of the State's evidence and his motion for directed verdict made at the close of all the evidence. Simply put, the evidence in this case is more than sufficient to present to the jury the charge of assault with a deadly weapon.

IX

In his final assignment of error defendant contends that the trial court in its charge to the jury expressed an opinion that the State proved defendant's threat that he was going to blow Barbara Miller's head off with a shotgun. Nothing in the court's instructions supports this argument, and we find it to be completely without merit.

For the foregoing reasons, we find

No error.

Chief Judge MORRIS and Judge JOHNSON concur.

ELIZABETH A. PETERS v. JACK T. ELMORE, JR.

No. 8121DC1310

(Filed 16 November 1982)

1. **Divorce and Alimony § 24.1— child support—ability to pay—findings supported by plaintiff's evidence**

In a child support action in which defendant was not present at any of the hearings, was not represented by counsel, and failed to submit an affidavit of financial standing, plaintiff presented sufficient evidence to support the trial court's determination of defendant's ability to pay child support as required by G.S. 50-13.4(c) and to support the court's temporary award of $500.00 per month and its later permanent award of $1,100.00 per month where plaintiff presented evidence that defendant had an income of over $1,000.00 per week, that he owned real property in North Carolina which produced rental income of at least $435.00 per month, and that he owned real property in Washington, D.C. worth over $600,000.00.

2. **Divorce and Alimony § 24.5— child support—increasing amount provided in temporary order—changed circumstances not required**

Child support payments of $500.00 per month required by a temporary order could properly be increased by the trial court to $1,100.00 per month in its permanent order without a finding of changed circumstances.

3. **Divorce and Alimony § 24.4— failure to make child support payments—contempt of court—ability to comply with order**

Findings that defendant was earning at least $1,000.00 per month and had real property investments valued at over $600,000.00 showed that defendant could take reasonable measures which would enable him to comply with an order requiring him to pay child support of $500.00 per month and supported the court's order finding defendant in contempt for failure to make such payments.

4. **Rules of Civil Procedure § 60.2— motion to set aside judgment—absence of excusable neglect**

Defendant was guilty of inexcusable neglect in this child custody and support action and was therefore not entitled to have an entry of default entered against him set aside under G.S. 1A-1, Rule 60(b)(1) where defendant contended that he was unable to attend two hearings held in the matter because of job commitments elsewhere, but the record showed that defendant delayed in seeking legal assistance until almost six months after plaintiff had filed her original complaint and failed to submit a financial affidavit until over seven months after the first hearing concerning child support.

5. **Judges § 5— refusal of judge to recuse himself**

The trial judge did not err in failing to recuse himself before signing an order denying defendant's motions to set aside an entry of default, denying defendant relief from child custody and support orders, finding defendant in contempt for failure to comply with a support order, and removing himself

from presiding over hearings on defendant's motions to reduce child support because of changed circumstances and to seek clarification of visitation rights.

6. **Divorce and Alimony § 24.1; Rules of Civil Procedure § 54— child support— amount greater than prayer for relief**

The trial court erred in awarding monthly child support in an amount greater than that contained in plaintiff's prayer for relief in the complaint. G.S. 1A-1, Rule 54(c).

APPEAL by defendant from *Tash, Judge.* Judgments entered 24 November 1980, 2 March 1981, 19 March 1981 and 30 July 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 17 September 1982.

Plaintiff and defendant were married on 20 May 1969 and divorced on 26 July 1976. Two children were born of that marriage. Defendant had been making voluntary child support payments up until 1 August 1980. This action was initiated by a complaint filed by plaintiff on 26 September 1980 which requested that permanent custody of the two children be awarded to plaintiff, that defendant be ordered to pay at least $1064.00 per month as child support, that the court award an amount for child support past due, that the court order the sale of defendant's real property in Kernersville, North Carolina, from which plaintiff would receive the above payments, and temporary relief in the form of custody, child support and attorney fees. Defendant was served with the complaint, summons, notice of the 17 November 1980 hearing, lis pendens and affidavit of attachment on 5 November 1980. Defendant contacted the presiding judge before the hearing date, for the purpose of obtaining a continuance, and the court refused to grant a continuance unless plaintiff agreed. As defendant and plaintiff could not come to any agreement which would permit a continuance, and defendant had a job commitment elsewhere, defendant was absent from the 17 November 1980 hearing. On 24 November 1980 the trial court awarded plaintiff temporary custody and monthly child support payments of $500.00.

Defendant failed to answer plaintiff's complaint within the statutory time limit and the Clerk of the Superior Court entered default against the defendant on 26 January 1981. Defendant also failed to make any child support payments under the 24 November 1980 order and on 2 March 1981 the trial court found defend-

ant in contempt of the 24 November 1980 order. The court also gave custody of the two children to plaintiff, found defendant $2,000.00 in arrears in child support payments, declared a lien against defendant's real property in Kernersville and ordered its sale, and ordered defendant to begin paying monthly child support in the amount of $1100.00. Defendant did not present any defense at the 2 March 1981 hearing. The 2 March 1981 order was amended on 19 March 1981 to include the procedure for sale of defendant's real property.

At some point between 19 March 1981 and 27 March 1981, defendant retained counsel. On 27 March 1981 defendant filed an answer to plaintiff's 26 September 1980 complaint and a motion for relief from the above orders. On 11 May 1981 defendant also filed a motion to set aside the 26 January 1981 entry of default. On 30 July 1981 the trial judge denied defendant's motions to set aside the entry of default and for relief from the 24 November 1980 and 2 March 1981 orders, and struck defendant's answer. The judge also removed himself from presiding over hearings on defendant's motions to reduce child support because of changed circumstances and to seek clarification of visitation rights.

Defendant's appeal entries were filed on 30 July 1981. On 21 September 1981 the trial court denied defendant's motion to stay the execution and proceedings to enforce the orders, and on 12 October 1981 the sale of defendant's Kernersville real property was confirmed by the trial court.

Defendant appeals from the court orders of 24 November 1980, 2 March 1981, 19 March 1981, and 30 July 1981.

Billings, Burns & Wells, by R. Michael Wells, for plaintiff-appellee.

White & Crumpler, by Fred G. Crumpler, G. Edgar Parker and Craig B. Wheaton, for defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant's first assignment of error deals with the 24 November 1980 court order which ordered defendant to pay child support of $500.00 per month. Defendant contends that the trial court's findings of fact did not support its conclusions of law because the court had no evidence on which to base its determina-

tion of defendant's ability to pay support, as required by N.C. Gen. Stat. 50-13.4(c). *Williams v. Williams*, 18 N.C. App. 635, 197 S.E. 2d 629 (1973).

The amount awarded by a trial court for alimony and child support will be disturbed only upon a showing of an abuse of discretion. *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975). We find no abuse of discretion in this case which would justify a reversal of the 24 November 1980 order.

The pertinent conclusions of law contained in the 24 November 1980 order were:

> 4. The sum of $500 per month for the support of the minor children to the plaintiff would best promote the welfare of said children.
>
> 5. The defendant is liable for the support of the minor children and has the ability to provide the sum of $500 per month for the support of said minor children, having due regard for the relative ability of the parties to provide support, and to the circumstances of the parties and the children, pursuant to N.C.G.S. 50-13.4(b)(c).

The findings of fact which supported these conclusions of law included:

> 8. Plaintiff is employed by the Forsyth County Health Department, and has a net take-home pay of approximately $135 per week.
>
> 9. Defendant is an able-bodied man, with years of training and experience as a contractor and engineer; he is employed by Reinforced Earth Movers in the Washington, D.C. area, and he has a gross income of at least $1,000 per week; further, he owns real estate in the Georgetown area of Washington, D.C. worth in excess of $600,000.
>
> 10. Defendant also owns two tracts of real estate in Forsyth County, North Carolina, for which he has received monthly rental income of $435 per month, and he has hired an agent in Forsyth County for the collection of the rent on the aforesaid property.
>
> 11. Plaintiff has submitted a financial affidavit to this Court concerning the monthly expenses of the minor

children, which totals $1,064 per month, and the children have reasonable needs for their support and maintenance of $500 per month.

12. The defendant has primary responsibility for the support of the minor children and has the present ability to provide the sum of $500 per month for the support of the minor children.

As this order was merely temporary, pending a full hearing, and since defendant was not present at the 17 November 1980 hearing, failed to be represented by counsel, and failed to submit an affidavit of financial standing, we find no abuse of discretion in the court's temporary award of one-half the amount of requested child support. The evidence presented by plaintiff will be deemed to support the findings of fact unless there is evidence to the contrary presented in the record. 1 N.C. Index 3d, Appeal & Error § 28.2.

Defendant's second assignment of error questions the validity of the 2 March 1981 order which ordered defendant to pay child support of $1100.00 per month, as well as a $2000.00 arrearage, and found defendant in willful contempt for failing to abide by the 24 November 1980 order. Once again we must limit our review of the trial court's decision to considering whether it abused its discretion in the 2 March 1981 order. *Gibson v. Gibson*, 24 N.C. App. 520, 211 S.E. 2d 522 (1975).

As with the 24 November 1980 order, we find no basis for defendant's claim that the evidence did not support the findings of fact of the 2 March 1981 order or that the findings of fact did not support the conclusions of law. Since no additional evidence pertaining to defendant's financial status was presented at the later hearing and defendant again failed to make any attempt to present a defense, the evidence presented by the plaintiff is deemed to support the findings of fact. 1 N.C. Index 3d, Appeal & Error § 28.2.

This court has previously held that the trial court erred where it increased the amount of child support to be paid by the husband where the husband did not appear at the hearing and no evidence was offered as to his ability to pay. *Williams v. Williams*, 18 N.C. App. 635, 197 S.E. 2d 629 (1973). But that case is

distinguishable. In our case plaintiff presented evidence at both hearings that defendant had an income of over $1000.00 per week, that he owned real property in North Carolina which produced rental income of at least $435.00 per month, and that he owned real property in Washington, D.C., worth over $600,000.00. This evidence was much more specific than the evidence presented in *Williams* that the husband "earned large sums of money, that he had income of several thousand dollars from an estate, and that he was able to support his children in accordance with the custom and standard formerly enjoyed by them." *Id.* at 637, 197 S.E. 2d at 630. We hold that plaintiff presented enough evidence to support a determination of defendant's ability to pay child support as required by N.C. Gen. Stat. 50-13.4(c).

[2] Defendant also contends that the court erred in increasing the child support payments from $500.00 per month under the 24 November 1980 order to $1100.00 per month under the 2 March 1981 order. We reject defendant's argument that the doctrine of *res judicata* prevented such an increase, since all parties were aware that the 24 November 1980 order was entered without prejudice as to the amount of child support the defendant would be required to pay after a full hearing.

Furthermore, since the 24 November 1980 order provided only a temporary solution, there was no need for the plaintiff to prove a "change in circumstances" justifying the 2 March 1981 order's increase in the amount of child support defendant was required to pay.

[3] The trial court committed no error by finding defendant in willful contempt of the 24 November 1980 order. It must be shown that defendant could comply with the order or could take reasonable measures that would enable him to comply with the order, before defendant can be held in contempt. *Teachey v. Teachey,* 46 N.C. App. 332, 264 S.E. 2d 786 (1980). Here the findings of fact clearly show that defendant could take reasonable measures that would enable him to comply with the order of 24 November 1980, since he was making at least $1,000.00 per week and had real property investments valued at over $600,000.00.

[4] Defendant's third assignment of error questions the trial court's refusal to set aside the 26 January 1981 entry of default. Defendant argues that Rule 60(b)(1) of the North Carolina Rules of

Civil Procedure is applicable, since he has shown "excusable neglect" and a "meritorious defense."

Rule 60(b)(1) provides that

> *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.*—On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;

A motion for relief under Rule 60(b) is within the discretion of the trial court, and our review is limited to determining whether the court abused its discretion. *Harrington v. Harrington*, 38 N.C. App. 610, 248 S.E. 2d 460 (1978). We are of the opinion that under the facts in this case the trial court has not abused its discretion.

Although defendant's motion for relief from the judgment suggested that he was unable to attend either the 17 November 1980 hearing or the 24 February 1981 hearing because of important job commitments, the defendant ignored the fact that he delayed in seeking legal assistance until almost 6 months after plaintiff had filed her original complaint, and failed to submit a financial affidavit until 8 July 1981, over 7 months after the first hearing concerning child support. We find that defendant inexcusably neglected this serious legal matter and is therefore prevented from seeking relief under Rule 60(b)(1).

The fourth and final assignment of error challenges the validity of the 30 July 1981 order and the 21 September 1981 order. We find no reversible error in either.

[5] Defendant contends that the judge should have recused himself from further dealings with the parties before signing his order of 30 July 1981 in which he removed himself from hearing defendant's motions to reduce child support because of changed circumstances and to seek clarification of visitation rights. Since the 30 July 1981 order and all subsequent orders were made in a fair and impartial manner, we find no basis for defendant's argument that the judge committed reversible error by not disqualifying himself. *Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449

(1977). Furthermore, while the trial judge may have acted improperly in continuing with the sale of defendant's real property after defendant perfected his appeal on 30 July 1981, no reversible error was committed since we find no error with the trial judge's order of 2 March 1981 permitting the sale of defendant's real property.

[6] However, we do find error with the 2 March 1981 order in that it awarded a monthly child support payment of $1100.00, when the plaintiff's prayer for relief in the complaint requested a monthly payment of only $1064.00. Under Rule 54(c) of the North Carolina Rules of Civil Procedure a default judgment cannot "exceed in amount that prayed for in the demand for judgment." Since the 2 March 1981 order was issued under the 26 January 1981 entry of default, the trial court could only award an amount not exceeding the sum certain stated in plaintiff's prayer for relief, which in this case was $1064.00.

For the foregoing reasons we find the trial court's judgments

Affirmed in part, reversed in part and remanded.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOHN EARL BROWN

No. 8218SC175

(Filed 16 November 1982)

1. **Criminal Law § 91— Speedy Trial Act—time between order and mental examination**

The 42-day period between a commitment order and the transportation of defendant to a hospital for a mental examination was properly excluded by the trial court from the statutory speedy trial period. G.S. 15A-701(b)(1)(a).

2. **Constitutional Law § 31— indigent defendant—denial of statistician at State expense**

The trial court did not abuse its discretion in the denial of an indigent defendant's request for the appointment of a statistician at State expense to aid him in an attempt to prove that his indictment was not returned by a grand jury representing a fair cross-section of the community. G.S. 7A-454; G.S. 7A-450(b).

3. Criminal Law § 99.9— examination of witness—no expression of opinion

The trial judge did not express an opinion on the evidence in asking a State's witness five questions eliciting testimony as to defendant's whereabouts before and on the date of the crimes charged.

4. Criminal Law § 138— increase in defendant's sentence during term

The trial court acted properly in increasing defendant's sentence during the term after discovering that the crime for which defendant was convicted was committed prior to a change in a parole law which the court had erroneously taken into consideration when imposing the original sentence where the sentence was changed only after a hearing in open court at which both parties, represented by counsel, were present.

APPEAL by defendant from *Long, Judge.* Judgment entered 3 September 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 September 1982.

On 10 November 1975 a bill of indictment was returned against defendant charging him with first degree murder of John Albert Hughes and armed robbery of Gary Edward Blackwell, Donnie Morris Vinson and Howard Moore at Blackwell's residence in Greensboro, North Carolina, on 6 January 1974. Defendant was arrested in New York and brought back to North Carolina on 3 October 1980. Defendant remained in the Guilford County Jail from 3 October 1980 until trial, except for the period of time from 12 March 1981 to 13 May 1981 when defendant underwent court-ordered psychiatric evaluation at Central Prison.

At trial, the State presented the testimony of Blackwell, Vinson and Howard who were with Hughes in Blackwell's home at the time of the shooting. Their testimony tended to show that Blackwell, Vinson, Howard and Hughes were smoking marijuana in Blackwell's bedroom, that three men entered the bedroom, one with a shotgun and one with a pistol, and that the three men said this was a stick-up. These witnesses also testified that they and Hughes did not resist, but that the shotgun went off and Hughes fell to the floor. The three men then took the money and marijuana and left the house. Neither Blackwell, Vinson nor Howard testified that they recognized defendant as the person who shot Hughes with the shotgun.

Viola Brown Coleman, defendant's aunt, testified that defendant had been to her house in Greensboro on 6 January 1974 and

that her children frequently saw defendant in Greensboro around the time of the shooting on 6 January 1974.

Wilbur Johnson testified that he, the defendant and another man named Ray Austin were together on 6 January 1974 when they entered Blackwell's house for the purpose of taking any marijuana they could find. He also testified that defendant was carrying a sawed-off shotgun when they entered Blackwell's house, that Johnson heard a gun go off and then ran to the car, and that the defendant followed him to the car and stated that his gun went off.

The State presented the testimony of two Greensboro police officers and of the pathologist who performed the autopsy on Hughes and concluded that he died of a gunshot wound to the neck.

The FBI agent who arrested defendant in New York testified for the State and stated that defendant was living under the assumed name of Douglas Hicks and that the defendant made a statement at the time of his arrest that he was at Blackwell's house on 6 January 1974 but that he was not involved in the shooting or robbery.

Defendant presented the testimony of four persons all of whom were residents of Brooklyn, New York. All four witnesses testified that they knew the defendant well and that they had met him in New York sometime in 1973. All four witnesses testified that they could not remember seeing the defendant on 6 January 1974, but that they had seen him in New York in late December of 1973 and in January of 1974. They testified that he lived in Brooklyn before and after 6 January 1974.

The defendant testified that he had some relatives in Greensboro, that he was using an assumed name because he had violated his probation under a larceny conviction in Ohio and was wanted in Ohio for forgery, that he had gone to New York to live in the spring or summer of 1973, that he could not remember where he was on 6 January 1974, that he had never seen Blackwell, Moore, Vinson, Johnson or Austin before, that he had never been to Blackwell's house, and that he did not go to his aunt's house in Greensboro on 6 January 1974. Defendant also testified that he had been drinking on the morning that the FBI agents ar-

rested him and that he did not make the statement that the FBI claims he made.

The jury found defendant guilty of armed robbery and involuntary manslaughter and defendant appeals from a judgment entered pursuant to that verdict.

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

E. S. Schlosser, Jr., for defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant first assigns as error the failure of the trial court to grant his motion to dismiss because of violation of his statutory right to a speedy trial. Specifically, defendant contends that the lower court erred in its refusal to include in the computation made pursuant to G.S. 15A-701(a1)(1) the 42 days between the judge's commitment order on 28 January 1981 and the day defendant was finally sent to Central Prison for his mental examination on 12 March 1981.

The pertinent section of the Speedy Trial Act, N.C. Gen. Stat. 15A-701(a1)(1) provides:

> (a1) Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1983, shall begin within the time limits specified below:
>
> (1) Within 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last;

To determine the time elapsed under G.S. 15A-701(a1)(1), the court is instructed under N.C. Gen. Stat. 15A-701(b)(1)(a) that

> (b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:
>
> (1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:

(a) A mental or physical examination of the defendant, *including all time when he is awaiting or undergoing treatment or examination,* or a hearing on his mental or physical capacity; (emphasis added)

We find no merit in defendant's first assignment of error, since the North Carolina Supreme Court has recently recognized that G.S. 15A-701(b)(1)(a) does not restrict the excludable period to the period of time a person is actually in custody of the hospital. *State v. Harren,* 302 N.C. 142, 273 S.E. 2d 694 (1981). The court stated that the reason for excluding the time between the order and transportation of defendant to the hospital was that "the State cannot bring the defendant to trial during this time period because to do so would deprive him of the benefit of the mental examination." *Id.* at 146, 273 S.E. 2d at 697.

Although *Harren* dealt with G.S. 15A-701(b)(1)(a) as amended in 1981, that amendment adding the words "including all time when he is awaiting or undergoing treatment or examination," the Speedy Trial Act is a procedural statute with any amendment thereto being treated as if part of the original statute. *State v. Morehead,* 46 N.C. App. 39, 264 S.E. 2d 400, *cert. den.,* 300 N.C. 201, 269 S.E. 2d 615 (1980). We conclude that the trial court properly excluded the 42 day period between the commitment order and transport to the hospital, with the remaining includable periods of delay being within the time limit set by G.S. 15A-701(a1)(1).

[2] Defendant next contends that the trial court erred by denying him access to a statistician to aid him in an attempt to prove that his indictment was not returned by a grand jury representing a fair cross-section of the community. Under N.C. Gen. Stat. § 7A-454 a trial court has the power to allow a fee for the service of an expert witness who testifies for an indigent defendant. N.C. Gen. Stat. § 7A-450(b) also provides that "it is the responsibility of the State to provide him (an indigent person) with counsel and the other necessary expenses of representation." The question of whether an expert should be appointed at State expense to assist an indigent defendant is within the discretion of the trial judge. *State v. Tatum,* 291 N.C. 73, 229 S.E. 2d 562 (1976).

Defendant's constitutional and statutory right to a State appointed expert arises only upon a showing that there is a reasonable likelihood that such an expert would discover evidence which would materially assist defendant in the preparation of his defense. *State v. Alford*, 298 N.C. 465, 259 S.E. 2d 242 (1979). There is no requirement that an indigent defendant be provided with investigative assistance merely upon the defendant's request. *State v. Parton*, 303 N.C. 55, 277 S.E. 2d 410 (1981). We hold that the trial judge did not abuse his discretion in denying defendant access to a statistician. Newspaper articles merely expressing the opinions of the Governor of North Carolina, the North Carolina Courts Commission, and the North Carolina Human Relations Council failed to show the reasonable likelihood of material assistance which *Alford* requires.

[3] Defendant's next assignment of error suggests that the trial judge unfairly prejudiced defendant's case by asking one of the State's witnesses five questions, which elicited testimony as to the defendant's whereabouts before and on 6 January 1974. It is well established that a trial judge may question witnesses as long as the judge does not violate the prohibition against expressing an opinion as to the weight of the evidence or the credibility of the witness. 1 Brandis on North Carolina Evidence § 37 (1982). "[J]udges should be regarded not merely as referees of prize fights, but rather as responsible participants in the difficult attempt to ascertain the truth (not always faithfully aided by counsel)." *Id.* See also *Eekhout v. Cole*, 135 N.C. 583, 47 S.E. 655 (1904). Not only may the judge question a witness for the purpose of promoting a better understanding of the testimony, *State v. Fuller*, 48 N.C. App. 418, 268 S.E. 2d 879, *review denied* 301 N.C. 403, 273 S.E. 2d 448 (1980), but the judge may also direct questions to the witness in an effort to elicit overlooked pertinent facts. *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976).

We find no error in the five questions which the trial judge asked the State's witness. Questions 1, 2, 3, and 5 began with the qualifying language "where do you say," "when you say," and "you say." That language clearly precludes any interpretation of the judge's questions as an expression of his opinion. He was merely attempting to clarify and develop the testimony already presented. Although Question 4 did not begin with the neutral language of the other questions, taken in conjunction with the

other questions it does not constitute an improper expression of opinion by the trial judge. The mere fact that the judge's questions may produce answers which contain new testimony, or cause the witness to repeat testimony already given on direct or cross examination, does not automatically create prejudicial error. Here the judge's questions were both necessary and proper to "insure justice and aid the jury in their search for a verdict that speaks the truth." *State v. Pearce*, 296 N.C. 281, 285, 250 S.E. 2d 640, 644 (1979).

The next assignment of error deals with the trial judge's denial of defendant's motion to set aside the verdict. Defendant's motion to set aside the verdict was addressed to the discretion of the trial court and refusal to grant the motion is not reviewable absent a showing of an abuse of discretion. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). We find that the verdict was adequately supported by the evidence and that there was no abuse of discretion.

Furthermore, as to defendant's fifth assignment of error, we are unable to find any fatal error or defect appearing on the face of the record and therefore find no error with the trial judge's refusal to arrest the judgment. *Id.*

[4] Defendant contends that the trial court improperly increased defendant's original sentence, after discovering that the crime defendant was convicted of was committed prior to a change in a parole law which the judge had erroneously taken into consideration when imposing the original sentence. The trial court acted properly in changing the defendant's sentence after discovering it had mistakenly applied the wrong parole law when originally sentencing defendant. Until the end of the term the orders and judgments of the court are *in fieri* and the judge has within his discretion the power to make any changes that he finds appropriate for the administration of justice, and for that purpose he may hear further evidence in open court. *State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1936). In the present case the defendant's sentence was changed only after a hearing in open court at which both parties, represented by counsel, were present and we find no error.

We have carefully reviewed defendant's final assignment of error and find no merit.

In the trial we find

No error.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. ROBERT EUGENE BENNETT

No. 8227SC369

(Filed 16 November 1982)

1. **Criminal Law § 163— failure to object to error in charge—rule of appellate procedure as preempting general statute**

Where defendant failed to object to a disputed portion of a jury charge, he did not properly preserve his assignment of error under App. Rule 10(b)(2). By enacting Rule 10(b)(2), the Supreme Court has by preemption abrogated G.S. 15A-1446(d)(13) in that it is inconsistent. N.C. Constitution Article IV, § 13(2), G.S. 7A-33, and G.S. 7A-34.

2. **Criminal Law § 163— failure to request instruction conference—inconsistency between statute and rule of practice**

Where G.S. 15A-1231(b) and (d) clearly contemplate that defendant was required to request an instruction conference as a prerequisite to assigning error to the trial court's failure to conduct one, pursuant to the provisions of G.S. 7A-34, Rule 21 of the Rules of Practice of the Superior and District Courts, which is inconsistent with the statute, must give way to the provisions of the statute.

3. **Criminal Law § 163— opportunity to object to jury instructions**

Where the trial judge concluded his jury instructions by asking: "all right, now, anything further from either the State or the defendant?" and the defense counsel replied: "nothing for the defense," defendant was given a sufficient opportunity to object to the jury instructions outside the hearing of the jury.

APPEAL by defendant from *Friday, Judge.* Judgment entered 3 December 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 19 October 1982.

Defendant was charged, in four separate indictments, with two counts of felonious possession of marijuana with the intent to sell and with two counts of feloniously selling and delivering marijuana. A jury returned guilty verdicts on all four counts. From

judgment imposing active sentences of imprisonment, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant-appellant.

WELLS, Judge.

By his sole assignment of error, defendant contends that the trial court erred in including in its charge to the jury, without request from defendant, the following instruction:

> Now, ladies and gentlemen, the defendant in this case has not gone on the witness stand and testified during this trial, and under the law, when a person is placed upon trial, such defendant may or may not go on the witness stand and testify in his own behalf as he may elect or as his counsel may advise. The Court, therefore, charges you that his failure to go upon the witness stand is not to be considered as evidence of any kind in this case, for the burden of proof is upon the State, as the Court will instruct you, to satisfy you from the evidence and beyond a reasonable doubt as to the defendant's guilt.

Defendant contends first that it was error for the trial court to give any instruction on defendant's failure to testify because defendant did not request such an instruction; and second, that the instruction given was erroneous because it failed to clearly inform the jury that defendant's failure to testify should not create any inferences adverse to defendant.

Defendant did not object to the disputed charge and therefore, the threshold question we must address in this appeal is whether defendant has properly preserved his assignment of error.

Article IV, Sec. 13(2) of the North Carolina Constitution provides the framework for our discussion:

> (2) *Rules of procedure.*—The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division. The General Assembly may

> make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.

Pursuant to that article, the General Assembly has enacted the following pertinent statutes:

> —G.S. 7A-33. *Supreme Court to prescribe appellate division rules of practice and procedure.*—The Supreme Court shall prescribe rules of practice and procedure designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division.
>
> —G.S. 7A-34. *Rules of practice and procedure in trial courts.*—The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.

Under its constitutional mandate, our Supreme Court has adopted the following pertinent rule of appellate procedure:

> —Rule 10(b)(2). *Jury Instructions; Findings and Conclusions of Judge.*—No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Pursuant to the authority delegated to it under G.S. 7A-34, our Supreme Court has adopted the following pertinent rule of practice for the Superior and District Courts:

> —Rule 21. *Jury Instruction Conference.*—At the close of the evidence (or at such earlier time as the judge may reasonably

direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party, if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. . . .

At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

[1] We next discuss the apparently conflicting provisions of Rule 10(b)(2) and the provisions of sub-sections (b) and (d)(13) of G.S. 15A-1446, which are:

—G.S. 15A-1446. *Requisites for preserving the right to appellate review.*—

. . .

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal, but the appellate court may review such errors in the interest of justice if it determines it appropriate to do so.

. . .

(d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

. . .

(13) Error of law in the charge to the jury.

A similar question was before our Supreme Court in *State v. Elam*, 302 N.C. 157, 273 S.E. 2d 661 (1981), involving the conflicting provisions of G.S. 15A-1446(d)(6),[1] and Appellate Rule 14(b)(2)[2], where the constitutional issue was not raised at trial. The Court's response to this issue in *Elam* was as follows:

> Subsection (6) of G.S. 15A-1446(d) is in direct conflict with Rules 10 and 14(b)(2) of the Rules of Appellate Procedure and our case law on the point. The Constitution of North Carolina provides that "[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division." N.C. Const. Art. IV § 13(2). The General Assembly was without authority to enact G.S. 15A-1446(d)(6). It violates our Constitution. Our Rule 14(b)(2) and our case law are authoritative on this point. . . . This Court will refrain from deciding constitutional questions which are not raised or passed upon in the trial court. . . .

Recognizing that the Court in *Elam* relied in part on a long case law history in this State requiring trial court activity as a requisite for appellate review of constitutional issues, the Court's language nevertheless compels us to the conclusion that by enacting Rule 10(b)(2), the Court has by preemption abrogated G.S. 15A-1446(d)(13).

[2] In the case now before us, defendant concedes that he failed to make a contemporaneous objection, but contends, nevertheless, that his assignment of error requires our review, for three rea-

1. (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division.

. . .

(6) The defendant was convicted under a statute that is in violation of the Constitution of the United States or the Constitution of North Carolina.

2. (2) *Appeal Presenting Constitutional Question.* In an appeal which is asserted by the appellant to involve a substantial constitutional question, the notice of appeal shall contain the elements specified in Rule 14(b)(1) and in addition shall specify the articles and sections of the Constitution asserted to be involved; shall state with particularity how appellant's rights thereunder have been violated; and shall affirmatively state that the constitutional issue was timely raised (in the trial tribunal if it could have been, in the Court of Appeals if not) and either not determined or determined erroneously.

sons: one, Judge Friday failed to conduct an instruction conference, as required by Rule 21 of the Rules of Practice; two, Judge Friday failed to give defendant an opportunity to object to the charge out of the hearing of the jury, in violation of Rule 21; and three, the disputed charge contains such "plain error" as to require our corrective action.

We next discuss the apparent conflict between Rule 21 and the provisions of G.S. 15A-1231(b). Defendant contends that the requirements of Rule 21 are mandatory, and therefore, by implication, that the trial court's failure to follow the rule requires a new trial. The statute is as follows:

> —G.S. 15A-1231. *Jury Instructions.*—
>
> . . .
>
> (b) On request of either party, the judge must, before the arguments to the jury, hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. 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.
>
> . . .
>
> (d) All instructions given and tendered instructions which have been refused become a part of the record. Failure to object to an erroneous instruction or to the erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with G.S. 15A-1446(d)(13).

The provision of the statute clearly contemplates that defendant was required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of G.S. 7A-34, Rule of Prac-

tice 21 must give way to the provisions of the statute. Defendant not having requested an instruction conference, he cannot assert as error the trial court's failure to conduct one, nor did this conduct of the trial court excuse defendant's failure to enter a contemporaneous objection to the disputed instruction.[3]

[3] We next address defendant's contention that he was not given an opportunity to object outside the hearing of the jury. When Judge Friday concluded his jury instructions, he then made the following inquiry: "all right, now, anything further from either the State or the defendant?" To the inquiry, defendant's counsel replied: "nothing for the defense." We hold that the trial court's inquiry was sufficient to provide defendant an opportunity to approach the Court and object outside the hearing of the jury and therefore constituted substantial compliance with that portion of Rule 21 which requires an opportunity to object outside the hearing of the jury.

We next address defendant's "plain error" argument. Defendant contends that the disputed instruction contained such plain substantive error as to provide the basis for our review under Rule 2 of the Rules of Appellate Procedure.[4] We do not agree. While it may be argued that to give such an instruction without request was error, we are not persuaded that it was such plain error as to invoke our review under Rule 2.

No error.

Judges VAUGHN and WHICHARD concur.

3. In view of our holding on this point, it would seem that in order to avoid the conflict between Rule 21 and G.S. 15A-1231, it would be the better practice for trial judges to comply with the Rule in all cases. We also note that the last sentence of 15A-1231(d), being in obvious conflict with Rule 10(b)(2), must be considered to be abrogated by the Rule.

4. Rule 2. SUSPENSION OF RULES. To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

STATE OF NORTH CAROLINA v. WINFRED (BO) THOMPSON AND LAWRENCE TUCKER

No. 8219SC307

(Filed 16 November 1982)

1. **Burglary and Unlawful Breakings § 5.8— accomplices of victim's daughter—consent to entry—jury question**

In a prosecution of defendants for breaking and entering and larceny as accomplices of the adult daughter of the victims, testimony by the victims that their daughter was welcome to come home at any time did not establish that the daughter entered the victims' residence with their consent where further testimony by the victims that the outside key had been removed to prevent the daughter from breaking in again and that the daughter was not welcome when the key was removed would permit the jury to find that the victims did not consent to their daughter's entry in their absence without an express grant of permission. G.S. 14-54(a).

2. **Criminal Law §§ 119, 163— jury instruction conference—opportunity to object out of presence of jury**

The jury instruction conference required by Rule 21 of the General Rules of Practice for the Superior and District Courts need not be on the record, and defense counsel in this case was not denied an opportunity to object to the instructions out of the presence of the jury.

3. **Criminal Law § 163— necessity for objections to jury instructions**

Appellate Rule 10(b)(2) barred appellate review of jury instructions to which no objection was made before the jury retired where the alleged errors did not relate to matters affecting fundamental or substantial rights. Whether the rule bars appellate review of "plain error" in jury instructions where an appellant fails to make timely objection is not decided.

APPEAL by defendants from *Cornelius, Judge.* Judgments entered 16 December 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 14 October 1982.

Defendants appeal from judgments of imprisonment entered upon convictions of felonious breaking or entering and felonious larceny.

Attorney General Edmisten, by Assistant Attorney General Tiare B. Smiley, for the State.

Morgan, Post, Herring & Morgan, by David K. Rosenblutt, for defendant appellant Thompson.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm Hunter, for defendant appellant Tucker.

WHICHARD, Judge.

Defendants were convicted of breaking or entering and larceny as accomplices of the adult daughter of the victims. The daughter testified for the State as follows:

She had lived with her parents until one week before the alleged crimes when she had moved in with a man she formerly had dated. Within a few days after moving out, she had returned to her parents' home in their absence, had entered by use of a key left hanging outside, and had obtained some clothes. The next day she had returned while her mother was at home, had stayed overnight, and without her parents' knowledge had then returned to the man's home, leaving her clothes behind.

On 8 June 1981 she had returned to her parents' home with the intention of taking her father's shotgun, some of her mother's jewelry, and some money. Defendant Thompson drove her and defendant Tucker to her parents' home. Because she could not find the outside key used earlier in the week, defendant Tucker gave her a screwdriver which she used to cut a window screen. He then boosted her through the window. She later handed items of her parents' property through the window to defendant Tucker, and they returned to the vehicle where defendant Thompson was waiting for them.

Her father testified that he had never "extended the understanding to her that any time she wanted to come back and come in the house . . . she could." When asked if "[s]he could come in the house anytime she wanted to," he replied that "[s]he generally called and asked to come back." He could recall no occasion when she did not ask for permission before returning home. However, "[i]t was just understood that she could come home when she wanted to."

Her mother testified that she had put the outside key away after her daughter used it to enter earlier in the week, because she "thought [the daughter] might break in again." She "hid the key so [the daughter] wouldn't come in again." Although the mother agreed that her daughter was "welcome to come home" anytime she wanted to, she stated that on past occasions when her daughter returned home she did not break in; and when she "took the key up, [the daughter] wasn't welcome."

[1] Defendants first contend the evidence was insufficient to support the convictions of felonious breaking or entering, since it failed to establish that their accomplice, the victims' daughter, entered without the consent of her parents. They rely on the victims' testimony that their daughter was welcome to come home whenever she wished, arguing that this established implied consent to enter.

G.S. 14-54(a) prohibits "[a]ny person [from] break[ing] or enter[ing] any building with intent to commit . . . larceny therein." While the statute does not make absence of consent an element of the offense, "an entry with consent of the owner of a building, or anyone empowered to give effective consent to entry, cannot be the basis of a conviction for felonious entry under G.S. 14-54(a)." *State v. Boone*, 297 N.C. 652, 659, 256 S.E. 2d 683, 687 (1979).

In reviewing the sufficiency of the evidence, however, all evidence must be considered

> in the light most favorable to the State, and the State is entitled to . . . every reasonable inference to be drawn therefrom . . . . Contradictions and discrepancies are for the jury to resolve . . . . All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court . . . . If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made . . . .

State v. McKinney, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975). Judged by this standard, the victims' testimony that their daughter was welcome to come home at any time merely created "contradictions and discrepancies . . . for the jury to resolve." *Id.* The further testimony that the outside key had been removed to prevent the daughter from breaking in again, and that the daughter was not welcome when the key was removed, considered in the light most favorable to the State, clearly indicated the victims' lack of consent to their daughter's entry in their absence without an express grant of permission. This contention thus is without merit.

Defendants next contend the evidence was insufficient to support the convictions of felonious larceny. "To establish the offense of larceny . . . the State must show that defendant[s] took and carried away the goods of another with the intent to deprive the owner thereof permanently." *State v. Perry*, 52 N.C. App. 48, 56, 278 S.E. 2d 273, 279 (1981), *modified and affirmed*, 305 N.C. 225, 287 S.E. 2d 810 (1982). Larceny is a felony if, *inter alia*, the taking was pursuant to a breaking or entering in violation of G.S. 14-54. G.S. 14-72(b)(2).

There was more than ample evidence to permit a finding that defendants took and carried away personal property of the victims with intent to deprive them thereof permanently. Because we have held the evidence sufficient to permit a finding of lack of consent to enter, and thus to support the convictions of breaking or entering, it also suffices to support convictions of larceny that was felonious in nature. This contention is thus without merit.

[2] Defendants next contend the court erred in failing to conduct an on-the-record jury instruction conference and to offer their counsel opportunity to object to the instructions out of the hearing of the jury. They rely on Rule 21, General Rules of Practice for the Superior and District Courts, which provides, in pertinent part:

> *Jury Instruction Conference.* At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party if not represented by counsel) to request any additional instructions or to object to any of those instructions proposed by the judge. Such requests, objections and the rulings of the court thereon shall be placed in the record. If special instructions are desired, they should be submitted in writing to the trial judge at or before the jury instruction conference.
>
> At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon re-

quest, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

The rule does not require that the conference be on the record. Defendants cite no authority so requiring, and our research discloses none. Defendants concede that the required conference occurred. They do not claim that any "requests, objections [or] . . . rulings of the court" during the conference should have been placed in the record, but in fact were not.

At the conclusion of the charge the court asked, in the hearing of the jury, whether counsel for defendants had "any additional instructions or requests." Counsel for both defendants replied in the negative. They did not ask to approach the bench. The rule provides that counsel shall have an opportunity to object, either out of the hearing of the jury or, upon request, out of the presence of the jury. The record does not suggest that counsel was denied opportunity to approach the bench to present matters out of the hearing of the jury, or that they were denied opportunity to present matters out of the presence of the jury. The court complied in every respect with the requirements of Rule 21.

[3] Defendants assign error to several portions of the jury instructions. Trial commenced subsequent to the effective date of Rule 10(b)(2), Rules of Appellate Procedure, which makes objection, before the jury retires, to any portion of the charge or omission therefrom, prerequisite to assignment of error thereto. Defendants did not object to the instructions before the jury retired. The record reveals no denial, in violation of the rule, of opportunity to make objection out of the hearing or, upon request, out of the presence of the jury. The rule thus precludes appellate review of the instructions.

Defendants acknowledge that they failed to make timely objections. They argue nevertheless that the "failure to object does not bar appellate review when the instruction error is of sufficient importance," and that the errors here were "plain" and thus constitute an exception to the apparently uneqivocal bar of Rule 10(b)(2). They cite authority from other jurisdictions in which "plain error" constitutes an exception to the nonreviewability of

matters not objected to at trial. *See, e.g., State v. Evans*, 165 Conn. 61, 69-70, 327 A. 2d 576, 581 (1973); *State v. Jones*, 377 So. 2d 1163, 1164 (Fla. 1979); *Webb v. State*, 259 Ind. 101, 106-07, 284 N.E. 2d 812, 815 (1972); *State v. Griffin*, 129 S.C. 200, 202-03, 124 S.E. 81, 81-82 (1924).

Generally, a "plain error" is one which is "obvious, which affect[s] the substantial rights of the accused, and which, if uncorrected, would be an affront to the integrity and reputation of judicial proceedings." *Black's Law Dictionary* 1035 (5th ed. 1979). The authorities cited by defendant excuse the failure to object at trial where the error affects a "fundamental right" or is of constitutional dimensions. The errors assigned here did not relate to matters affecting fundamental or substantial rights. We need not consider whether Rule 10(b)(2) bars appellate review of "plain error" in jury instructions where an appellant fails to make timely objections. The rule does bar review of the matters affecting less than fundamental or substantial rights to which error was assigned here.

Defendant Thompson asserts prejudicial error in certain evidentiary rulings. We have carefully examined the rulings complained of, and we find no merit in the contentions.

No error.

Judges HEDRICK and HILL concur.

STATE OF NORTH CAROLINA v. GEORGE W. BALDWIN, JR.

No. 8215SC285

(Filed 16 November 1982)

1. Criminal Law § 66.16— tainted photographic identification—independent origin of in-court identification

Even though a pretrial photographic showing was unnecessarily suggestive, the in-court identification was of independent origin and still admissible since the victim looked into the defendant's face for three or four minutes, was very attentive, described the person who robbed him, did not waiver in his identification at trial, and where the length of time between the crime and the trial was about ten weeks.

2. Arrest and Bail § 6— resisting arrest—relevancy of evidence

Testimony concerning defendant's abusive behavior and language while he was handcuffed was relevant to his resisting arrest charge. G.S. 14-223.

3. Arrest and Bail §§ 6.1, 6.2— resisting arrest—jury charge—indictment as giving notice

It was not error to instruct the jury that defendant threatened the officers when he was charged with resisting arrest since there was no merit to defendant's argument that the indictment did not give him notice that the threats would be used against him. An indictment for resisting arrest must only include a general description of the defendant's actions, and that standard was met.

4. Arrest and Bail § 6.2— resisting arrest—sufficiency of jury instructions

An instruction on resisting arrest was proper where the judge gave the jury the duty of determining if the evidence proved all the elements of the crime.

5. Criminal Law § 114.2— instructions—summary of evidence—no error

There was no error in the trial judge's summary of the evidence where he did not label any of his summary as defendant's evidence since (1) the judge stated the evidence "to the extent necessary to explain the application of law to the evidence," G.S. 15A-1232, (2) the judge instructed on all material features of the case, and (3) even though the defendant presented no evidence, the trial judge stated facts favorable to him in summarizing the State's case.

APPEAL by defendant from *Battle, Judge.* Judgment entered 25 September 1981, in Superior Court, ORANGE County. Heard in the Court of Appeals 13 October 1982.

Defendant was indicted on charges of armed robbery, kidnapping, assault with a deadly weapon with intent to kill, and resisting arrest. He pled not guilty to all of the offenses.

The evidence tended to show that James Carlton was sitting in his parked car outside of a grocery store in Chapel Hill on the evening of 3 June 1981. About 10:00 p.m., a man approached the car and asked if Carlton had any drugs. When Carlton answered no, the man got into the car and eventually pulled out a gun. He ordered Carlton to drive several blocks where he took his wallet and made Carlton get out of the car. Carlton called the police and told them the facts, including a description of his car.

Officer Wayne Hoffman testified that he observed a car matching the description of the vehicle involved in the robbery shortly after it occurred. He followed it, turned on his siren and blue lights and informed other officers that he was in pursuit.

The man eventually ran off the road. He left the car and ran into a wooded area. When Lieutenant Wilbert Simmons arrived, Hoffman followed the man. After observing what looked like a gun pointed at him in the man's hand, Hoffman fired a warning shot. The man ran. Hoffman then heard a shot fired.

When he saw the man pointing a gun at him again, Hoffman fired another warning shot and told the man to freeze. The man, who Hoffman identified as the defendant, put down his gun and was arrested. According to Hoffman, the defendant struggled and used abusive language while being taken into custody and was intoxicated.

Hoffman found a .22 caliber pistol about 20 feet from the defendant with five of the six chambers loaded. He testified that in his opinion, the gun had been fired.

Simmons corroborated Hoffman's testimony about the defendant being abusive and uncooperative when arrested. He also stated that he heard three shots fired in the woods that Hoffman had followed the defendant into and observed that the second shot sounded like it was a lesser caliber than the other shots.

Carlton was told on the telephone that a suspect in the case had been taken into custody. He then went to the police station where he gave an oral statement and was shown some photographs. Carlton picked out two photographs that looked like the person who robbed him, one of which was a picture of the defendant. He was then told that he had picked a photograph of the man that had been arrested and a photograph of the defendant was pointed out to him. As he was leaving the station, Carlton saw defendant in the hall. At trial, he identified defendant as the person who robbed him.

A jury convicted defendant of armed robbery, assault with a deadly weapon and resisting arrest. From the convictions and sentences imposed, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney K. Michele Allison, for the State.

Appellate Defender Adam L. Stein, by Assistant Appellate Defender Marc D. Towler and James R. Glover, for the defendant.

ARNOLD, Judge.

[1] Defendant first attacks the refusal of the trial court to suppress the in-court identification of the defendant by Carlton. He argues that not only was the pretrial showing of photographs improper, but that the in-court identification did not meet the tests to remove the taint of illegality. We disagree.

Even though the photograph showing here was unnecessarily suggestive, as the State concedes, the in-court identification is still admissible if it is of independent origin. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *vacated and remanded as to death penalty only*, 428 U.S. 902 (1976). The burden of showing that the in-court identification is of independent origin is on the State. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980). Standards to be used to determine reliability of the in-court identification were set out in *Neil v. Biggers*, 409 U.S. 188 (1972). They are:

> [1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness' degree of attention, [3] the accuracy of the witness' prior description of the criminal, [4] the level of certainty demonstrated by the witness at the confrontation and [5] the length of time between the crime and the confrontation.

409 U.S. at 199. *See also, State v. Clark*, 301 N.C. 176, 183, 270 S.E. 2d 425, 429 (1980). Our application of these factors to this case leads us to find the in-court identification proper.

First, Carlton looked into the defendant's face in the car until he pulled the gun. Carlton estimated that he looked at the defendant for three or four minutes. This also establishes the requisite degree of attention, the second factor.

On the third factor, Carlton described the person who robbed him as a large black man, probably over six feet tall and weighing over 200 pounds. Defendant is black, over six feet tall and weighs over 200 pounds. Fourth, he was certain at the confrontation. Carlton did not waiver in his identification at trial.

Fifth, the length of time between the crime and the trial was about ten weeks. That is not too long to damage the reliability of the in-court identification, especially since Carlton identified the

defendant as the man in one of two photographs within minutes after the crime. The court in *Neil* upheld a station-house identification as reliable that occurred seven months after the crime occurred.

We find enough evidence in the record to support the trial judge's findings of fact on this point and thus are bound by them. *See Clark*, 301 N.C. at 183, 270 S.E. 2d at 429.

We reject defendant's second assignment of error that the trial judge should have instructed the jury that the pointing and firing of the gun had to occur contemporaneously when he charged on the assault with a deadly weapon charge. A look at the instruction on this point reveals that any reasonable juror would not have thought it ambiguous or misleading as the defendant claims. In reviewing instructions on appeal, they should be read contextually and as a whole. *State v. Wright*, 302 N.C. 122, 273 S.E. 2d 699 (1981).

[2] Defendant's next three attacks concern the resisting arrest charge. He first argues that testimony about his abusive behavior and language while he was handcuffed should not have been admitted because it is not relevant to this charge. We disagree.

G.S. 14-223, the resisting arrest statute that defendant was convicted under, states "If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty. . . ." Defendant's conduct, even while handcuffed, is relevant to his guilt under the statute because it illustrates his general demeanor. "[I]t is well established in this jurisdiction that in criminal cases, every circumstance that is calculated to shed any light upon the supposed crime is admissible into evidence." *State v. Bundridge*, 294 N.C. 45, 51, 239 S.E. 2d 811, 816 (1977).

[3] The second attack on this charge is also erroneous. Defendant contends that it was incorrect to instruct the jury that he threatened the officers when he was charged with resisting arrest. His basic argument is that the indictment did not give him notice that the threats would be used against him.

An indictment for resisting arrest must only include a general description of the defendant's actions. *State v. Wiggs*, 269 N.C. 507, 153 S.E. 2d 84 (1967). That standard was certainly met

here where the indictment charges that defendant "unlawfully and wilfully did resist, delay and obstruct PSO W. P. Hoffman . . . by struggling with Officer W. P. Hoffman and attempting to get free of PSO W. P. Hoffman's grasp." This indictment was notice to the defendant that he should expect the facts surrounding the arrest to be brought out at trial, including his abusive language.

[4] Defendant's third contention on this charge is that by his instructions the trial judge took a question of fact from the jury on if defendant's conduct was resisting arrest under the statute. The judge stated:

> So I charge you that if you find from the evidence beyond a reasonable doubt that . . . the defendant . . . willfully and unlawfully struggled to get away and threatened W. P. Hoffman . . . while the officer was making a lawful arrest, it would be your duty to return a verdict of guilty as to this offense. However, if you do not so find or if you have a reasonable doubt as to one or more of those things, it would be your duty to return a verdict of not guilty as to that offense.

The instruction on this offense was proper because the judge gave the jury the duty of determining if the evidence proved all elements of the crime. We will not speculate on what the jury "could have found" as the defendant suggests. There was sufficient evidence to support the guilty verdict on this charge.

[5] A final attack by defendant alleges that the summary of the evidence by the trial judge in his instruction was prejudicial because he did not label any of his summary as defendant's evidence. We find no error on this point for the following reasons.

First, the summary met the G.S. 15A-1232 requirement that a trial judge "is not required to state the evidence except to the extent necessary to explain the application of law to the evidence." Second, the judge instructed on all material features of the case as required by *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980). Finally, even though the defendant presented no evidence, the trial judge stated facts favorable to him in summarizing the State's case. An example would be where the summary concluded that Officer Hoffman saw the gun pointed in his direction, but only heard, rather than saw, a shot.

No error.

Judges MARTIN and WHICHARD concur.

STATE OF NORTH CAROLINA v. DAVID JOSEPH

STATE OF NORTH CAROLINA v. DAVID ALLEN WHITT

No. 8219SC119

(Filed 16 November 1982)

1. **Larceny § 7.4— possession of recently stolen property—inference of larceny**

An inference of defendant's guilt of larceny under the doctrine of possession of recently stolen property was not based upon an inference that defendant possessed the property and was proper where there was ample direct evidence that defendant was in possession of the recently stolen goods.

2. **Criminal Law § 112.1— comment on reasonable doubt—absence of prejudice**

Where the trial court correctly instructed the jury on reasonable doubt, defendant was not prejudiced by the court's statement, "and that does mean reasonable doubt."

3. **Larceny § 8— instructions—failure to repeat all elements of crime**

Where the trial court had just fully instructed the jury on all of the elements of larceny, there was no prejudicial error in the court's failure to repeat some of the elements when he thereafter instructed the jury that it should return a verdict of guilty if it found that defendant took and carried away the victim's property from a building after a breaking or entering or that the property was worth more than $400.00.

4. **Criminal Law § 116.1— defendant's failure to testify—instruction on "any other contentions"**

The trial court's instruction that the jury should consider "any other contentions that occur to you that arise from the evidence or lack of evidence" did not imply that the jury should consider the defendant's failure to testify as evidence where the court instructed the jury several times that defendant's exercise of his right not to testify created no presumption against him.

APPEAL by defendants, Joseph and Whitt, from *Hairston, Judge*. Judgments entered 30 September 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 14 September 1982.

Defendants were tried on bills of indictment charging them with felonious breaking and entering and felonious larceny.

The State's evidence tended to show the following. On 12 October 1980, Jimmy Sheffield returned to his house at 6:00 p.m. and discovered several items of personal property were missing and his back door had been jimmied open. The missing property consisted of a JVC integrated amplifier, a JVC AM-FM tuner, a Pioneer tape player, a Pioneer cassette tape deck, an audio control graphic equalizer, two BIC speakers, a GE portable color TV, a digital alarm clock, a 7.5 horsepower boat motor, a Realistic stereo with two speakers, and two custom speakers. Sheffield testified that he immediately called the police department and police officer McIver came to his house. At 6:30 p.m., McIver and Mr. and Mrs. Sheffield noticed tire tracks in a field behind the house. They followed the tracks down to the woods and found the stolen property hidden under a large piece of tin.

Officer McIver testified that after they found the stereo equipment in the woods, he called two other policemen to plan a stakeout. He went back to the woods at approximately 8:30 p.m., and stayed there most of the night. At about 3:18 a.m., a truck drove up. McIver radioed the other policemen to set up at various locations. Three men got out of the truck and began to load the stereo equipment on the truck. When McIver thought the men were finished, he radioed the police cars that were standing by to move in. Then he ordered the three men to halt and identified himself as a police officer. Two of the men, later identified as defendants Joseph and Whitt, escaped into the woods, the third man, Richardson, jumped into the truck. After he chased Joseph and Whitt for a while, McIver returned to the truck and arrested Richardson.

According to McIver, Richardson made the following statement at the police station:

> "At the time of about 6:00 o'clock a friend took me through town and to the bowling alley. There I was told by Mr. David Joseph that I could buy a stereo at a cheap price if I would help them load it. We rode around and wasted time at his business establishment until early in the morning. He then took me and an unidentified person behind the Datsun place in Asheboro, North Carolina, where the stereo equip-

ment was hidden in some woods, and I and Mr. Joseph and the other person began to load it. At no time beforehand was I told that the stereo was not legal. The truck we were riding in was in the possession of David Joseph."

In March 1981, Richardson identified the third person as David Whitt.

At trial, Richardson testified that he was drinking beer at the bowling alley with defendants from 8:00 p.m. to 3:00 a.m. One of the defendants mentioned that they had a stereo for sale. Richardson said that he wanted to see the stereo. They left the bowling alley in David Joseph's father's truck and went to the field behind the Datsun dealership. Then Richardson followed the defendants into the woods. The defendants picked up the piece of tin, and the three men loaded the stereo equipment onto the truck. Richardson explained that he did not give Whitt's name to the police when he was arrested because he was afraid of him.

The jury returned verdicts of not guilty of breaking and entering, and guilty of felonious larceny, and defendants Whitt and Joseph were sentenced to not less than five years and not more than six years imprisonment.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for the State.

Oldham and Alexander, by Pierre Oldham, for defendant appellant Joseph.

Appellate Defender Adam Stein and Assistant Appellate Defender Nora B. Henry, for defendant appellant Whitt.

VAUGHN, Judge.

[1] Defendant Whitt brings forth two assignments of error. His first argument is that the larceny conviction impermissibly rests on an inference drawn from recent possession stacked upon an inference that he possessed the property.

The possession of recently stolen property raises a presumption of the possessor's guilt of larceny of the property. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972). The presumption arises only when the State proves beyond a reasonable doubt:

(1) the property described in the indictment was stolen;

(2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods; and

(3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E. 2d 289, 293 (1981) (citations omitted).

It is clear that the State has proven that the property was stolen. Also, there is overwhelming evidence that the stolen goods were found in defendant Whitt's custody and subject to his control and disposition shortly after they were stolen. Whitt was present when the stereo was mentioned in the bowling alley, he went with Joseph and Richardson to where the goods were hidden, he helped load the truck, and he fled when the police appeared.

Defendant Whitt's reliance on *State v. Voncannon*, 302 N.C. 619, 276 S.E. 2d 370 (1981) is mistaken. In *Voncannon*, the defendant testified that when he stopped at a closed gas station to buy a soda, he saw a man on a tractor. The man asked him if he knew where he could buy gas. Defendant said that he did not know of any gas stations in the area that were open all night, but suggested the man leave the tractor at his sister's house which was nearby. In reversing defendant's larceny conviction, the Supreme Court concluded that since there was no direct evidence that defendant possessed the tractor, the State was relying on an inference of guilt based on possession of recently stolen goods stacked upon an inference of possession of the stolen goods. The Court held that every inference must stand on direct evidence, not on another inference.

In this case, however, there is ample direct evidence that defendant Whitt was in possession of the recently stolen goods, so the inference of guilt based on the possession of recently stolen goods was proper.

[2] Defendant's Whitt's second argument is that the trial judge's comment on reasonable doubt improperly expressed an opinion. This argument is without merit. The judge correctly instructed the jury on reasonable doubt. Then, after summarizing the evidence, the judge said:

> Now, members of the jury, the State seeks to establish in each case the guilt of the defendant by the doctrine of recent possession. For this doctrine to apply to this case, the State must prove three things each beyond a reasonable doubt, as I have defined reasonable doubt to you, and that does mean reasonable doubt.

Since the instruction on reasonable doubt was correct, merely saying "and that does mean reasonable doubt" cannot be prejudicial.

[3] Defendant Joseph does not discuss his first three assignments of error, so they are deemed abandoned. N.C. Rules of Appellate Procedure, Rule 28(a). Defendant Joseph's first argument is that the trial court committed prejudicial error in his instruction to the jury on the offense of felonious larceny. The trial judge gave the following instruction:

> Now, in the second count, as to each defendant, the defendants have been accused of felonious larceny. I charge that for you to find each defendant guilty of felonious larceny, the State must prove six things each beyond a reasonable doubt. First, that the defendant took the Pioneer tape player, the Pioneer cassette, the Integrated amplifier, the tuner, the audio control graphic equalizer, the BIC formula speakers, a portable color TV, a digital alarm clock, the 7.5 horsepower boat motor, the Realistic stereo with two speakers and the two custom speakers belonging to Jimmy Sheffield. Second, that the defendant carried away the property that I have just listed.
>
> Now, to carry it away, that just means to move it a very small—any small moving of the property is sufficient to be carrying it away. It doesn't have to be carried away where he couldn't find it.
>
> Third, that Jimmy Sheffield did not consent to the taking and carrying away of the property. Fourth, that at the

time the defendant intended to deprive Jimmy Sheffield of its use permanently. Fifth, that the defendant knew that he was not entitled to take the property. And sixth, either that the property was taken from a building after a breaking or entering or that the property was worth more than four hundred dollars.

Then the judge said:

So I charge that if you find from the evidence and beyond a reasonable doubt, as I have defined that to you, that on or about the 12th day of October, 1980, David Joseph took and carried away Jimmy Sheffield's property, the list of which I have repeated a number of times and I won't repeat it again here, from a building after a breaking or entering or that the property was worth more than four hundred dollars, it would be your duty to return a verdict of guilty of felonious larceny. However, if you do not so find or have a reasonable doubt as to any one of these things, you would return a verdict of not guilty of felonious larceny as to David Joseph.

Defendant Joseph claims that the instruction was prejudicial because the trial judge failed to repeat three elements of the offense: that Sheffield did not consent to the taking and carrying away; that defendant intended to deprive Sheffield of the property permanently; and that defendant knew he was not entitled to the property. Since the judge had just fully instructed the jury on all the elements of larceny, there was no prejudicial error in his failure to repeat a few of the elements. The charge must be read as a whole, if it presents the law fairly the fact that some portions, read alone, might be erroneous, is not grounds for reversal. *State v. Cummings*, 301 N.C. 374, 271 S.E. 2d 277 (1980).

[4] Defendant Joseph's second argument is that the trial court erred in its instructions on his choice not to testify. A defendant's failure to testify does not create any presumption against him. G.S. 8-54. The trial judge gave the following instruction to the jury on defendant's privilege not to testify: "Neither defendant in this case has testified. The law of North Carolina gives them this privilege. The same law also assures them that their decision not to testify creates no presumption against them. Therefore, their

silence is not to influence your decision in any way." The basis for the defendant's assignment of error is the following:

> You take into consideration all their contentions to you in these cases and any other contentions that occur to you that arise from the evidence or lack of evidence except, as I have instructed you, you are not—the fact that the defendant does not take the witness stand, doesn't testify, creates no presumption against him. The law of North Carolina gives him that privilege.

Defendant argues that the phrase "any other contentions" was prejudicial because it implied that the jury should consider the defendant's failure to testify as evidence. The judge, however, instructed the jury several times that defendant's right not to testify created no presumption against him. As mentioned above, the entire charge to the jury must be read as a whole. The phrase "any other contentions" does not negate the instructions to the jury that defendant had the right and privilege not to testify.

We have carefully reviewed defendants' assignments of error and find no error.

No error.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. REGINALD LEE DANIELS

No. 8214SC174

(Filed 16 November 1982)

1. Criminal Law § 101.1— prospective juror's statement before entire panel—no abuse of discretion in denial of motion for mistrial

There was no abuse of discretion in the denial of defendant's motion for a mistrial after a prospective juror stated before the entire panel that a co-defendant, tried jointly with defendant, "used to go with [her] daughter and also . . . took [her] car at one time." The court excused the prospective juror who made the statement, asked whether any of the jurors chosen knew any reason why they could not be fair and impartial, and inquired whether the jurors understood that they were to consider each defendant separately and to return a separate verdict as to each of them. G.S. 15A-1061.

2. Criminal Law § 101.4— failure to give complete and proper instructions before various recesses during trial—no objections—no prejudicial error

Where defendant did not object to the court's failure to give complete and proper instructions, pursuant to G.S. 15A-1236, before various recesses during the trial, there was no prejudicial error.

3. Criminal Law § 89.8— plea concession to witness in exchange for testimony—failure to give notice to defense—failure to show prejudice

Defendant failed to show prejudice in the State's failure to give written notice of a plea concession to a witness in exchange for his testimony against defendant since there was evidence that defendant's attorney became aware that the witness had been allowed to plead guilty to a misdemeanor over two and one-half months prior to trial, and since the court inquired as to whether defendant required a recess to prepare cross-examination of the witness, and the attorneys indicated they did not. G.S. 15A-1054(c).

4. Criminal Law § 89.10— cross-examination concerning prior criminal record—untruthful answer—inability to introduce arrest record

The trial court did not err, under existing law, in denying defendant's motion to require disclosure to the jury of the fact that a State's witness was untruthful about his prior criminal record.

5. Criminal Law § 81— photostatic copies of money taken in robbery—"best evidence rule" not applying

The "best evidence rule" did not apply to the admission of photostatic copies of the money allegedly taken in a robbery since the contents or terms of the bills were not in question and the copies were used solely to illustrate the witness's testimony.

6. Criminal Law § 117.4— charge on credibility of State's witness—accomplice in crime

An instruction with regard to the testimony of an accomplice in the robbery with which defendant was charged was substantially in accord with instructions approved in other cases.

7. Robbery § 4.2— common law robbery—sufficiency of evidence

The evidence in a prosecution for common law robbery was sufficient to withstand defendant's motion to dismiss where it tended to show that the perpetrator of the robbery took $78.00 from a victim in a grocery store parking lot; that he drove away in a green Mercury Cougar; that a manager of a store adjacent to the grocery store saw the automobile leave the parking lot and called the police; that an officer stopped an automobile identified by the service manager; that defendant was in the front passenger seat; that a search of the occupants revealed $70.00 in the same denominations as the currency taken from the victim; that a torn piece of currency found on the ground near the victim's car matched one of the bills found on the occupant of the car; and that defendant purchased cigarettes from the grocery store shortly before the robbery.

APPEAL by defendant from *Martin, Judge.* Judgment entered 25 September 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 September 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of common law robbery.

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

William G. Goldston for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motion for mistrial made after a prospective juror stated before the entire panel that a co-defendant, tried jointly with defendant, "used to go with [her] daughter and also . . . took [her] car at one time." The statement was made in response to the court's question as to whether any member of the panel knew the co-defendant.

"Ruling on a motion for mistrial in a criminal case less than capital rests largely in the discretion of the trial court." *State v. McCraw*, 300 N.C. 610, 620, 268 S.E. 2d 173, 179 (1980). While G.S. 15A-1061 provides that the court "must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case," our Supreme Court "has stated that the resolution of this issue also is within the trial court's discretion." *State v. McGuire*, 297 N.C. 69, 74-75, 254 S.E. 2d 165, 169, *cert. denied*, 444 U.S. 943, 100 S.Ct. 300, 62 L.Ed. 2d 310 (1979), *citing State v. Swift*, 290 N.C. 383, 396, 226 S.E. 2d 652, 663 (1976).

Here the court excused the prospective juror who made the statement. It subsequently inquired whether any of the jurors chosen knew any reason why they could not be fair and impartial, and none responded in the affirmative. It also inquired whether the jurors understood that they were to consider each defendant separately and to return a separate verdict as to each. None of the jurors indicated they did not so understand. In denying the motion the court found as facts that each defendant had opportunity to examine all jurors concerning the remarks, that neither defendant had exercised all his peremptory challenges, and that

neither defendant had exercised any challenges for cause. Under these circumstances we find no "substantial and irreparable prejudice to the defendant's case," G.S. 15A-1061, and no abuse of discretion in denial of the motion for mistrial.

[2] Defendant contends the court erred in failing to give complete and proper instructions, pursuant to G.S. 15A-1236, before various recesses during the trial. Defendant did not object at the times he contends the court failed to instruct as required, nor did he request further instructions on those occasions as to which he contends the instructions were incomplete. Under the holding in *State v. Turner*, 48 N.C. App. 606, 269 S.E. 2d 270 (1980), we find no prejudicial error. *See also State v. Carr*, 54 N.C. App. 309, 310, 283 S.E. 2d 175, 176 (1981); *State v. Chambers*, 52 N.C. App. 713, 718-19, 280 S.E. 2d 175, 178-79 (1981).

[3] Defendant next contends the court erred in overruling his objection to the State's calling of a witness, lodged on the ground that the District Attorney failed to give notice to defense counsel, as required by G.S. 15A-1054(c), of a plea concession to the witness in exchange for his testimony against defendant. The record establishes that defendants' trial attorneys were present at the probable cause hearing, which occurred over two and one-half months prior to trial; and that at that hearing they became aware that the witness had been allowed to plead guilty to a misdemeanor. It also establishes that the District Attorney had talked with defendants' attorneys on several occasions and had made them aware that the witness was to testify for the State. The court asked defendants' attorneys at trial whether they claimed surprise upon learning that the witness was allowed to plead guilty to a misdemeanor, and neither responded affirmatively. It also inquired whether they required a recess to prepare cross-examination of the witness, and they indicated they did not.

The remedy for failure to comply with G.S. 15A-1054(c) is the granting of a recess upon motion by the defendant, not suppression of the testimony. *State v. Lester*, 294 N.C. 220, 229, 240 S.E. 2d 391, 398 (1978); *State v. Spicer*, 50 N.C. App. 214, 217, 273 S.E. 2d 521, 524, *disc. rev. denied*, 302 N.C. 401, 279 S.E. 2d 356 (1981). Because defense counsel indicated that a recess was not required, and because counsel had more than ample notice of the plea con-

cession and of the witness' pending testimony, defendant has shown no prejudice; and this assignment of error is overruled.

[4] Defendant contends the court erred in denying his motion to require disclosure to the jury of the fact that a State's witness was untruthful about his prior criminal record. The witness had responded in the negative when asked, on cross-examination, if he had pled guilty to a larceny charge in April 1979. His arrest record, which defense counsel presented to the District Attorney upon making the motion to require disclosure, indicated that in fact he had pled guilty to the charge.

While for purposes of impeachment the witness was subject to cross-examination with respect to prior convictions, his denial thereof could not be contradicted by introducing the conviction record or by otherwise proving the fact of conviction. *State v. Monk*, 286 N.C. 509, 517, 212 S.E. 2d 125, 132 (1975); *State v. Gaiten*, 277 N.C. 236, 240, 176 S.E. 2d 778, 781 (1970); *State v. King*, 224 N.C. 329, 30 S.E. 2d 230 (1944). Dean Brandis has noted "the profound irrationality of the exclusionary aspect of the rule," and has stated that "[i]f our Court continues to allow the original inquiry, then, like many other jurisdictions, it should permit *proof* of the record of conviction." 1 *Brandis on North Carolina Evidence* § 112, p. 415 (2d rev. ed. 1982). We concur in that observation. It is not in the province of this Court to change the rule, however; and because denial of defendant's motion was proper under the extant rule, this assignment of error must be overruled.

[5] Defendant contends the court violated the "best evidence rule" by allowing a State's witness, over objection, to use photostatic copies of the money allegedly taken in the robbery. The best evidence rule applies only where the contents or terms of a document are in question. *State v. Garner*, 34 N.C. App. 498, 500, 238 S.E. 2d 653, 654 (1977); 2 *Brandis, supra*, at § 191. The contents or terms of the bills were not in question here. The copies were used solely to illustrate the witness' testimony, and the court so instructed the jury. Photographs may be used by a witness "to explain or illustrate anything that is competent for him to describe in words." *State v. Swift, supra*, 290 N.C. at 395, 226 S.E. 2d at 662. *See also State v. Fulcher*, 294 N.C. 503, 510, 243 S.E. 2d 338, 344 (1978); 1 *Brandis, supra*, at § 34. This assignment of error is overruled.

[6] Defendant contends the court erred in the following instruction with regard to the testimony of an accomplice in the robbery:

> [T]here's some evidence . . . that [the witness] was testifying under an agreement . . . for a charge reduction and a sentence concession . . . in exchange for his testimony. If you find that he testified in whole or in part for that reason then you should examine his testimony with great care and caution in deciding whether . . . to believe it. If after you have done so you believe the testimony . . . in whole or in part then you should treat what you believe the same as any other believable evidence in the case.

The instruction substantially accords with instructions approved in other cases. *See State v. Abernathy*, 295 N.C. 147, 154-55, 244 S.E. 2d 373, 378-79 (1978); *State v. Willard*, 293 N.C. 394, 411, 238 S.E. 2d 509, 519-20 (1977); *State v. Hairston and State v. Howard and State v. McIntyre*, 280 N.C. 220, 234-35, 185 S.E. 2d 633, 642, *cert. denied*, 409 U.S. 888, 93 S.Ct. 194, 34 L.Ed. 2d 145 (1972). There is no merit to this contention.

[7] Defendant finally contends the court erred in denying his motion to dismiss. The motion requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581 (1975). "If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and [dismissal] should be denied." *Id.* at 117, 215 S.E. 2d at 582.

The State's evidence here showed the following:

The perpetrator of the robbery took $78.00 from the victim while the victim was in her automobile in a grocery store parking lot. He then entered a green Mercury Cougar automobile and drove away. The service manager of a store adjacent to the grocery store saw the automobile leave the parking lot and called the police. An officer thereafter stopped an automobile which was identified by the service manager as the one he had seen leaving the parking lot. Defendant was in the front passenger seat, Harold Burton was in the driver's seat, and Anthony Jones was in

the back seat. Two officers searched the occupants and found $70.00 in Jones' pocket in the same denominations as the currency taken from the victim. Jones testified that defendant had handed him the $70.00 as the officer was about to stop the automobile.

Two officers took the suspects back to the parking lot. There a third officer found on the ground near the victim's car a torn piece of currency which matched a torn bill found on Jones. An employee of the grocery store sold a pack of Newport cigarettes to a man shortly before the robbery. When the suspects were brought back to the grocery store following their apprehension, the employee positively identified one of the three as the man who purchased the cigarettes, although she was unable to identify him in the courtroom at the time of the trial. Jones testified that he, defendant and Burton went to the grocery so that defendant could purchase cigarettes, and that he saw defendant enter the store. When the officers searched defendant, they found on his person a pack of Newports with only one or two cigarettes missing.

This evidence, judged by the standard set forth above, was sufficient to support a finding that the offense of robbery had been committed and that defendant was the perpetrator. The court thus properly denied the motion to dismiss.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; THE PUBLIC STAFF v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC.

No. 8110UC1197

(Filed 16 November 1982)

1. Utilities Commission § 22— amendment of final order—general rate hearing not required

While the procedures of complaint hearings must be used before a final order of a panel of the Utilities Commission may be amended pursuant to G.S. 62-80, a general rate hearing is not required in order for a final order to be amended. G.S. 62-73; G.S. 62-78; G.S. 62-133.

2. Utilities Commission § 49— hearing to amend rate order—facts not in existence at time of original hearing

In a hearing to determine whether a prior rate order should be amended because the Utilities Commission had failed to consider amortization of investment tax credit, the Commission properly received testimony calculating the amortization for the year ending 30 September 1980 by using the fiscal year ending 30 December 1980 although the witness thus testified to facts not in existence at the close of the original hearing.

3. Utilities Commission § 21— lowering rates for future service—no retroactive rate making

A Utilities Commission order lowering a gas company's rates for future service because it had improperly calculated federal income tax expense in its prior rate order did not constitute retroactive rate making.

4. Utilities Commission § 22— authority to amend rate order—objections to original order—sale of stock based on prior rate

The Utilities Commission had authority under G.S. 62-80 to reduce a gas company's rates to take into account the amortization of investment tax credit although the gas company has now been deprived of an opportunity to argue the exceptions it would have made if it had known that the original order would later be amended, and although the gas company has sold 500,000 shares of stock based on a rate contained in the original order.

5. Utilities Commission § 56— hearing to amend final order—appellate review

Where a final rate order was amended by the Utilities Commission pursuant to G.S. 62-80 for the purpose of taking into account the amortization of investment tax credit, defendant utility could not properly present in an appeal from the amendment the question of the allowance for depreciation in the original order.

APPEAL by defendant from order of North Carolina Utilities Commission entered 5 August 1981. Heard in the Court of Appeals 1 September 1982.

On 12 January 1981 a panel of three members of the Utilities Commission filed an order in which it recommended that Public Service Company of North Carolina, Inc. be allowed to increase its rates to produce an additional $4,716,903.00 in annual revenues. The Commission did not make any finding in the January order as to an amount for amortization of investment tax credit. No appeal was taken from this order, and it became final on 11 February 1981.

Rates were subsequently put into effect based on the amount of revenues allowed in the January order. Thereafter, Public Service sold 500,000 shares of stock, making representations in

both the prospectus and the registration statement, filed with the Securities and Exchange Commission, that it was entitled by virtue of the January order to receive $4,716,903 in additional annual revenues.

On 7 July 1981 the Commission issued an order determining that it had improperly calculated the federal income tax expense in the January order. The Commission gave notice that there would be a hearing to determine the effect the tax credit would have on the rates and to determine the amount of income tax expense which should have been employed in setting rates. After the hearing, the Commission issued an order, dated 5 August 1981, lowering the rates for service subsequently rendered so as to reduce by $415,530 the amount of annual revenues allowed to Public Service.

The defendant appealed.

Robert Fishbach, Executive Director of The Public Staff, by Staff Attorneys Vickie L. Moir and Gisele L. Rankin, for plaintiff appellee.

Boyce, Morgan, Mitchell, Burns and Smith, by F. Kent Burns, for defendant appellant.

WEBB, Judge.

[1] The defendant first contends the Utilities Commission was without authority to reopen the January order without a hearing for a general rate case. It bases its argument on the following sections of Chapter 62 of the General Statutes:

> § 62-78. *Proposed findings, briefs, exceptions, orders, expediting cases, and other procedure.*
>
> * * *
>
> (c) In all proceedings in which a panel of three commissioners, commissioner or examiner has filed a report, recommended decision or order to which exceptions have been filed, the Commission, before making its final decision or order, shall afford the party or parties an opportunity for oral argument. When no exceptions are filed within the time specified to a recommended decision or order, such recommended decision or order shall become the order of the Com-

mission and shall immediately become effective unless the order is stayed or postponed by the Commission; provided, the Commission may, on its own motion, review any such matter and take action thereon as if exceptions thereto had been filed.

* * *

§ 62-80. *Powers of Commission to rescind, alter or amend prior order or decision.*—The Commission may at any time upon notice to the public utility and to the other parties of record affected, and after opportunity to be heard as provided in the case of complaints, rescind, alter or amend any order or decision made by it. Any order rescinding, altering or amending a prior order or decision shall, when served upon the public utility affected, have the same effect as is herein provided for original orders or decisions.

The defendant argues that under G.S. 62-78(c) when a panel of the Commission issues an order to which no exception is taken, it becomes a final order which cannot be amended under G.S. 62-80 without a hearing as a complaint proceeding as provided in G.S. 62-73, a new record developed, and a new order issued based on the new record.

Whatever the effect of G.S. 62-78(c) on an order filed by a panel of three Commissioners we do not believe this affects the power of the Utilities Commission to act pursuant to G.S. 62-80. G.S. 62-80 provides the Utilities Commission may "alter or amend" an order after a hearing. We believe that by using the words "alter or amend" the Legislature intended that the Commission may change an order in some respects without considering all factors that must be considered in a general rate case. The statute does not limit changes in orders to those that have not become final.

The defendant argues that since the statute provides that before an order may be "altered or amended" the matter shall "be heard as provided in the case of complaints," this means there must be a complaint hearing pursuant to G.S. 62-73 and all the elements required by G.S. 62-133 must be considered. We do not so read G.S. 62-80. We believe it requires that the procedures of complaint hearings shall be used before amending an order but

it does not require a general rate hearing before an order may be amended.

[2] The defendant also contends the evidence which the Commission heard at the reopened hearing made the hearing an unlawful procedure. It bases this argument on the testimony of a Public Staff witness as to the proper amount of investment tax credit amortization. The witness testified that the most reliable way to calculate the amortization for the year ending 30 September 1980 was to use the fiscal year ending 30 December 1980 and based his testimony on this period. The defendant contends that by doing so, the witness testified to facts that were not in existence at the close of the first hearing. We do not believe it was error for the Commission to receive this evidence. It could accept this testimony as the best way to calculate the investment tax credit amortization for the period in question.

The defendant also argues that the Commission could not under G.S. 62-136(a) change a rate without a finding that the rate is "unjust, unreasonable, insufficient or discriminatory, or in violation of any provision of law." No such finding was made by the Commission. The Commission was proceeding pursuant to G.S. 62-80, not G.S. 62-136(a). The finding required by G.S. 62-136(a) was not necessary to the validity of the Commission's August order.

[3] The defendant contends that the action of the Commission constituted retroactive rate making. It says this is so because the Commission had already determined the proper amount of income tax expense. We do not believe the Commission's order of 5 August 1981 constituted retroactive rate making. It did not reduce the defendant's revenue to compensate in the future for what may have been an excessive rate in the past. It reduced the defendant's future rate for what it found was a more realistic investment credit tax amortization. This is not retroactive rate making. *See Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E. 2d 184 (1977) for a discussion of retroactive rate making.

[4] The defendant says there were matters in the January order which were unfavorable to it. Defendant did not except to the order because it was satisfied overall, which it would not have been if the rate had been originally reduced by taking into account the amortization of the investment tax credit. It has now

been deprived of an opportunity to argue the exceptions it would have made if it had known what would occur in August. The defendant also argues that it has sold 500,000 shares of stock based on a rate contained in a final order which rate has now been reduced. The defendant contends this is unfair to the public which bought the stock. We believe the fairness of the statute is a matter for the General Assembly. As we read it, the statute allows the Utilities Commission to amend a final order as was done in this case. We are bound by this statute.

We do not believe the cases relied on by the defendant are helpful to it. *Utilities Commission v. Edmisten*, 291 N.C. 575, 232 S.E. 2d 177 (1976) deals with the authority of the Utilities Commission to rehear a general rate case under G.S. 62-80 before the 30-day period for appealing from its order had expired. It does not deal with the power of the Commission to amend an order after it has become final. *Utilities Commission v. Carolina Coach Company*, 260 N.C. 43, 132 S.E. 2d 249 (1963) involved the rescission of an order made pursuant to an agreement by two buslines in regard to transportation rights. Our Supreme Court said the Commission could not act arbitrarily or capriciously in rescinding the order but there must be a change of circumstance requiring it in the public interest. We do not believe *Carolina Coach* is a precedent for this case.

[5] The defendant brings forward an assignment of error as to the allowance for depreciation in the January order. We have held that the January order is a final order which was reopened by the Utilities Commission under G.S. 62-80 for the purpose of a hearing as to the investment tax credit amortization. The January order was in other respects a final order from which no appeal was taken. We do not pass on the question of depreciation in this appeal.

The defendant stated in its brief that the Commission's action violated the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Constitution of North Carolina. The defendant advances no reasons why this is so other than its arguments as to the application of Chapter 62 of the General Statutes and its effect on the defendant. G.S. 62-80 was in effect at the time this case was instituted. All orders entered by the Commission were subject to this section. The developments of

this case may work a hardship on the defendant, but we do not believe it is of constitutional dimension.

Affirmed.

Chief Judge MORRIS and Judge WHICHARD concur.

MARIE R. LEONARD, ADMINISTRATRIX OF THE ESTATE OF SAMUEL L. LEONARD, DECEASED v. JOHNS-MANVILLE SALES CORPORATION, A DELAWARE CORPORATION; UNARCO INDUSTRIES, INC., AN ILLINOIS CORPORATION; GAF CORPORATION, A DELAWARE CORPORATION; ARMSTRONG CORK COMPANY, A PENNSYLVANIA CORPORATION; RAYBESTOS-MANHATTAN, INC., A CONNECTICUT CORPORATION; OWENS-CORNING FIBERGLASS CORPORATION, A DELAWARE CORPORATION; PITTSBURGH CORNING CORPORATION, A PENNSYLVANIA CORPORATION; THE CELOTEX CORPORATION, A DELAWARE CORPORATION; NICOLET INDUSTRIES, A PENNSYLVANIA CORPORATION; FORTY-EIGHT INSULATION, INC., AN ILLINOIS CORPORATION; EAGLE-PICHER INDUSTRIES, INC., AN OHIO CORPORATION; STANDARD ASBESTOS & INSULATION CO., A MISSOURI CORPORATION; OWENS-ILLINOIS, INC., AN OHIO CORPORATION; H. K. PORTER, A PENNSYLVANIA CORPORATION; NATIONAL GYPSUM CO., A DELAWARE CORPORATION; FIBREBOARD CORPORATION, A DELAWARE CORPORATION; GARLOCK, INC., A FOREIGN CORPORATION; KEENE CORPORATION, A NEW JERSEY CORPORATION; NORTH AMERICAN ASBESTOS CORPORATION, A FOREIGN CORPORATION; CAREY CANADIAN MINES, LTD., A FOREIGN CORPORATION; LAKE ASBESTOS OF QUEBEC, LTD., A FOREIGN CORPORATION; AMATEX CORPORATION, A PENNSYLVANIA CORPORATION; SOUTHERN ASBESTOS COMPANY

No. 8214SC22

(Filed 16 November 1982)

Courts § 21.5; Master and Servant § 89.3— action against third party—subrogation rights of employer—application of Virginia law

The law of Virginia will be applied with regard to whether a third party may defeat a negligent employer's subrogation rights when the injured employee sues the third party at common law after recovering workers' compensation benefits from his employer where the employment was in Virginia and the injury occurred in that state. G.S. 97-10.2(e).

CERTIORARI to review *Godwin, Judge.* Order entered 3 August 1981 in DURHAM County Superior Court. Heard in the Court of Appeals 21 October 1982.

Leonard v. Johns-Manville Sales Corp.

Plaintiff, Marie R. Leonard, widow and administratrix of the estate of Samuel L. Leonard, decedent, brought this action to recover actual and punitive damages allegedly resulting from defendants' acts. Defendants are companies involved in the manufacturing and distribution of asbestos products. Plaintiff's decedent was exposed to asbestos products in the course of his employment and suffered asbestosis, which eventually caused his death in 1978. Prior to his death, plaintiff's decedent filed a claim against his employer, Stone & Webster Engineering Corp., a user of asbestos products, for worker's compensation, with the Virginia Industrial Commission. After decedent's death, the Virginia Industrial Commission made an award to plaintiff, as a dependent surviving spouse of the claimant, in the amount of $175.00 per week for 500 weeks plus all medical expenses and the statutory burial expenses. The total worker's compensation award amounted to approximately $100,000.00. Defendants in the present action sought to amend their answers to allege as a "Last Defense" that the negligence of Stone & Webster was a contributing cause of decedent's injuries. This amendment was allowed and Stone & Webster was thus made a party to the lawsuit because, under North Carolina law, an allegedly negligent third party is allowed to show the independent negligence of the plaintiff's employer from whom the plaintiff has recovered in a worker's compensation action in order to defeat such employer's right to recoup from the third party sums paid to the plaintiff under the worker's compensation award. Stone & Webster moved to strike defendants' "Last Defense," asserting that Virginia law controls defendants' right to assert such a defense and that under Virginia law a third party is not able to prove the independent negligence of the employer in order to defeat the employer's right of subrogation. Stone & Webster's motion to strike was denied and this Court allowed review by Writ of Certiorari.

Haywood, Denny & Miller, by George W. Miller, Jr. and Michael W. Patrick, for plaintiff.

Battle, Winslow, Scott & Wiley, P.A., by Marshall A. Gallop, Jr., for all defendant-appellees.

Young, Moore, Henderson & Alvis, P.A., by B. T. Henderson, II and William F. Lipscomb, for third party defendant-appellant, Stone & Webster Engineering Corporation.

WELLS, Judge.

The sole question before us is whether we will apply the Virginia rule or the North Carolina rule with regard to whether a third party may defeat a negligent employer's subrogation rights when the injured employee sues the third party at common law after recovering worker's compensation benefits from his employer or his employer's insurance carrier. Both North Carolina and Virginia law are clear to the effect that a negligent third party may not seek contribution from a jointly negligent employer when the employee obtains a judgment against the third party. *Hunsucker v. High Point Bending & Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768 (1953); *Virginia Electric and Power Co. v. Wilson*, 221 Va. 979, 277 S.E. 2d 149 (1981). Under the Virginia Workmen's Compensation Act, the employer is allowed to recoup from a negligent third party any money paid to its employee under the Act. *See* Va. Code Ann. §§ 65.1-41 to -43 (1980). Such a recoupment by the employer is subject to a *pro rata* deduction of attorney fees and costs for the benefit of the claimant. Va. Code § 65.1-42. Virginia statutory and case law is conspicuously lacking in any means by which the third party may defeat the employer's right to subrogation; it appears that Virginia employers are entitled to recoup sums paid regardless of whether their negligence contributed to the employee's injury for which he seeks recovery from the third party. *See* 2A Larson's, Workmen's Compensation Law, § 76.20. This is the majority rule. 2A Larson's § 75.22.

North Carolina appellate courts developed a rule through which the third party, when sued at common law by an injured employee who has recovered from the employer a worker's compensation award, could prove the employer's concurring negligence and thereby defeat the employer's recovery of sums paid or payable to the injured worker. *See Essick v. Lexington*, 233 N.C. 600, 65 S.E. 2d 220 (1951); Larson's § 75.22. This rule is based on the proposition that a negligent party should not be allowed to take advantage of his own wrong. *Lovette v. Lloyd*, 236 N.C. 663, 73 S.E. 2d 886 (1953). In 1959, the General Assembly enacted what is now G.S. 97-10.2(e), codifying the rule in *Essick*. Although the North Carolina rule does not subject the employer to joint liability at common law or to actions for contribution brought by the negligent third party, it does require the employer to help pay for injuries caused by its negligence.

Generally, our courts still apply the law of the state of the plaintiff's injury, the *lex loci delicti*. *Henry v. Henry*, 291 N.C. 156, 229 S.E. 2d 158 (1976); *Suskin v. Hodges*, 216 N.C. 333, 4 S.E. 2d 891 (1939). We must take judicial notice of the law of our sister states. G.S. 8-4; *Thames v. Nello L. Teer Co.*, 267 N.C. 565, 148 S.E. 2d 527 (1966). We apply the law of other states, even when we are not precluded by the U.S. Constitution from applying our own law, under the doctrine of comity. *Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E. 2d 884 (1953). Comity will not be so extended where the *situs* rule is abhorrent to the public policy of our state, *Id.*, or where it would operate in opposition to settled statutory policy or override express statutory provisions of this state. *Bank v. Ramsey*, 252 N.C. 339, 113 S.E. 2d 723 (1960) and cases cited therein. Where we apply the law of sister states to a cause in our courts, North Carolina law is applied to procedural matters. *Young v. Railroad*, 266 N.C. 458, 146 S.E. 2d 441 (1966).

We hold that the court below erred in denying Stone & Webster's motion to strike defendants' last defense and in applying the North Carolina rule with regard to the rights of defendants *vis-a-vis* Stone & Webster's subrogation rights. Since the *situs* of decedent's injury was Virginia, Virginia substantive law will be applied to the issue before us. *Henry v. Henry, supra.* The rule with regard to whether a negligent third party tort-feasor may defeat an employer's right to recoup from it damages paid under a worker's compensation award is a rule of substantive, not procedural, law. *Cf. Charnock v. Taylor*, 223 N.C. 360, 26 S.E. 2d 911, 148 A.L.R. 1126 (1943) (*situs* state's rule not allowing contribution between joint tort-feasors is a substantive rule). Our public policy is not affected by applying the Virginia rule to the present case; the award paid out was paid from a fund collected from Virginia employers. The rights asserted are rights which arise under worker's compensation law and the only worker's compensation law involved in this case is that of Virginia. Decedent's employment was in Virginia and this state has no interest in how its sister states administer their laws intended to compensate their employees for injuries sustained in employment in those states. The only party to this lawsuit with sufficient North Carolina connections to create a policy-based preference for one of the two conflicting rules of law is the plaintiff, and her right to recover will not be affected by the choice as to which rule we ap-

ply. The North Carolina Worker's Compensation Act has no application to the circumstances that exist in the present case: the injury did not occur in this state, the employer's principal place of business is not in this state and the record does not show that the contract of employment was made in this state. *See* G.S. 97-36.

The Virginia rule applies: it gives defendants no right to defeat Stone & Webster's right to recoup monies paid or payable from defendants should plaintiff recover from them in this action. Since the trial court erred in denying Stone & Webster's motion to strike defendants' "Last Defense," the order of the trial court is

Reversed.

Judges VAUGHN and WHICHARD concur.

BILLY WYATT SCOTT v. WILLIAM L. KIKER, III

No. 8112SC1362

(Filed 16 November 1982)

1. **Husband and Wife § 28— criminal conversation—competency of husband to testify about ex-wife's adultery**

Since plaintiff's ex-wife was not a party to an action for criminal conversation and alienation of affections, nothing prohibited plaintiff from testifying about her adultery. G.S. 8-56.

2. **Appeal and Error § 24; Husband and Wife § 28— testimony concerning private conversation with ex-wife—failure of defendant to object**

Plaintiff's ex-wife could have prevented plaintiff from testifying about a private conversation under G.S. 8-56; however, defendant waived his privilege when he failed to object to the testimony. App. Rule 10(b)(1).

3. **Husband and Wife §§ 26, 29— alienation of affections and criminal conversation—instructions concerning damages**

Where a jury found both actual and punitive damages in an action for alienation of affections and criminal conversation, the trial judge's failure to instruct the jury that they must find actual damages before awarding punitive damages was not prejudicial error.

4. Husband and Wife §§ 26, 29— alienation of affections and criminal conversation —compensatory damages not based on pecuniary loss

In actions for criminal conversation and alienation of affections, compensatory damages need not be based on pecuniary loss; therefore, because plaintiff had a better paying job after his divorce did not necessarily diminish his suffering from losing his wife, and the trial court properly denied defendant's motion to set aside the award of damages.

5. Husband and Wife § 26— alienation of affections—instructions concerning malice and punitive damages proper

In an action for alienation of affections the trial judge's instructions concerning the need to find circumstances of aggravation in addition to the malice implied by law in order to award punitive damages were correct.

6. Husband and Wife § 29— criminal conversation—plaintiff's infidelity no effect on entitlement to damages

Infidelity, *per se*, does not prevent plaintiff from collecting damages for defendant's criminal conversation but is a factor to reduce plaintiff's damages.

7. Husband and Wife §§ 25, 28— alienation of affections and criminal conversation —sufficiency of evidence

In an action for alienation of affections and criminal conversation, the evidence was sufficient to withstand a motion for a directed verdict where plaintiff introduced evidence of the love and affection in his marriage which continued until defendant interfered by allowing plaintiff's wife to visit him every night, knowing that it would affect plaintiff's marriage.

8. Husband and Wife §§ 24.1, 28— alienation of affections and criminal conversation—spouse's consent not a defense

In neither alienation of affections nor criminal conversation is the consent of the wife a defense to recovery by the plaintiff of the damages which he had sustained as the result of the wrongful conduct of the defendant.

APPEAL by defendant from *Clark (Giles R.), Judge*. Judgment entered 19 May 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 23 September 1982.

This is an action for alienation of affections and criminal conversation. Plaintiff, who was married in 1957, met defendant when they were stationed in Korea. Plaintiff and defendant continued to be good friends after they were reassigned to Fort Bragg, North Carolina in 1977. Plaintiff testified that before he went to Korea, he had a close and loving relationship with his wife, and they had a healthy sex life until the spring of 1978.

In July 1978, plaintiff saw his wife's car parked in defendant's driveway. He looked through the window in the front door and did not see anyone. He became hysterical, broke the

window, and opened the door. He saw defendant, nude, run out of the bedroom, and he saw his wife getting dressed. According to plaintiff, defendant handed him a shotgun and said, "if you don't believe we're in love, shoot me." Plaintiff was going to shoot defendant, they started fighting, then defendant told plaintiff that the gun was not loaded. Plaintiff's wife went home with him. She told him that she had made a mistake, and she was sorry. Plaintiff forgave her.

The morning of 21 August 1978, plaintiff followed his wife to work. He saw his wife park her car next to defendant's car in the hospital parking lot. Defendant was in his car. Plaintiff tried to run his truck through defendant's car. Then he tried to kill defendant by attacking him with a baseball bat. He was arrested and put in jail. After that incident, plaintiff's wife visited defendant every night. Plaintiff and his wife started seeing a marriage counselor regularly. In October 1978, plaintiff's wife moved into an apartment. She returned home for one day in December and then moved into defendant's house. In March 1980, plaintiff and his wife were divorced, and she married defendant.

In January 1980, plaintiff got a job with a life insurance company. He earned about $16,000.00. He also received $15,500.00 in military retirement pay.

Plaintiff's ex-wife testified that plaintiff had a drinking problem ever since they were married. She said that plaintiff had not been interested in sex since he returned from Korea. After July 1978, plaintiff would keep her awake all night talking, and he would follow her to work all the time.

She testified that defendant's house was divided into two apartments. In December 1978, she moved into one of the apartments, while he lived in the other apartment. She paid him $250.00 per month rent. She did not have sex with him until they married.

Defendant testified that he did not kiss plaintiff's ex-wife until October 1978 when they began to talk about marriage. They did not have sex prior to their marriage.

The jury awarded plaintiff $25,000.00 actual damages and $25,000.00 punitive damages.

Reid, Lewis and Deese, by Marland C. Reid and Renny W. Deese, for plaintiff appellee.

Jack E. Carter, for defendant appellant.

VAUGHN, Judge.

Alienation of affections and criminal conversation are tort actions. Elements of an action for alienation of affections are: the marriage, the loss of affection, the wrongful and malicious conduct of defendant, and a causal connection between such loss and conduct. Criminal conversation is adultery. The cause of action is based on the violation of the fundamental right to exclusive sexual intercourse between spouses. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E. 2d 104 (1969).

[1] Defendant's first argument is that the trial court erred by allowing plaintiff to testify about his ex-wife's adultery, in violation of G.S. 8-56. We do not agree. According to G.S. 8-56, spouses are competent and compellable to testify as witnesses in civil actions, except "[n]othing herein shall render any husband or wife competent or compellable to give evidence *for or against the other* in any action or proceeding in consequence of adultery, or . . . criminal conversation. . . ." (Emphasis added.) Since plaintiff's ex-wife was not a party to the action, nothing prohibited plaintiff from testifying about her adultery. In *Powell v. Strickland*, 163 N.C. 393, 79 S.E. 872 (1913), the Supreme Court held that a husband was competent to testify as a witness in his own behalf to the adultery of his wife in an action for criminal conversation and alienation of affections. *Accord, Golding v. Taylor*, 23 N.C. App. 171, 208 S.E. 2d 422, *cert. denied*, 286 N.C. 334, 210 S.E. 2d 57 (1974).

[2] Defendant also contends that the trial court erred in allowing plaintiff to testify about a private conversation with his ex-wife. A spouse shall not "be compellable to disclose any confidential communication made by one to the other during their marriage." G.S. 8-56. The nonwitness spouse holds the privilege and may prevent the witness spouse from testifying about confidential communications. *Hicks v. Hicks*, 271 N.C. 204, 155 S.E. 2d 799 (1967). Defendant, however, waived his privilege because he failed to object to the testimony, and he cannot raise it on appeal. Rule 10(b)(1), Rules of Appellate Procedure.

[3] Defendant's second argument is that the trial court erred in failing to instruct the jury that they must find actual damages before awarding punitive damages. Since the causes of action of alienation of affections and criminal conversation were so intertwined, the court properly submitted only one issue of compensatory damages and one issue of punitive damages to the jury. *Sebastian v. Kluttz, supra.* Punitive damages may not be awarded unless compensatory damages are awarded. *Phillips v. Universal Underwriters Ins. Co.*, 43 N.C. App. 56, 257 S.E. 2d 671 (1979). Since the jury found both actual and punitive damages there was no error, even though the trial judge failed to instruct the jury that they must find actual damages before awarding punitive damages.

[4] Defendant's third argument is that the trial court erred by not allowing his motion to set aside the award of damages because plaintiff failed to show that he suffered any pecuniary loss since his income increased after his divorce. Defendant is mistaken in his belief that compensatory damages must be based on pecuniary loss. In determining compensatory damages, the jury may also consider the loss of consortium, humiliation, shame, mental anguish, loss of sexual relations, and the disgrace the tortious acts of defendant have brought. *See Powell v. Strickland, supra; Sebastian v. Kluttz, supra.* Merely because plaintiff had a better paying job after the divorce does not necessarily diminish his suffering from losing his wife.

[5] Defendant argues that the trial judge inferred to the jury that if they found the requisite malice for alienation of affections, they must find punitive damages. This is not true. To find punitive damages, plaintiff must show circumstances of aggravation in addition to the malice implied by law which was necessary to prove compensatory damages. *Heist v. Heist*, 46 N.C. App. 521, 265 S.E. 2d 434 (1980). The judge instructed the jury that to find alienation of affections, they must find either "adultery or that defendant acted maliciously. Malice is a disposition to do wrong without legal excuse." Punitive damages, the trial judge correctly instructed, "are not allowed as a matter of course, but they may be awarded only when there are some features of aggravation, as when the act is done wilfully and evidences a reckless and wanton disregard of plaintiff's rights."

[6] Defendant contends that since plaintiff admitted that he was unfaithful to his wife, he should not be entitled to damages for criminal conversation because the cause of action for criminal conversation is based on the violation of exclusive sexual intercourse between spouses. We do not agree. The impairment of plaintiff's relationship with his wife that was due to his infidelity was merely a factor to reduce his damages. The trial judge correctly instructed the jury: "If the marital relationship between . . . [plaintiff and his wife] was already strained or impaired, then the amount of damages should be reduced accordingly." Infidelity, *per se*, does not prevent plaintiff from collecting damages for defendant's criminal conversation. For example, in *Sebastian v. Kluttz, supra*, the evidence showed that plaintiff's husband was a heavy drinker and had been unfaithful. The Court held that the husband's past activity may have been a contributing factor to their separation, but defendant's conduct was the controlling and effective cause.

[7] Defendant's fourth argument is that the trial judge erred in failing to grant defendant's motion for nonsuit. G.S. 1-183 [repealed in 1967, effective 1 January 1970], provided for the motion for judgment as of nonsuit at the close of plaintiff's evidence. Today, we use a motion for directed verdict pursuant to G.S. 1A-1, Rule 50(a). When a motion for directed verdict is made at the close of plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to plaintiff, and giving plaintiff the benefit of every reasonable inference, was sufficient to withstand defendant's motion for directed verdict. *Sawyer v. Shackleford*, 8 N.C. App. 631, 175 S.E. 2d 305 (1970).

To sustain a cause of action for alienation of affections, plaintiff must show that: (1) he and his wife were happily married and a genuine love and affection existed between them; (2) the love and affection was alienated and destroyed; and (3) the wrongful and malicious acts of defendant produced the alienation of affection. *Heist v. Heist, supra.*

Plaintiff introduced ample evidence of the love and affection in his marriage which continued until defendant interfered by allowing plaintiff's wife to visit him every night, knowing that it would affect plaintiff's marriage. Defendant contends that plaintiff failed to prove that defendant attempted to lure plaintiff's

wife. Luring is not required. Defendant's wrongful conduct need only be the controlling or effective cause of the alienation. *Sebastian v. Kluttz, supra.* Direct proof is not required to show adultery in a criminal conversation action. *Powell v. Strickland, supra.* Clearly, there was sufficient circumstantial evidence of adultery to withstand a motion for directed verdict.

Defendant's fifth argument is that the trial court erred in admitting plaintiff's officer efficiency reports because they are hearsay. These documents, however, were offered to corroborate plaintiff's testimony, not as substantive evidence. Defendant should have requested a limiting instruction. Absent such request, failure to give a limiting instruction is not error. *State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 97 S.Ct. 2178, 53 L.Ed. 2d 226 (1977). *See* 1 Brandis on North Carolina Evidence § 52 (1982).

Defendant's next two arguments are based on his contention that the alienation of affections and criminal conversation causes of action should be abolished. These arguments were not addressed to the trial court and are not reviewable on appeal. Rule 10(a), Rules of Appellate Procedure.

[8] Defendant's last argument is that the court erred in failing to instruct the jury that consent of plaintiff's wife is a defense to criminal conversation and alienation of affections. This argument is wholly without merit. "In neither case [alienation of affections nor criminal conversation] is the consent of the wife a defense to a recovery by the plaintiff of the damages which he has sustained as the result of the wrongful conduct of the defendant." *Chestnut v. Sutton*, 207 N.C. 256, 257, 176 S.E. 743, 743 (1934).

We have carefully reviewed defendant's assignments of error and find no error.

No error.

Judges WEBB and WELLS concur.

DIANNE GREENE HARDEE v. EDDIE RAY HARDEE

No. 8119DC1417

(Filed 16 November 1982)

1. **Divorce and Alimony § 24.4— child support payments—inability to use possession of real estate prior to 18 June 1981**

The trial court erred in finding defendant in contempt of court for filing a petition for partition or sale of real property, which the plaintiff occupied under a 13 March 1981 order giving her possession of the real estate for support of the child born of plaintiff and defendant, since G.S. § 50-13.4(e) did not empower the courts with authority to award the possession of real property as a part of the support for a minor child until after 18 June 1981.

2. **Divorce and Alimony § 27— award of attorney's fees error**

Since the trial judge erred in holding the defendant in contempt for violation of an invalid order, the trial court also erred in awarding attorney's fees to plaintiff's attorney.

APPEAL by defendant from *Grant, Judge.* Order entered 3 September 1981 in District Court, CABARRUS County. Heard in Court of Appeals 14 October 1982.

The order appealed from was entered pursuant to various motions in the cause made by both plaintiff and defendant. After a hearing on the motions, Judge Grant made the following pertinent findings of fact:

. . .

5. That the plaintiff and the defendant were purportedly married to each other in York, South Carolina, on January 12, 1973; that there was one child born of the purported marriage of the parties hereto, namely, Christopher Ray Hardee, born May 29, 1974, in Duval County, Florida; that the purported marriage of the parties hereto was declared null and void from its inception by Judgment of this Court dated December 2, 1980; that there was no appeal from said Judgment.

6. That at the time of the entry of said Judgment of annulment, a Supplemental Order was entered in which the plaintiff, Dianne Greene Hardee, was awarded the primary care, custody and control of the minor child of the parties, namely, Christopher Ray Hardee; that the defendant was

ordered to pay support for the minor child and was awarded reasonable and liberal visitation privileges with his minor child.

7. That the plaintiff was awarded the exclusive possession of the home of the parties known as Route 4, Box 685-M, Kannapolis, Cabarrus County, North Carolina, for the continued support and maintenance of the minor child of the parties until the issue of occupancy of the property by the plaintiff and the minor child was reviewed by the Court for a final determination as to future occupancy of the property and what conditions, if any, should be attached to the possession thereto; that by Order of this Court dated March 13, 1981, the plaintiff, Dianne Greene Hardee, was awarded possession of the home of the parties until the minor child of the parties becomes emancipated, until the plaintiff remarries, or until the plaintiff and the defendant mutually agree to sell said property; that no appeals were made from either of the orders aforementioned.

8. That on this date, August 28, 1981, the plaintiff continues to have the primary care, custody and control of the minor child of the parties and the plaintiff continues to have possession of the home of the parties known as Route 4, Box 685-M, Kannapolis, Cabarrus County, North Carolina; that the minor child of the parties is not emancipated; that the plaintiff herein has not remarried; that the plaintiff and the defendant have not mutually agreed to sell said real property.

9. That on August 11, 1981, the defendant, Eddie Ray Hardee, caused to be filed in the General Court of Justice, Superior Court Division, Cabarrus County, North Carolina, a Petition and Complaint, before the Clerk, File No. 81SP243, entitled *"Eddie Ray Hardee, Plaintiff, vs. Dianne Greene Hardee and Farmers Home Administration, Defendants"* in which the plaintiff, Eddie Ray Hardee, seeks the partitioning or sale of the said real property of the parties known as Route 4, Box 685-M, Kannapolis, Cabarrus County, North Carolina.

. . .

12. That by Order of this Court dated March 13, 1981, the plaintiff was ordered that at no time shall any male

friend or person cohabit or reside with her in the home of the parties hereto, unless the plaintiff remarries; that the plaintiff is presently dating a male individual known as Bruce Bassinger, whose car has been observed at the home of the plaintiff on at least six occasions between the dates of July 4, 1981, and August 8, 1981, in the early morning hours between 2:00 and 11:30 a.m.; that the plaintiff and the male individual, Bruce Bassinger, are presently employed and working third shift between the hours of 11:00 p.m. and 7:30 a.m.; that the male individual, Bruce Bassinger, has only been observed by the defendant and defendant's father at the residence of the parties hereto while the defendant was exercising his visitation privileges and at no other time.

13. That the minor child of the parties has continued to reside with the plaintiff since the annulment of the purported marriage of the parties; that the minor child is a healthy, well-adapted youngster presently enrolled in the Cabarrus County School System and continues to receive the proper supervision and maintenance from the plaintiff; that the plaintiff is an able-bodied woman, gainfully employed, and is a fit and proper person to continue to have the primary care, custody and control of the minor child of the parties; that the present living conditions and circumstances of the minor child are fit and proper; and that it would be in the best interest of the minor child to be and remain in the primary care, custody and control of the plaintiff herein.

14. That there has been no change in circumstances since the entry of the Supplemental Order dated December 11, 1980, to warrant a modification of said Order placing the custody of the minor child with the defendant.

15. That the plaintiff is presently employed, however, her income is insufficient to support herself and the minor child of the parties and to defray the costs of this action; that Timothy M. Hawkins, attorney for the plaintiff, has provided valuable legal services to the plaintiff in bringing this contempt proceeding and in defending the plaintiff on the defendant's Motion that he be awarded custody of the minor child and that the plaintiff be held in contempt of the Order of this Court dated March 13, 1981; that the nature and scope

of the legal services rendered included numerous telephone conversations and office conferences with the plaintiff, preparation of the plaintiff's Motion and Order to Show Cause, conferences with the plaintiff concerning the defendant's Petition to partition the real property of the parties, the appearance of said counsel in representing the plaintiff in the litigation of this Motion, Order to Show Cause and the hearing of this matter and defendant's Motion that the plaintiff be held in contempt and previous orders of this Court be vacated and set aside and that the defendant be awarded custody of the minor child of the parties; that considerable time and skill were required in the preparation, hearing and defense of this action and that a partial attorney's fee of $500.00 payable to Timothy M. Hawkins is reasonable and consistent with the work and efforts involved; that the defendant, Eddie Ray Hardee, is a healthy, able-bodied man, gainfully employed and well able to pay the sum of $500.00 to Timothy M. Hawkins, attorney for the plaintiff, as partial attorney's fee in this matter.

16. That the defendant's filing of the Petition and Complaint before the Clerk, File No. 81SP243, General Court of Justice, Superior Court Division, Cabarrus County, North Carolina, is a willful and deliberate attempt to deny the plaintiff and the minor child possession of the home of the parties known as Route 4, Box 685-M, Kannapolis, Cabarrus County, North Carolina, and said conduct and action by the defendant are willful and deliberate and in contempt of the Order of this Court dated March 13, 1981.

17. That the plaintiff, Dianne Greene Hardee, is not in contempt of the Order of this Court dated March 13, 1981.

Based on these findings, the Court made the following conclusions of law:

1. That the plaintiff, Dianne Greene Hardee, is a fit and proper person to continue to have the primary care, custody and control of the minor child of the parties, namely, Christopher Ray Hardee, and that it would be in the best interest of said minor child to be and remain in the primary care, custody and control of the plaintiff herein.

2. That there has not been a sufficient change in circumstances to warrant a modification of the prior orders of this Court granting the primary custody of the minor child to the plaintiff.

3. That the plaintiff, Dianne Greene Hardee, is not in contempt of the Order of this Court dated March 13, 1981, in reference to her relationship and association with the male individual, namely, Bruce Bassinger, concerning alleged cohabitation.

4. That the defendant's filing of the Petition and Complaint, before the Clerk, File No. 81SP243, seeking to partition or sale [sic] the real property known as Route 4, Box 685-M, Kannapolis, North Carolina, is a willful and deliberate attempt on the part of the defendant to deny the plaintiff and the minor child possession of the home of the parties as awarded by Order of this Court dated March 13, 1981, and the defendant's conduct in filing said Petition and Complaint is willful and deliberate and in contempt of this Court.

5. That the income of the plaintiff is insufficient to support herself and the minor child and to defray the costs of this action; that Timothy M. Hawkins, attorney for the plaintiff, provided valuable assistance and services to the plaintiff in the preparation of the plaintiff's Motion and Order to Show Cause and in the defense of defendant's proceedings against the plaintiff and is therefore entitled to an award of $500.00 as partial attorney's fees in this matter; that the defendant, Eddie Ray Hardee, is a healthy, able-bodied man, gainfully employed and well able to pay said attorney's fee.

6. That the association and conduct of the plaintiff with the male individual, namely, Bruce Bassinger, to whom she is not married, is not a violation of the Order of March 13, 1981, and the plaintiff is not in contempt of said Order.

The Court denied defendant's motion to void the prior orders granting the plaintiff possession of the real property and custody of the child, as well as defendant's motion that plaintiff be adjudged in contempt for violating an order prohibiting plaintiff from cohabiting and residing in the parties' home with a male person to whom she is not married. The Court further denied defend-

ant's motions to declare the writ of possession a cloud upon title, to award defendant custody of the child and to dismiss plaintiff's motion. Finally, the Court held defendant in contempt for seeking a partition and sale of the real property owned jointly by plaintiff and defendant and ordered the defendant to pay $500.00 as partial attorney's fees to plaintiff's counsel.

Defendant appealed.

Koontz & Hawkins by Timothy M. Hawkins for the plaintiff, appellee.

Myers, Ray and Myers by Charles T. Myers for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant first contends in his Assignment of Error No. 1, based on Exception Nos. 4, 9 and 17, that the Court erred in finding him in contempt of court for filing a petition for partition or sale of the real property, which the plaintiff occupied under a 13 March 1981 order giving her possession of the real estate for support of the child born of plaintiff and defendant. The applicable statute in effect at the time the order was signed was G.S. § 50-13.4(e) which reads:

> Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of [sic] any interest therein, or a security interest in real property, as the court may order. In every case in which payment for the support of a minor child is ordered and alimony or alimony pendente lite is also ordered, the order shall separately state and identify each allowance.

Effective 18 June 1981, G.S. § 50-13.4(e) was amended to read in pertinent part:

> Payment for the support of a minor child shall be paid by lump sum payment, periodic payments, or by transfer of title or possession of personal property of [sic] any interest therein, or a security interest in *or possession of real property,* as the court may order. (Emphasis added.)

Thus, it is clear that on 13 March 1981 the Court lacked authority to award the possession of real property as a part of the support for the minor child. The amendment to G.S. § 50-13.4(e) did not affect the validity of any existing order or judgment and applied only to hearings and trials conducted after 18 June 1981. Since the trial Judge on 13 March 1981 lacked authority to award possession of the property to the wife for the support of the child, it also lacked authority to order that the defendant not attempt to dispose of the property except by mutual consent of the parties. Therefore, the Court had no authority to declare defendant in contempt of an order which it lacked authority to enter. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. 2d 724 (1962); *accord*, *Webb v. Webb*, 50 N.C. App. 677, 274 S.E. 2d 888 (1981); *Collins v. Collins*, 18 N.C. App. 45, 196 S.E. 2d 282 (1973). The order adjudging the defendant in contempt must be vacated.

Defendant next assigns error to the denial of his motions to alter or set aside the custody order upon the grounds of a change in condition. The findings and conclusions of the trial judge support his order denying the defendant's motion to alter or set aside the custody order and these findings and conclusions are amply supported by the record and the evidence.

The defendant also assigns as error the denial of his motion to hold the plaintiff in contempt. The evidence and record support the trial judge's order denying this motion.

[2] Defendant argues the Court erred in awarding attorney fees to plaintiff's attorney. Inasmuch as this proceeding was initiated by the plaintiff's motion to find the defendant in contempt for filing a petition to partition or sell the real estate owned by plaintiff and defendant and since the trial judge erred in holding the defendant in contempt for violation of an invalid order, we hold the trial court likewise erred in awarding attorney fees to plaintiff's attorney under the circumstances. The motions filed by defendant and denied by the Court were obviously defensive, and the plaintiff would not have incurred expenses for an attorney if she had not initiated the proceeding to find and hold defendant in contempt. The order awarding plaintiff's counsel a fee of $500 must be vacated.

The result is: the orders holding the defendant in contempt and awarding attorney fees to plaintiff's counsel are vacated; the orders denying the defendant's motions to alter or set aside the orders granting plaintiff custody of the child, to hold plaintiff in contempt of court, to declare the writ of possession a cloud upon title and to dismiss plaintiff's motions are affirmed.

Affirmed in part; vacated in part.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOHNNY J. JONES, SR.

No. 823SC376

(Filed 16 November 1982)

1. **Criminal Law § 138— Fair Sentencing Act—element of crime as aggravating circumstance—improper aggravating circumstance**

In imposing a sentence on defendant for attempting to burn a dwelling in violation of G.S. 14-67, the trial court improperly relied upon the same evidence to establish an element of the crime and an aggravating factor in violation of G.S. 15A-1340.4 where the court found as an aggravating factor that the residence was "the usual and customary dwelling house" of the owners. Furthermore, the trial court erred in finding as an aggravating factor that the owners were not at home when the crime was committed, since the fact that the residence was unoccupied at the time of the crime should be considered a mitigating factor.

2. **Criminal Law § 138— Fair Sentencing Act—element of dismissed charge as aggravating factor**

In imposing a sentence on defendant upon his plea of no contest to a charge of attempted burning of a dwelling in exchange for the State's dismissal of an arson charge against him, the trial court properly considered the fact that the house "was actually partially burned" as an aggravating factor, although such fact was an element of the original arson charge.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 18 November 1981, in Superior Court, CARTERET County. Heard in the Court of Appeals 18 October 1982.

Defendant was indicted on 19 October 1981 for the felonious burning of the inhabited dwelling house of Mr. and Mrs. Buddy Letchworth in Morehead City, a crime under G.S. 14-58. After

waiver of indictment, defendant agreed to be tried on an information alleging that he attempted to burn the dwelling house of the Letchworths, in violation of G.S. 14-67.

The State's evidence showed that a fire was discovered on the Letchworths' front porch near the front door on 22 July 1981. The front door area was charred.

Defendant, a next door neighbor of the Letchworths, was standing across the street from the house when the fire was discovered. His clothes smelled of a flammable liquid and a recent burn hole was found in his coat. State Bureau of Investigation laboratory results indicated that a mineral spirit similar to that which was the fire accelerant was found on defendant's coat.

Defendant entered a plea of no contest to the attempt charge in exchange for the State dismissing the arson charge. The trial court accepted his plea.

At the sentencing hearing, both sides presented evidence. In mitigation, defendant showed that he suffers from a form of epilepsy which can cause blackouts and erratic behavior. Following brain surgery in 1980 for an aneurysm, his personality and behavior changed drastically. The evidence showed that prior to the surgery, he had a good reputation among his employers in the community.

The State offered and defendant stipulated to a prior conviction for two counts of misdemeanor breaking and entering for which he received an active sentence. Those misdemeanors consisted of him walking into the Letchworth home uninvited and naked.

The State asked that the court find that the aggravating factors outweighed the mitigating ones and impose a six year term. The defense asked for the presumptive sentence of three years, but in no case, more than four or five years.

The trial judge found the following aggravating factors:

> [1.] Defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement . . .

[2.] The residence which was the subject of the burning was the usual and customary dwelling house of Mr. and Mrs. Buddy Letchworth.

[3.] They were not at home at the time of the alleged burning.

[4.] The house was actually partially burned.

He found two mitigating factors:

[1.] The defendant was suffering from a mental or physical condition which was insufficient to constitute a defense but significantly reduced the culpability for the offense. . . .

[2.] From and after neurosurgery for a cerebral aneurysm in February, 1980, the personality of the defendant substantially changed.

Concluding that the aggravating factors outweighed the mitigating ones, the trial judge sentenced defendant to the maximum of ten years. The defendant appealed to this Court.

Attorney General Edmisten, by Special Deputy Attorney General David S. Crump, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first attacks his sentence on the ground that the trial judge relied upon the same evidence to prove a fact in aggravation which was necessary to prove an element of the offense in violation of G.S. 15A-1340.4. We agree.

The offense that defendant pled no contest to was attempting to burn an uninhabited dwelling in violation of G.S. 14-67. Thus, that the structure was uninhabited and was a dwelling when defendant tried to burn it were two elements of the offense.

Aggravating factors listed by the court included that the residence was "the usual and customary dwelling house" of the Letchworths and that they were not home at the time of the alleged burning.

When the case was heard, the prosecutor alleged that the house was the Letchworths, and that it was unoccupied at the time of the offense. Although the court apparently thought that G.S. 14-67 uses the word "uninhabited" to mean "unoccupied," an examination of the record makes it clear that the trial court incorrectly relied on the same evidence to establish an element of the offense and an aggravating factor.

We also agree with the defendant that it was incorrect for the trial judge to find as an aggravating factor the fact that the Letchworths were not at home when the offense was committed. If anything, this should be considered a mitigating factor. In defining the degrees of arson, G.S. 14-58 distinguishes first degree from second degree in that the more serious offense occurs when the dwelling is occupied. Thus, the fact that the Letchworths' house was unoccupied when a G.S. 14-67 offense was committed should be considered a mitigating factor.

[2] Defendant's third attack is on the trial judge's consideration of the fact that the house "was actually partially burned." He contends that it was a violation of his substantive due process rights to consider this fact as aggravating since it is an element of arson, a charge that the State dropped against him in exchange for this plea bargain. It is also pointed out that the trial judge told defendant that his plea to the lesser offense was in lieu of all other charges. We find no error on this point.

First, the trial judge was not using a dismissed charge to aggravate the sentence. He was only considering a fact in evidence as allowed by the G.S. 15A-1340.4 guidelines. The statute provides that the trial judge may consider "any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are *reasonably related to the purposes of sentencing,* whether or not such aggravating or mitigating factors are set forth herein. . . ." (Emphasis added.) It was proper for the trial judge to consider that the house was actually burned as related to one purpose of the sentencing here, *i.e.,* to remove him from society and prevent similar acts by him.

Second, we find no violation of the spirit of plea bargaining here because the defendant was fully informed of the maximum sentence of ten years before he entered his plea.

Finally, we note that defendant benefited from the plea bargain even though he received the maximum sentence. If the State had proceeded on the original charge, the evidence tended to show second degree arson under G.S. 14-58, which is a Class D felony. The presumptive sentence for Class D felonies is twelve years. G.S. 15A-1340.4(f). The maximum sentence for Class D felonies is forty years imprisonment or a fine or both. G.S. 14-1.1(a)(4). Thus, the plea arrangement was defendant's best alternative.

We acknowledge that the trial judge at one point stated that "[a]ctually, you are looking at a first-degree arson case." While this comment was an incorrect conclusion, it alone does not require reversal absent a showing of prejudice by the defendant. *Kanoy v. Hinshaw*, 273 N.C. 418, 160 S.E. 2d 296 (1968).

Because of our holding that certain factors were improperly considered in the sentencing here, defendant's sentence is vacated and the case is remanded for a new sentencing.

The stated goals of the Fair Sentencing Act should guide trial judges in pronouncing sentence. G.S. 15A-1340.3 states those purposes as:

> to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

See also, Comment, *The North Carolina Fair Sentencing Act*, 60 N.C. L. Rev. 631 (1982).

Balancing the aggravating and mitigating factors is still a discretionary matter for the trial judge and "is not a simple matter of mathematics. . . . The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case." *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E. 2d 658, 661 (1982).

Sentence vacated. Remanded for sentencing only.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. JERRY MUSSELWHITE

No. 8216SC301

(Filed 16 November 1982)

1. **Criminal Law § 34.7— admissibility of prior threats and assaults—admissible to show intent**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in allowing the prosecuting witness to testify that defendant had threatened her with a knife and struck her with his hand on prior occasions since when a specific mental state is an essential element of the crime charged, evidence of commission of another offense is admissible to establish requisite mental state or intent.

2. **Assault and Battery § 14.5— assault with a deadly weapon with intent to kill inflicting serious bodily injury—sufficiency of evidence**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the evidence was sufficient on both the elements of "intent to kill" and "inflicting serious injury" where it tended to show that defendant had threatened the prosecuting witness previously; he and the prosecuting witness were arguing violently; he pulled a knife on her, threatening to cut off her head and cut her into pieces; he stabbed her twice in the arm; after arrest, he stated he wished he had cut her throat; and the cuts on the arm produced heavy bleeding and one cut required eight or nine stitches.

3. **Assault and Battery § 14.1— assault with a deadly weapon—sufficiency of evidence**

In a prosecution for assault with a deadly weapon, the evidence was sufficient to withstand defendant's motion to dismiss where defendant swung a knife at a detective and the knife missed the detective's stomach by approximately a foot.

4. **Assault and Battery § 15.2— failure to instruct on lesser offense of assault with deadly weapon proper**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court properly failed to instruct on the lesser offense of assault with a deadly weapon since the State's evidence regarding the victim's injuries was positive and uncontradicted.

APPEAL by defendant from *Britt, Judge.* Judgment entered 30 October 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 13 October 1982.

Defendant was convicted of (1) assault with a deadly weapon with intent to kill inflicting serious injury on his girlfriend, Sherill Vernon; and (2) assault with a deadly weapon on police detective P. H. Atkinson, who had come to the scene in response to a call about the domestic disturbance. From judgments imposing active prison sentences, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Robert D. Jacobson for defendant appellant.

BECTON, Judge.

The issues raised on appeal concern the trial court's evidentiary rulings; the trial court's denial of defendant's motions for nonsuit and dismissal; and the trial court's failure to instruct, in the case involving Sherill Vernon, on the lesser included offense of assault with a deadly weapon.

I

At trial, Sherill Vernon testified that she was defendant's girlfriend and that, on 28 August 1981, she and defendant had a violent argument while sitting in her car. Defendant was angry because Ms. Vernon had worked the previous night and had not had time to see him. He slapped her and, when she tried to get out of the car, he threatened to cut off her head. Defendant then pulled out his knife and told her that he was going to cut her into pieces and watch her die and that if he could not have her, no other man could either. During defendant's tirade, he asked Ms. Vernon to take him to the cemetery. Ms. Vernon told defendant that she would take him to the cemetery but asked first to go by the bank so she could make a deposit. Ms. Vernon drove to the bank, but instead of going to the bank she ran across the street to the fire station for help. Defendant ran after Ms. Vernon, caught her, and tried to get her back to the car. At this time, several police officers arrived, including plainclothes detective P. H. Atkinson, who began to talk to defendant, urging him to release Ms. Vernon. As Atkinson was talking, defendant took out his knife, which got caught in the sleeve of Ms. Vernon's shirt. Ms. Vernon testified:

He got it caught in the sleeve and he was trying to get it loose. He cut the sleeve completely out and went in my arm here and cut me here. He had a-hold of me at that time.

It's hard for me to remember. He had his arm around my neck and I was twisting and trying to get away from him. I know that he did hit me on the head several times and also hit me in the stomach before he cut me. He cut me on my left arm. . . . This required stitches. . . .

. . . [W]hen Officer Atkinson got to Jerry . . . Jerry turned me loose or else they grabbed him. . . . But anyway, Jerry turned around and I can remember him turning around and swinging toward Mr. Atkinson. He was swinging the knife.

Ms. Vernon was taken to the hospital emergency room where she received 8 or 9 stitches as a result of one of the cuts. The other cut was bandaged.

Ms. Vernon also testified that defendant had threatened her with a knife two days before the cutting incident, and had struck her with his hand two weeks prior to that incident.

Detective Atkinson and three other police officers corroborated Ms. Vernon's testimony about what happened at the fire station. Detective Atkinson and one other officer further testified that defendant told them after he was arrested that he should have cut Ms. Vernon's throat.

Defendant testified that he had an argument with Ms. Vernon, but that he had not threatened to kill her. He admitted slapping her, but did not remember pulling out the knife and stabbing her. Defendant denied telling the officers after the arrest that he should have cut Ms. Vernon's throat.

II

[1] Defendant first argues that it was error to permit Ms. Vernon to testify that he had threatened her with a knife and struck her with his hand on prior occasions. Although defendant correctly states the general rule on admissibility of evidence of other crimes, we reject his argument because the evidence objected to in this case falls into a well-recognized exception to the general rule. When a specific mental state is an essential element of the

crime charged, evidence of commission of another offense is admissible to establish requisite mental state or intent. The evidence of a threat with a knife two days earlier and a slap two weeks prior to the incident tended to show design or intent on the part of the defendant. *See State v. Lowry*, 231 N.C. 414, 57 S.E. 2d 479 (1950), in which evidence of a similar assault two months earlier on another party was held competent to show intent or design. Further, even if it were error to admit the testimony, defendant has failed to show that a different result might have occurred had the evidence not been admitted, and therefore, such error is not prejudicial.

III

Defendant made several motions challenging the sufficiency of the evidence against him. All were denied at trial. With respect to the charge of assault upon Sherill Vernon with a deadly weapon with intent to kill, inflicting serious injury, defendant maintains that the evidence was insufficient on the elements of "intent to kill" and "inflicting serious injury." With respect to the separate offense of assault with a deadly weapon on Detective Atkinson, defendant maintains that the evidence was insufficient to prove such an assault.

[2] The requisite "intent to kill" may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972). In this case, defendant had threatened Ms. Vernon previously; he and Ms. Vernon were arguing violently; he pulled a knife on her, threatening to cut off her head and cut her into pieces; he stabbed her twice in the arm; after arrest, he stated he wished he had cut her throat. Taken in the light most favorable to the State, the evidence supports a reasonable inference of defendant's intent to kill.

" '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." *State v. Rotenberry*, 54 N.C. App. 504, 511, 284 S.E. 2d 197, 201 (1981), *cert. denied* 305 N.C. 306, 290 S.E. 2d 705 (1982). In this

case, the heavy bleeding and the cut requiring 8 or 9 stitches were sufficient to send the case to the jury.

[3] With regard to the assault on Detective Atkinson, the evidence discloses that defendant, after cutting Sherill Vernon, swung the knife at Detective Atkinson. The knife missed the detective's stomach by approximately a foot. Because Detective Atkinson did not state that he was put in fear of the consequence of the attack, the defendant argues that the charge should have been dismissed. The common law offense of assault places emphasis on the intent or state of mind of the person accused. *State v. Roberts*, 270 N.C. 655, 658, 155 S.E. 2d 303, 305 (1967). Although our courts have said that a defendant may be prosecuted for assault upon a show of violence accompanied by reasonable apprehension of immediate bodily harm or injury on the part of the person assaulted, *Id.*, it is still not necessary that the victim be placed in fear in order to sustain a conviction for assault. All that is necessary to sustain a conviction for assault is evidence of an overt act showing an intentional offer by force and violence to do injury to another sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. *Id.*

For the foregoing reasons the trial court did not err in denying defendant's motions for nonsuit and dismissal.

IV

[4] Relying on his earlier argument that Ms. Vernon's injuries were not serious, defendant contends that the trial court erred by failing to instruct the jury that it could find defendant guilty of the lesser included offense of assault with a deadly weapon on Ms. Vernon. We summarily reject this argument. The State's evidence regarding the injuries was positive and uncontradicted. The evidence supported the submission of the charged offense to the jury. The following quote from *State v. Hall*, 305 N.C. 77, 84, 286 S.E. 2d 552, 556 (1982) is dispositive of this issue:

> A trial court must submit a defendant's guilt of a lesser included offense of the crime charged in the bill of indictment when and only when there is evidence to sustain a verdict of guilty of the lesser offense. . . . When the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element,

no instruction on a lesser included offense is required. [Citation omitted.]

For the foregoing reasons, in defendant's trial, we find

No error.

Chief Judge MORRIS and Judge JOHNSON concur.

DON JENKINS & SON FORD-MERCURY, INC. v. RUSSELL CATLETTE AND INEZ COTTEN CATLETTE

No. 8210DC35

(Filed 16 November 1982)

Uniform Commercial Code § 46— sale of repossessed car—commercial reasonableness

The evidence supported the trial court's determination that plaintiff creditor's sale of a repossessed car for $6,345.00 ($5,995.00 plus a trade-in appraised at $350.00) was commercially reasonable, although plaintiff had earlier listed the selling price of the repossessed car as $6,995.00, where there was testimony that the use of an overallowance for a trade-in is a well established trade practice, and where the resale price was 88% of the original sale price of the car. G.S. 25-9-504(3); G.S. 25-9-507(2).

APPEAL by defendants from *Barnette, Judge.* Judgment entered 25 August 1981 in District Court, WAKE County. Heard in the Court of Appeals 20 October 1982.

Defendants bought a 1979 Mercury Cougar from plaintiff on 2 October 1980 for $7,225.50. They made a down payment of $300 and executed a conditional sales contract for the balance of the purchase price.

When defendants became delinquent in their payments, plaintiff lawfully repossessed and sold the car. Notice was given to the defendants before the private sale occurred on 17 March 1981.

Upon sale of the repossessed car, plaintiff received $5,995 and a 1972 Ford with an appraised value of $350 as a trade-in. The trial court found this $6,345 total to be a reasonable selling price. Plaintiff had earlier listed the selling price of the repos-

sessed car as $6,995. The $650 difference between the earlier price and the actual selling price was termed a "Trade-In Adjustment-Overallowance" by plaintiff.

The trial court awarded plaintiff a deficiency judgment for $794.09 after demand on defendants for payment of that amount proved unsuccessful. That figure equals the loan payoff of $7,014.09 minus the actual selling price of $6,345 plus a sales commission of $125. From this judgment, the defendants appealed.

Akins, Mann, Pike & Mercer, by J. Jerome Hartzell, for plaintiff-appellee.

Howard & Morelock, by Fred M. Morelock, for defendant-appellants.

ARNOLD, Judge.

Defendants argue that the resale of the repossessed car in this case was not "commercially reasonable" as that term is defined in G.S. 25-9-504(3), and that the selling price should be $6,995, which would reduce the deficiency judgment against them.

G.S. 25-9-504(2) allows plaintiff, a secured party, to recover a deficiency from defendant debtors, when property subject to a security interest is repossessed and sold for less than the amount of the debt. But G.S. 25-9-504(3) requires that "every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable." The case *sub judice* turns on whether the sale by plaintiff of the repossessed car met this standard.

When a secured party seeks a deficiency judgment, it has the burden of "establishing compliance with the twin duties of reasonable notification and commercially reasonable disposition." *North Carolina National Bank v. Burnette*, 297 N.C. 524, 529, 256 S.E. 2d 388, 391 (1979). *Accord, ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976) and cases cited therein. The notice given to defendant here is not attacked as inadequate.

Although G.S. 25-9-504 does not define commercial reasonableness, G.S. 25-9-507(2) helps in the determination:

> The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.

G.S. 25-9-507(2) provides "guiding rules" in defining commercial reasonableness, *Hodges v. Norton*, 29 N.C. App. 193, 197, 223 S.E. 2d 848, 851 (1976), a concept that has been "notoriously difficult to define and . . . therefore . . . unevenly applied by courts and juries." *Burnette*, 297 N.C. at 530, 256 S.E. 2d at 391. But one commentator suggests that a flexible standard "is perhaps the only effective way of assuring that unfair practices do not go undetected." Comment, *The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral by Secured Creditors in North Carolina*, 15 Wake Forest L. Rev. 71, 87 (1979).

When deciding if a sale of repossessed collateral meets the statute the trier of fact must consider all of the elements of the sale together. *Allis-Chalmers Corp. v. Davis*, 37 N.C. App. 114, 245 S.E. 2d 566 (1978). An authority often quoted in interpreting the Uniform Commercial Code points to three factors to consider in deciding if the resale price was adequate: 1) price handbooks, 2) expert testimony about fair market value and 3) price received on a second resale. J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* § 26-11 (1972).

Although there is no evidence in the record here about price handbooks, the other two factors were considered. The plaintiff's employee testified that the use of overallowances in motor vehicle sales is "a well established trade practice" when a trade-in is used as partial payment of the vehicle being purchased as in this case. G.S. 25-9-507(2) cites selling "in conformity with reasonable commercial practices among dealers in the type of property sold" as commercially reasonable. Defendants did not refute this testimony.

The other factor to be noted is the $6,345 price for which plaintiff resold the repossessed car. This amount is not "a truly gross inadequacy in price," *Allis-Chalmers Corp.*, 37 N.C. App. at 118, 245 S.E. 2d at 570, that the statute prohibits. Although the ratio of the resale price to the original sale price is not determinative in these cases, we note that the ratio here was about 88 percent, a reasonable resale price given the lag of over five months between the original sale to defendants and the resale after repossession.

Defendants may be correct in asserting that the setting of the amount of overallowance by plaintiff is arbitrary. However, we find the overallowance in this case was commercially reasonable and thus, renders unnecessary the consideration of whether this practice violates G.S. 25-9-504(3).

The trial judge as the trier of fact found that the resale price was "a reasonable selling price at the time the car was sold." Given the fact that there was evidence to support this finding, it is conclusive on appeal even though the evidence might support a finding 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). 1 Strong's N.C. Index 3d *Appeal and Error* § 57.2 (1976).

Affirmed.

Judges HILL and JOHNSON concur.

MARGARET WALKER v. THOMAS J. WALKER

No. 8115DC1379

(Filed 16 November 1982)

Divorce and Alimony § 24.4— judgment ordering child support—not void upon temporary resumption of marital relationship

Temporary resumption of a marital relationship did not require the trial court to grant a motion, pursuant to G.S. 1A-1, Rule 60(b)(4), to have a previous judgment ordering payment of child support declared void. While courts have held that reconciliation voids alimony provisions, and that a separation agreement is terminated upon reconciliation as to the purposes for which

it remains executory, including child support payments, this principle has not been applied to void, as a matter of law, a *judgment* ordering payment of child support.

Judge MARTIN concurring in the result.

APPEAL by defendant from *Harris, Judge.* Order entered 18 August 1981 in District Court, ALAMANCE County. Heard in the Court of Appeals 24 September 1982.

Latham, Wood and Balog, by M. Blen Gee, Jr., for plaintiff appellee.

Tharrington, Smith & Hargrove, by J. Harold Tharrington and Carlyn G. Poole, for defendant appellant.

WHICHARD, Judge.

The principal issue is whether temporary resumption of the marital relationship requires the court to grant a motion, pursuant to G.S. 1A-1, Rule 60(b)(4), to have declared void a judgment ordering payment of child support. We hold it does not.

On 20 September 1977 plaintiff obtained a judgment against defendant which awarded custody of the parties' minor child to plaintiff and ordered defendant to pay child support. On 28 July 1981 plaintiff moved that defendant be required to show cause why he should not be punished as for contempt for his willful failure to comply with that judgment. On 11 August 1981 defendant moved, pursuant to G.S. 1A-1, Rule 60, "to relieve him from the . . . Judgment on the ground that [it] is void." The alleged basis for his assertion that the judgment is void was that after the judgment was entered he and plaintiff had continued to have sexual relations; and that they had temporarily reconciled, living in the family home as husband and wife, from the fall of 1979 through January 1980.

Plaintiff stipulated "that she engaged in periodic sexual relations with the defendant on December 1, 1979 up to January 29, 1980." Defendant offered evidence regarding the parties' sexual relations from December 1977 through April or May, 1980. Plaintiff, through counsel, informed the court that she denied having relations with defendant at some of the times to which he testified, but not at others.

The court found as facts that plaintiff and defendant had resumed sexual relations beginning in December 1977; had resided together and had sexual relations during late 1979 through 29 January 1980; had thereafter had sexual relations on two or more occasions, up to and including late April or early May, 1980; and since that time had lived separate and apart and had no further sexual relations. Defendant did not except to these findings, and their correctness thus is not before us for review. *Brown v. Board of Education*, 269 N.C. 667, 670, 153 S.E. 2d 335, 338 (1967). The court concluded as a matter of law that the 1977 judgment related, in relevant part, solely to child support, and that defendant's motion to have the judgment declared void should be denied. The hearing on the show cause order was continued.

Defendant appeals from the denial of his motion to have the 1977 judgment declared void. He contends the parties' periodic sexual relations and temporary reconciliation voided the 1977 judgment, and that the court therefore erred in refusing to relieve him from the judgment pursuant to G.S. 1A-1, Rule 60(b)(4), which provides: "[T]he court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (4) The judgment is void."

Sexual intercourse between a husband and wife after execution of a separation agreement voids the contract. *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978). (See *Pitts v. Pitts*, 54 N.C. App. 163, 282 S.E. 2d 488 (1981), for criticism of the *Murphy* rule.) Resumption of the marital relationship after an award of alimony *pendente lite* voids the award. *Hester v. Hester*, 239 N.C. 97, 79 S.E. 2d 248 (1953); *Pennington v. Pennington*, 42 N.C. App. 83, 255 S.E. 2d 569 (1979). Resumption of the marital relationship likewise voids an award of permanent alimony. *O'Hara v. O'Hara*, 46 N.C. App. 819, 266 S.E. 2d 59 (1980).

A "*separation agreement* is terminated for *every purpose*, in so far as it remains executory," when the parties resume the marital relationship. *Moore v. Moore*, 185 N.C. 332, 334, 117 S.E. 12 (1923) (emphasis supplied). *Accord, Tilley v. Tilley*, 268 N.C. 630, 633-34, 151 S.E. 2d 592, 594 (1966); *Jones v. Lewis*, 243 N.C. 259, 261, 90 S.E. 2d 547, 549 (1955); *Newton v. Williams*, 25 N.C. App. 527, 531, 214 S.E. 2d 285, 287 (1975). Among the executory purposes for which a separation agreement is terminated is the

payment of child support. *See Campbell v. Campbell*, 234 N.C. 188, 191, 66 S.E. 2d 672, 674 (1951) (suit to collect child support cannot be based on promise in separation agreement because "[t]hat agreement has been without legal efficacy since [the day] . . . the plaintiff and the defendant resumed their marital relation"). *See also Potts v. Potts*, 24 N.C. App. 673, 674, 211 S.E. 2d 815, 816 (1975) (dicta that "a separation agreement *or a consent judgment*" normally "incorporates provisions for periodic . . . child support [payments], which by their very nature remain executory from period to period and may be abrogated upon reconciliation") (emphasis supplied).

Authority in other jurisdictions is sparse, and in the main does not distinguish between child support and alimony provisions, whether contractually or judicially imposed, for the purpose of determining the effect thereon of reconciliation of the parties. *See Boyd v. Boyd*, 188 Ill. App. 136, 140 (1914) (reconciliation renders ineffective a separation agreement, "at least in so far as it attempts to relieve the husband from the maintenance and support of his wife and children"); *Rutter v. Rutter*, 24 Ohio Misc. 7, 261 N.E. 2d 202 (1970) (dicta that language of statute allowing parties to make agreement regarding spouse and child support "may be revoked by the parties . . . by resuming marital relations"); *Barnes v. American Fertilizer Co.*, 144 Va. 692, 723, 130 S.E. 902, 911-12 (1925) ("whether the wife and children have forfeited their rights under the agreement" by resumption of the marital relationship depends upon the parties' intentions). *See, contra*, Ga. Code Ann. § 19-6-12 (1982) ("The subsequent voluntary cohabitation of spouses . . . shall annul . . . all provision made either by deed or decree for permanent alimony; provided, however, that the rights of children under any deed of separation or voluntary provision or decree . . . shall not be affected by such subsequent voluntary cohabitation of the spouses.").

While our Courts have held that reconciliation voids alimony provisions, whether in a separation agreement or a court order (*e.g., Murphy, Hester*, and *O'Hara, supra*), and that a separation agreement is terminated upon reconciliation as to purposes for which it remains executory, including child support payments (*e.g. Campbell, supra*), this principle has not been applied to void, as a matter of law, a *judgment* ordering payment of child support. This Court noted in *Jackson v. Jackson*, 14 N.C. App. 71, 74, 187

S.E. 2d 490, 493 (1972): "If, after the order . . . there was a reconciliation and the wife and . . . children resumed the family group and lived together with the defendant-husband, the necessity for the [child] support payments . . . ceased." The Court further noted, however:

> If thereafter there was a subsequent separation and need for [child] support payments . . ., the courts are open for whatever relief may be justified by the situation then existing. The original cause was at all times pending, and upon a proper motion and evidence to sustain same, an order could be entered granting whatever relief might be justified by the situation then existing.

Jackson, 14 N.C. App. at 74-75, 187 S.E. 2d at 493.

Here, as in *Jackson*, the pendency of the cause was not affected by the parties' periodic sexual relations or by their temporary reconciliation. The judgment in the cause was and is subject to modification or vacation at any time upon motion by either party and a showing of changed circumstances. G.S. 50-13.7(a). Defendant thus may, upon a proper showing, be entitled to relief from those payments which, under the judgment, fell due during the period of reconciliation. Neither the resumption of periodic sexual relations nor the temporary reconciliation of the parties necessarily affected the need for child support, however; and we decline to hold that either, standing alone and under the circumstances of continuing family instability presented here, required the court as a matter of law to grant the motion to declare the entire judgment void.

Defendant also contends the court erred in consolidating his action for absolute divorce, which was filed in Wake County, with this Alamance County action for child custody and support. Because defendant has entered a voluntary dismissal in his Wake County divorce action, the issue is moot; and we thus do not consider it. *See In re Peoples*, 296 N.C. 109, 147-48, 250 S.E. 2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed. 2d 297 (1979); *Kendrick v. Cain*, 272 N.C. 719, 722, 159 S.E. 2d 33, 35 (1968); 1 *Strong's North Carolina Index 3d*, Appeal and Error, § 9 ("An appellate court will not hear and decide a moot question, or one which has become moot.").

Affirmed.

Judge ARNOLD concurs.

Judge MARTIN (Robert M.) concurs in the result.

Judge MARTIN (Robert M.) concurring in the result.

I am of the opinion that *Jackson v. Jackson*, 14 N.C. App. 71, 187 S.E. 2d 490 (1972), is sufficient authority to justify the trial court's denial of defendant's Rule 60(b)(4) motion and I therefore concur in the result.

STATE OF NORTH CAROLINA v. DARRYL WASHINGTON

No. 8226SC358

(Filed 16 November 1982)

1. **Criminal Law § 91— Speedy Trial Act—dismissal of charge without prejudice—failure to make pertinent findings—no abuse of discretion**

The trial court did not abuse its discretion in ordering the dismissal of a robbery charge against defendant without prejudice for the State's failure to comply with the Speedy Trial Act although the court failed to include in its order findings as to the factors set forth in G.S. 15A-703(a) for use by the court in determining whether a dismissal should be with or without prejudice.

2. **Criminal Law §§ 76.10, 178— two confessions—prior appellate decision—law of the case**

Where defendant in another robbery case made a motion to suppress confessions to the robbery in that case and the robbery in the present case and asserted the same grounds in support of his motion with respect to each confession, the Court of Appeals decision finding that the motion was properly denied as to the confession used in the prior case became the law of the case as to the confession used in the present case.

3. **Constitutional Law § 65— right to confront witnesses not violated**

An officer's testimony that before he interrogated defendant he had talked with defendant's alleged accomplice, who was not present at defendant's trial, did not violate defendant's constitutional right to confront the witnesses against him where the substance of anything the accomplice might have said was not before the jury.

State v. Washington

APPEAL by defendant from *Morgan, Judge.* Judgment entered 7 October 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 October 1982.

Defendant, Darryl Washington, was indicted for the robbery, with a firearm, of a Taco Bell restaurant. The offense was allegedly accomplished with the aid of an accomplice, Charles Grier, who was neither tried with defendant nor a witness against him. Defendant moved to suppress inculpatory statements made to police investigators during an in-custody interrogation. Judge Snepp heard and denied defendant's motion to suppress, and his statements were offered against him at trial. Defendant next made a motion for a dismissal with prejudice, on the grounds of post-indictment delay, pursuant to N.C.G.S. 15A-701 *et seq.*—the Speedy Trial Act. Judge Johnson heard this motion and granted a dismissal without prejudice. Judge Johnson's order was based on findings that 212 days had elapsed since the indictment; that 90 of those days were excludable under the Act; that, therefore, a total of 122 days had elapsed, entitling defendant to a dismissal; and that, for good cause shown, the dismissal was without prejudice and the State was free to seek a new indictment against defendant. Thereafter, defendant was re-indicted and tried for robbery with a firearm. The jury returned a verdict of guilty and Judge Morgan, the trial judge, entered judgment on the verdict, committing defendant to an active sentence of imprisonment. Defendant appealed from that judgment.

Attorney General Rufus L. Edmisten by Assistant Attorney General Francis W. Crawley, for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender Marc D. Towler, for defendant.

WELLS, Judge.

[1] By his first assignment of error, defendant contends that Judge Johnson erred in granting defendant a dismissal without prejudice for the State's failure to comply with the Speedy Trial Act because he failed to establish in the record that he had considered the factors set out by the legislature as those the court must consider in deciding whether to dismiss a case with or without prejudice. G.S. 15A-703(a) provides, in part:

> In determining whether to order the charge's dismissal with or without prejudice, the court shall consider, among other matters, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; the impact of a reprosecution on the administration of this Article and on the administration of justice.

In *State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981) this court made observations "for the guidance of the bench and bar" which included the following:

> The Statute . . . leaves in the discretion of the trial court the determination of whether dismissal should be with or without prejudice. It *mandates*, however, that the court consider *each* of the factors set forth in making that determination. Thus, failure to establish in the record that the court has considered each of these factors, and to establish its conclusions with regard to each, may leave the reviewing court no choice but to find an abuse of discretion. . . . We . . . suggest that trial courts detail for the record findings of fact and conclusions therefrom demonstrating compliance with the mandate of G.S. 15A-703 that the factors set forth therein be considered in determining whether motions to dismiss for noncompliance with the Speedy Trial Act should be granted with or without prejudice.

The face of Judge Johnson's order, granting defendant's motion to dismiss for lack of a speedy trial, does not contain any of the findings or conclusions suggested by us in *Moore, supra.* While we endorse the suggestions made in *Moore*, we note that Judge Johnson's order in this case was entered on 30 June 1981, less than four months after our opinion in *Moore* was filed, and we assume, therefore, that it is entirely possible that at the time he entered his order, Judge Johnson had not had the benefit of our advice in *Moore.* Judge Johnson, an able and experienced trial judge, in order to rule on defendant's motion, would necessarily have been familiar with the nature of the case and the implication of his order. Under these circumstances, we are unwilling to find an abuse of discretion and this assignment of error is overruled.

[2] By his second assignment of error, defendant contends that Judge Snepp erred in denying his motion to suppress his in-custo-

dy statement. Defendant's motion to suppress was based on his contentions that he did not freely and voluntarily waive his *Miranda* rights and that the statement was coerced by threats and promises of the investigating officers. The court below rejected these contentions of defendant and refused to suppress defendant's statement upon finding that defendant freely and voluntarily waived his *Miranda* rights and made the statement without threats or coercion. In *State v. Washington*, 57 N.C. App. 309, 291 S.E. 2d 270 (1982), this Court reviewed Judge Snepp's order denying defendant's motion to suppress another statement made by defendant at the same time he made the statement used against him in the present case. Defendant made one motion to have both statements suppressed and asserted the same grounds in support of his motion with regard to each confession. This Court, in *Washington, supra*, held that the findings of fact made by the court below were supported by competent evidence and that defendant's motion was properly denied. Our decision on this point in *Washington* is the law of the case, *see State v. Wright*, 275 N.C. 242, 166 S.E. 2d 681, *cert. denied* 396 U.S. 934, 90 S.Ct. 275, 24 L.Ed. 2d 232 (1969), and is binding upon us in this case. This assignment of error is overruled.

[3] By his third assignment of error, defendant contends that the trial court erred in permitting Officer Mitchell, the State's witness who interrogated defendant, to testify to the fact that before he interrogated defendant he had talked to Charles Grier, defendant's alleged accomplice. Defendant maintains that by allowing this evidence, when Grier was not present at defendant's trial, the trial court violated defendant's constitutional right to confront witnesses against him. This argument is without merit and defendant's third assignment of error must be overruled. A defendant's right to confront his accusers and witnesses against him is guaranteed by Art. I § 23 of the Constitution of North Carolina. Grier was neither an accuser of nor a witness offering evidence tending to inculpate defendant. *Cf. State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981). The substance of anything Grier might have said was not before the jury. This assignment of error is overruled.

Defendant received a fair trial, free of prejudicial error. We find

No error.

Judges VAUGHN and WHICHARD concur.

PEGGY S. RICHARDSON v. THE CAROLINA BANK, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN P. RICHARDSON

No. 8120SC1341

(Filed 16 November 1982)

Quasi Contracts and Restitution § 5— unjust enrichment—sufficient evidence to support equitable lien on former husband's property

The trial court erred in granting defendant's motion to dismiss since plaintiff's complaint set forth a cause of action for unjust enrichment where the evidence tended to show that plaintiff and decedent had been married, divorced, later resumed living together but did not marry, and bought a tract of land, in which title was in deceased's name only, but to which plaintiff contributed $20,606.15 of her own funds.

APPEAL by plaintiff from *Lane, Judge.* Judgment entered 24 August 1981 in Superior Court, MOORE County. Heard in the Court of Appeals 22 September 1982.

Plaintiff and John P. Richardson were married on 24 February 1962 and later divorced. After the divorce plaintiff and Richardson resumed living together, but did not remarry. They moved to Moore County, North Carolina, in October 1972 and Richardson bought a tract of land on which plaintiff and Richardson began building a home in 1979. Title to the property was in Richardson's name only. Plaintiff alleged in her complaint that she contributed $20,606.15 of her own funds to the cost of improvements to Richardson's land. When Richardson died, the Moore County property was included among Richardson's estate, and defendant, the personal representative of Richardson's estate, refused to reimburse plaintiff for her contribution to improvements on Richardson's property. Plaintiff brought this action for reimbursement of those funds under the theory of unjust enrichment.

The complaint was filed on 21 October 1980 and on 11 August 1980 plaintiff filed a motion to amend the complaint to include a

prayer for imposition of a constructive trust. On 6 October 1981 the trial court granted defendant's motion to dismiss plaintiff's complaint because of failure to state a claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. The trial court also denied plaintiff's motion to amend the complaint.

Pollock, Fullenwider, Cunningham & Patterson, by Bruce T. Cunningham, Jr., for plaintiff-appellant.

Van Camp, Gill & Crumpler, by James R. Van Camp, for defendant-appellee.

MARTIN (Robert M.), Judge.

This appeal presents two questions, the most important question being whether the trial court erred in granting defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We hold that the trial court erred in granting defendant's Rule 12(b)(6) motion, since plaintiff's complaint sets forth a cause of action for unjust enrichment.

The facts in this case are similar to those in *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965). In that case the husband and wife placed improvements on land titled in the husband's name only. The husband agreed that he would add the wife's name to the deed if she would contribute one-half of the cost of the improvements. The wife paid one-half the costs of the improvements and then asked that the property be titled in both their names, but the husband refused to change the deed. The parties separated in 1959 at which time the wife brought an action to impose a resulting or constructive trust, or in the alternative, to recover her contributions to the cost of the improvements.

Justice Sharp (later Chief Justice), speaking for the Court, found the theories of resulting trusts and constructive trusts inapplicable to that fact situation, since the wife's funds had not been used by the husband to acquire title to realty. *Id.* at 22, 140 S.E. 2d at 711. Instead, the court found the wife's evidence sufficient to establish an equitable lien. In describing this remedy it stated "An equitable lien, or encumbrance, is not an estate in land, nor is it a right which, in itself, may be the basis of a possessory action. It is simply a charge upon the property, which charge subjects the property to the payment of the debt of the creditor in whose favor the charge exists." *Id.* at 24, 140 S.E. 2d at 712.

The court further stated that the remedy "results only where there are factors invoking equity, here the confidential relationship." *Id.* at 25, 140 S.E. 2d at 713. While, in the present case, the plaintiff and Richardson were not husband and wife at the time plaintiff contributed to the cost of improvements placed on Richardson's land, we feel that their relationship was so similar to the confidential relationship found in *Fulp* that we are compelled to invoke the equitable lien doctrine.

In another similar case where husband and wife had divorced, the husband sought to recover the value of improvements he had made to the wife's property during the marriage. *Parslow v. Parslow*, 47 N.C. App. 84, 266 S.E. 2d 746 (1980). The facts did not disclose any express or implied communication on the part of the wife indicating she was willing to add her husband's name to the record of title. The Court of Appeals held that where the plaintiff possessed a good faith belief that plaintiff owned or would own an interest in the value of the improvements made by plaintiff on defendant's property and the improvements inured to defendant's benefit, plaintiff had a claim sufficient to support an equitable lien under the unjust enrichment doctrine. "No contract, oral or written, enforceable or not, is necessary to support a recovery based upon unjust enrichment." *Id.* at 88-89, 266 S.E. 2d at 749.

We hold that plaintiff's action should not have been dismissed, as the complaint contained enough information to set out a cause of action for unjust enrichment. Plaintiff should be allowed to prove, as in *Parslow*, that she possessed a good faith belief that she owned or would own an interest in the value of the improvements made by plaintiff to defendant's property.

Since we hold that the theory of constructive trusts is not applicable to these facts, we find no prejudicial error in the trial court's denial of plaintiff's motion to amend her complaint to include a prayer for imposition of a constructive trust.

With respect to the plaintiff's appeal from the judgment dismissing the complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), we hold that the judgment of the trial court was in error. The judgment is therefore

Reversed and remanded.

Judges ARNOLD and WHICHARD concur.

GODWIN SPRAYERS, INC. v. UTICA MUTUAL INSURANCE CO.

No. 8211DC7

(Filed 16 November 1982)

Insurance § 147— aircraft insurance—exclusion of coverage for property which insured "has charge of"—genuine issue of material fact

A genuine issue of material fact was presented as to whether plaintiff "had charge of" a United States Department of Agriculture plane which was damaged by plaintiff's agent so as to come within a provision of an aircraft liability policy issued to plaintiff excluding coverage for damage to property which the insured "has charge of."

APPEAL by plaintiff from *Pridgen, Judge.* Judgment entered on 12 October 1981 in District Court, HARNETT County. Heard in the Court of Appeals 18 October 1982.

This case results from an accident on 17 June 1980 in which plaintiff's agent Raymond Godwin drove plaintiff's plane into a plane owned by the United States Department of Agriculture and parked at plaintiff's airstrip. Godwin was hired in June, 1980 by the USDA to pilot its plane in connection with a sterile boll weevil release program. The USDA plane was kept at plaintiff's airstrip at the request of Dr. Robert G. Jones, supervisor of the release program, because of the poor condition of the USDA airstrip.

Evidence offered in support of summary judgment motions by both parties showed that Godwin would fly the USDA plane to the USDA airstrip, which was seven miles from plaintiff's airstrip, whenever Jones wanted to perform an experiment. Although Jones did not know how to fly an airplane, he was Godwin's supervisor. After an experiment was completed, Godwin would let Jones out at the USDA airstrip and return to plaintiff's airstrip, where he would land and tie down the plane. Keys to the USDA plane and a USDA credit card for fuel remained at plaintiff's airstrip.

After the 17 June accident, plaintiff paid for the repair of the USDA plane. The defendant later refused to reimburse plaintiff for the damages under its aircraft liability policy based on the policy provision stating "We do not cover any . . . property damage to property you or anyone we protect owns, has charge of or transports." Defendant contends that plaintiff "had charge" of the USDA plane and thus, refused to reimburse plaintiff under the policy.

From a denial of its summary judgment motion and a grant of summary judgment for the defendant, plaintiff appealed.

Lytch & Thompson, by Benjamin N. Thompson, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Keith A. Clinard, for defendant appellee.

ARNOLD, Judge.

Summary judgment under G.S. 1A-1, Rule 56(c) is proper when there is "no genuine issue as to any material fact . . . ." It is a "drastic remedy . . . [that] must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). This remedy "does not authorize the court to *decide* an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists." *Vassey v. Burch*, 301 N.C. 68, 72, 269 S.E. 2d 137, 140 (1980). (Emphasis in original.) Summary judgment should be denied "[i]f different material conclusions can be drawn from the evidence." *Spector Credit Union v. Smith*, 45 N.C. App. 432, 437, 263 S.E. 2d 319, 322 (1980).

In *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *reh. denied*, 281 N.C. 516 (1972), the court defined two terms that are determinative on a summary judgment question.

> An issue is *material* if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is

> denominated "*genuine*" if it may be maintained by substantial evidence.

280 N.C. at 518, 186 S.E. 2d at 901 (emphasis added). In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." 2 McIntosh, N.C. Practice and Procedure § 1660.5 (2d Ed., Phillips Supp. 1970). *See also,* W. Shuford, N.C. Civil Practice and Procedure § 56-7 (2d Ed. 1981).

Our examination of the record and briefs leads us to conclude that summary judgment was improperly granted here. The issue of fact that must be resolved is whether plaintiff's actions, and those of its agent Godwin, put it "in charge of" the USDA plane. We cannot say as a matter of law that the issue is clear. The task of an appellate court in ruling on a summary judgment motion is only to see if the issue of fact exists, not to determine the resolution of the issue.

But we do note some principles that the trial court on remand should consider. According to our case law, if terms in an insurance policy are "uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder." *Woods v. Nationwide Mutual Insurance Co.*, 295 N.C. 500, 506, 246 S.E. 2d 773, 777 (1978). *See also,* 7 Strong's N.C. Index 3d *Insurance* § 6.2 (1977).

In cases like this one, if an insured shows that his loss is apparently covered by the policy, "the burden is [then] upon the insurer to prove that the loss arose from a cause of loss which is excepted or for which it is not liable. . . ." *Flintall v. Insurance Co.*, 259 N.C. 666, 670, 131 S.E. 2d 312, 315 (1963). *See also,* 44 Am. Jur. 2d *Insurance* § 1938 (1982).

Research has not revealed cases in North Carolina that interpret the policy clause before us. However, other courts have dealt with similar clauses with varying results. *See generally,* Annot., 86 A.L.R. 3d 118 (1978). 12 Couch on Insurance 2d § 44A:15 and 21 (Rev. ed. 1981). *Compare Fish v. Nationwide Mutual Insurance Co.*, 126 Vt. 487, 236 A. 2d 648 (1967) (held covered since insured not "in charge" of damaged property because he did not have the right to exercise dominion and control over it) *with Columbia*

Helicopters, Inc. v. Transport Indemnity Co., 428 F. 2d 1385 (9th Cir. 1970) (held no coverage because "in charge of" exclusion refers to physical possession with mechanical control which insured had in the case).

Reversed and remanded.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. DENNIS J. ROUSE

No. 828SC207

(Filed 16 November 1982)

1. **Criminal Law § 88.4— cross-examination of defendant—proper**

The trial court did not err in allowing the State to question defendant on cross-examination about a stocking cap and paper bag found in his car and to ask him if he had been in the area of a First Citizens Bank the afternoon prior to his arrest since the State was bound by defendant's answers, the control of cross-examination must be left largely to the discretion of the trial judge, and since the questions were proper.

2. **Larceny § 8.1— instructions concerning right to possess item allegedly stolen**

In a prosecution for felonious breaking or entering and felonious larceny among other crimes, the trial judge's instruction to the jury that to convict defendant, they must find that defendant took the pistol without the prosecuting witness's consent and that at the time of the taking, defendant knew he was not entitled to take it, were complete and correct.

3. **Criminal Law § 112— failure to instruct on presumption of innocence—no prejudicial error**

The trial judge's failure to instruct the jury on the presumption of innocence was not prejudicial error where the judge's instruction on the State's duty to prove the defendant's guilt beyond a reasonable doubt made it clear that the defendant was presumed innocent until the State proved otherwise, and where in his remarks to the jury before it was empaneled, the judge said that defendant "is presumed to be innocent."

4. **Larceny § 1; Receiving Stolen Goods § 1— improper to impose sentence for larceny and possession of same property**

Since a defendant cannot be sentenced for both larceny and possession of the same property, where defendant was charged with felonious breaking or entering, felonious larceny, felonious receipt of stolen property and felonious possession of stolen property, and the trial judge consolidated the breaking

and entering case with the larceny case for sentencing and imposed a separate sentence in the possession case, the case must be remanded for the judge to enter sentence on the breaking and entering and either the larceny or possession case.

APPEAL by defendant from *Bruce, Judge.* Judgments entered 6 November 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 21 September 1982.

Defendant was charged with felonious breaking or entering, felonious larceny, felonious receipt of stolen property and felonious possession of stolen property.

The State's evidence tended to show the following. Christopher Tinney testified he knew defendant because they both worked at the Caswell Center. On 5 August 1981, defendant visited Tinney at his trailer. Tinney testified about the conversation that took place when he showed defendant his pistol:

> The pistol was there underneath some papers and I showed it to him and I told him my father gave it to me for protection because my wife was pregnant and because I live in the country and no houses around there, or anything else, and he said it was nice; that he would like to borrow it sometime to get something. . . . Some money.

Tinney did not lend defendant his pistol. He left it at home under the stack of papers when he went to work the following day. At work, defendant asked Tinney if he could borrow his car to go to the bank to get a loan. He told Tinney that he would be back at 3:00. Defendant returned at 5:00, and they went to the bank together. Then they went to Tinney's trailer. Defendant mentioned that the window in the back door was broken. Tinney looked around the trailer and found that the only thing missing was his pistol. Nothing else in the trailer had been disturbed. Defendant was the only person who knew where the pistol was hidden, other than members of Tinney's family. Tinney said that he did not give defendant permission to take his pistol.

Detective Honeycutt arrived to investigate the burglary. After making his investigation at the scene, he drove down the street and saw defendant on the side of the road. He asked defendant to get in the car, and advised him of his rights. Defendant told him that he did not know about the break-in, and did not

know that Tinney's pistol was missing. Then Honeycutt took defendant to the sheriff's office for fingerprinting.

Deputy Sheriff Garris testified that on 11 August 1981, as a result of information received over the police radio, he followed defendant, stopped him, and asked to see his driver's license. Garris placed defendant under arrest because he did not have a valid license. Defendant fought with Garris and the other officers, but they handcuffed him after a few minutes. Tinney's pistol was found in defendant's sock. The gun was loaded. Detective Honeycutt said that when asked about the pistol, defendant said he won it from Tinney in a card game.

Defendant testified that the first time he saw the pistol was when Tinney brought it to his house and offered it to him as collateral for a loan. Defendant loaned Tinney one hundred dollars, and Tinney gave him the pistol. Defendant said he kept it in his girl friend's car. He said that when he was arrested, he was not asked about the pistol. On cross-examination, he was asked about a stocking cap and paper bag that were found in his possession at the time of his arrest. He said that he wore the stocking cap when he played basketball. He said the paper bag was for his lunch.

Defendant was found guilty of felonious breaking or entering and felonious larceny. He was sentenced to three years and fined $500.00. He was also found guilty of felonious possession of stolen property and sentenced to five years, to run at the expiration of the three years' sentence.

Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

Assistant Appellate Defender James H. Gold, for defendant appellant.

VAUGHN, Judge.

[1] Defendant argues it was error to allow the State to ask him about the stocking cap and paper bag that were found in his car when he was found with the loaded pistol concealed in his sock. He identified the cap as being his and said the bag was similar to the one he used to carry his lunch. He also argues it was error to allow the State to ask him if he had been in the area of the First

Citizens Bank that afternoon prior to his arrest. There is no merit to defendant's argument. In the first place, the State was bound by defendant's answers, and those answers were favorable to him. Secondly, the control of cross-examination must be left largely to the discretion of the trial judge. Most importantly, however, the questions were proper. There was evidence that defendant wanted the gun in order to get some money. The questions to which defendant now takes exception were proper to attempt to show defendant's motive for stealing the gun. Testimony at the sentencing hearing clearly demonstrated that the questions were asked in good faith.

[2] Defendant argues that the judge committed error because he did not instruct the jury that defendant could not be convicted if he honestly believed he had a right to possess the pistol. The argument is without merit. The jury had to believe either that defendant stole the pistol as the State's evidence tended to show or that it was pawned to him as his evidence tended to show. The judge made it clear to the jury that to convict, they must find that defendant took the pistol without Tinney's consent, and that at the time of the taking, he knew he was not entitled to take it. The judge's instructions were complete and correct in all respects.

[3] Defendant's next argument is that the trial court erred by failing to instruct the jury on the presumption of innocence. One accused of a crime is entitled to have his guilt or innocence determined on the basis of the evidence introduced at trial, not on the grounds of official suspicion or indictment, and it has long been recognized that an instruction or presumption is one way to impress the importance of that right upon the jury. *Taylor v. Kentucky*, 436 U.S. 478, 56 L.Ed. 2d 468, 98 S.Ct. 1930 (1978). Failure to instruct on the presumption of innocence is not, in and of itself, prejudicial error. *Kentucky v. Whorton*, 441 U.S. 786, 60 L.Ed. 2d 640, 99 S.Ct. 2088, *rehearing denied*, 444 U.S. 887, 62 L.Ed. 2d 121, 100 S.Ct. 186 (1979); *State v. Perry*, 226 N.C. 530, 39 S.E. 2d 460 (1946). The judge's instruction on the State's duty to prove the defendant's guilt beyond a reasonable doubt made it clear that the defendant was presumed innocent until the State proved otherwise. Moreover, in his remarks to the jury before it was impaneled, the judge said

The defendant, Mr. Rouse, has entered a plea of not guilty as to the charge and the fact that he's indicted is no evidence of his guilt. When a defendant pleads not guilty, the defendant is not required to prove that he is innocent. Rather, *he is presumed to be innocent* and the burden is on the State of North Carolina to satisfy you of the guilt of the defendant by the evidence and beyond a reasonable doubt in order for you to return a verdict of guilty of some crime. (Emphasis added.)

[4] This case was tried prior to the decision of the Supreme Court in *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982), holding that a defendant could not be sentenced for both larceny and possession of the same property. In this case, the judge consolidated the breaking and entering case with the larceny case for sentencing, and imposed a separate sentence in the possession case. The defendant can only be punished for the breaking and entering and either the larceny or possession. The case must be remanded for the judge to enter sentence on the breaking and entering and either the larceny or possession, and arrest judgment on the remaining charge.

No error in the trial.

Remanded for resentencing.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. HOWARD GOFORTH

No. 8228SC158

(Filed 16 November 1982)

1. Criminal Law § 34.8— prior crimes—competency to show common plan or scheme

In a prosecution of defendant for the attempted rape of his 10-year-old stepdaughter, testimony by the victim's two older sisters that defendant began sexually abusing them as they reached puberty and that defendant had had nonconsensual sexual intercourse with the eldest stepdaugther regularly from the time she was twelve until two days before the crime charged was competent to establish a common plan or scheme embracing the crime charged.

2. Criminal Law § 138— Fair Sentencing Act—two aggravating factors based on same evidence—error not prejudicial—imposition of sentence exceeding presumptive term

Although the trial court erred in basing the two aggravating factors it found on the same evidence that defendant abused a position of trust by attempting to rape his stepdaughter, such error was not prejudicial, and the court acted within its discretion in finding that defendant's abuse of trust outweighed all evidence in mitigation and warranted imposition of a sentence exceeding the presumptive term for attempted first degree rape. G.S. 15A-1340.4(a)(1).

APPEAL by defendant from *Lewis, Judge.* Judgment entered 2 October 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 September 1982.

Defendant was charged in a proper bill of indictment with attempted first-degree rape. He appeals from the judgment entered on his conviction.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis, for the State.

Assistant Appellate Defender Marc D. Towler for defendant-appellant.

HILL, Judge.

The defendant was found guilty of the attempted first-degree rape of his 10-year-old stepdaughter in violation of G.S. § 14-27.6. The issues before us involve the propriety of the trial court's admission of evidence of defendant's prior sexual misconduct and the propriety of the trial court's imposition of a sentence in excess of the presumptive prison term prescribed by G.S. § 15A-1340.4(f). This Court finds no error.

The State offered evidence that early on the morning of 4 July 1981, defendant carried his sleeping stepchild from the room she shared with her older sisters to his bed and attempted to rape her. The child's mother had gone to work. Her siblings were asleep and awoke only after hearing the child's cries. Defendant denied the charge, testifying that he had merely spanked the child for having rudely awakened him that morning. Over objection, the trial court permitted testimony that defendant began sexually abusing his two other stepdaughters as they approached puberty, and that defendant had had nonconsensual intercourse

with his eldest stepdaughter regularly from the time she was twelve until two days before the attempt on the child. The jury returned a verdict of guilty. Finding the factors in aggravation outweighed the factors in mitigation, the trial court imposed a prison term twice that of the statutory presumptive sentence.

[1] Defendant claims the trial court improperly allowed the sisters' testimony solely as proof of his propensity to commit the crime charged. We disagree.

To avoid raising a legally spurious presumption of guilt in the minds of the jurors, the State cannot offer evidence that the accused has committed another distinct, independent or separate offense. This is true even where the offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). This general rule, however, yields to several well-recognized exceptions, among them:

> Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and to connect the accused with its commission.

Id., at 176, 81 S.E. 2d at 367. We find this exception applicable here. The testimony at issue tends to show that defendant systematically engaged in nonconsensual sexual relations with his stepdaughters as they matured physically, a pattern of conduct embracing the offense charged. The trial court properly admitted the evidence.

[2] We find, in addition, that the evidence supports the trial court's imposition of a prison term that exceeds the applicable presumptive sentence prescribed by G.S. § 15A-1340.4(f). As required by G.S. § 15A-1340.4(b), Judge Lewis listed the factors in aggravation and factors in mitigation and found the former outweighed the latter. Two factors were found in aggravation: (1) the offense was especially atrocious "[i]n that the offense was committed on [the child] who was at the time living in the same house with the Defendant even though perhaps not legally his stepchild" [*see* G.S. § 15A-1340.4(a)(1)(f)]; and (2) the defendant took advantage of a position of trust or confidence by committing the offense "in the house where Mrs. Goforth had her minor

children at that time when she was not present" [*see* G.S. § 15A-1340.4(a)(1)(n)]. The court found in mitigation that: (1) defendant's immaturity or limited mental capacity and his physical condition significantly reduced his culpability [*see* G.S. § 15A-1340.4(a)(2)(e)]; (2) defendant was disabled; and (3) defendant had a good reputation in his community [*see* G.S. § 15A-1340.4(a)(2)(m)].

G.S. § 15A-1340.4(a)(1) provides: "[T]he same item of evidence may not be used to prove more than one factor in aggravation." Defendant argues that the trial court erred by supporting both factors in aggravation with evidence of a familial relationship between defendant and the child. We agree that the trial court erred in basing both factors in aggravation essentially on evidence that defendant abused a position of trust. We find, however, that the error was not prejudicial.

There is no question that the trial court properly found the defendant took advantage of a position of trust by attempting to rape his wife's daughter to whom defendant was, for all practical purposes, a stepfather. The trial judge apparently found this evidence aggravating to the degree that it was subsumed into two headings. The resulting redundancy simply indicates the overwhelming importance of this evidence in the trial court's imposition of sentence.

The weighing of aggravating and mitigating factors is within the sound discretion of the sentencing judge. *State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658 (1982).

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. (Citations omitted.)

Id., at ---, 293 S.E. 2d at 661. The court was well within its discretion in finding, in substance, that defendant's abuse of trust outweighed all evidence in mitigation and warranted imposition of a sentence exceeding the presumptive term.

In any event, defendant has failed to carry his burden by showing he was prejudiced. *See* G.S. §§ 15A-1442(6) -1443(a). Nor has defendant shown that had the court considered the circumstances in aggravation under only one statutory factor, a different result would have been reached in the weighing process. *See State v. Ahearn* (No. 821SC78, Filed 5 October 1982).

Defendant's assignments of error are overruled.

No error.

Judges HEDRICK and MARTIN concur.

C. M. BALLINGER, E. R. BALLINGER, AND M. D. BALLINGER, HEIRS OF THE ESTATE OF W. T. BALLINGER, AND THE ESTATE OF W. T. BALLINGER, DECEASED v. THE SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, THE NORTH CAROLINA DEPARTMENT OF REVENUE, AND THE STATE OF NORTH CAROLINA

No. 8118SC1230

(Filed 16 November 1982)

1. Rules of Civil Procedure § 56.3; Taxation § 38.2— *inheritance tax assessment* —secretary's affidavit supporting order after administrative hearing—summary judgment for defendant proper

In an action in which plaintiff challenged the assessment of inheritance taxes at an administrative hearing before the Secretary of Revenue, the trial court properly granted summary judgment for defendants on the issue of whether an order entitled "Administrative Hearing and Final Decision Entered by the Secretary of Revenue" was signed by Howard Coble before he resigned as Secretary of Revenue. Defendants' verified answer by Mark Lynch, Coble's successor, stated that Coble did in fact execute the final decision, and a supporting affidavit signed by Coble also states he executed and entered the decision before he resigned as Secretary of Revenue. Plaintiffs produced no evidence to support their conclusory allegation that Coble did not sign the final decision in either their unverified complaint or unverified response to defendants' summary judgment motion.

2. Rules of Civil Procedure § 56.4— failure to show genuine issue of material fact —summary judgment proper

Where the sole ground for recovery alleged in plaintiffs' complaint was that the final decision of the Secretary of Revenue concerning an inheritance tax assessment was not validly issued, and where defendant's verified answer and affidavit established that the decision was validly issued, no genuine issue as to any material fact existed since plaintiffs asserted no other grounds for recovery.

APPEAL by plaintiffs from *Seay, Judge.* Judgment entered 13 July 1981 in Superior Court, High Point Division, GUILFORD County. Heard in the Court of Appeals 3 September 1982.

Webster T. Ballinger, a resident of Guilford County, died on 9 October 1971 and left an estate of approximately 147 acres of Guilford County farmland. On 8 April 1975, plaintiff heirs filed an inheritance tax return valuing the real property at $67,398.80 and paid from the estate to the North Carolina Department of Revenue total tax, penalty and interest of $863.83. On 26 January 1976, plaintiffs received a notice of proposed tax assessment reflecting that the Department of Revenue appraised the real property at $273,400. Plaintiffs protested this assessment and requested an administrative hearing before the Secretary of Revenue pursuant to G.S. 105-241.1. J. Howard Coble, then Secretary of Revenue, convened a hearing which commenced on 18 June 1976 and continued on 23 July 1976 and 18 August 1976. During this hearing, Secretary Coble heard plaintiffs' complaints, but rendered a final decision in which he sustained the assessment against plaintiffs and assessed the estate an additional inheritance tax of $8,929.24 plus interest. Plaintiffs were notified of Secretary Coble's final decision and assessment when they received the document entitled "Administrative Hearing and Final Decision Entered by the Secretary of Revenue" which was signed by Secretary Coble on 7 January 1977. The document was accompanied by a transmittal letter dated 11 January 1977 and postmarked 13 January 1977. Having had their petition for rehearing denied by Secretary Coble's successor, Mark G. Lynch, plaintiffs paid the tax assessment under protest and requested in writing a refund of the sums paid. The Secretary of Revenue did not refund the sums demanded by plaintiffs within 90 days. In January 1979, plaintiffs brought this action demanding a refund of the sums paid and alleging that an unauthorized person, not the

Secretary of Revenue, made the assessment. Defendants filed a motion for summary judgment supported by defendants' answer which was verified by present Secretary of Revenue Mark G. Lynch. Defendants also relied on Howard Coble's attached affidavit which stated the following: On 7 January 1977, as Secretary of Revenue, he executed and entered a final decision sustaining the assessment issued against plaintiffs, he gave the final decision to the Director of the Inheritance and Gift Tax Division of the Department of Revenue for transmittal to plaintiffs, and he resigned as Secretary of Revenue on 8 January 1977. The court granted summary judgment in favor of defendants and dismissed plaintiffs' claim. From this judgment plaintiffs appeal.

Attorney General Edmisten, by Assistant Attorney General George W. Boylan, for defendant appellee.

Max D. Ballinger for plaintiff appellants.

MORRIS, Chief Judge.

[1] Plaintiffs' first assignment of error is that the court erred in allowing defendants' motion for summary judgment with reference to the issue of whether the order purportedly signed by Howard Coble on 7 January 1977 was, in fact, signed by Howard Coble while he was still Secretary of the North Carolina Department of Revenue. Defendants responded to the complaint filed against them with a verified answer and an affidavit, both of which the court may consider on a summary judgment motion. *See Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976). Defendants' answer, verified by Mark G. Lynch, Howard Coble's successor as Secretary of Revenue, stated that Coble did in fact execute the final decision in question on 7 January 1977. In addition, Howard Coble's affidavit in which he swears under oath that he executed and entered the decision on 7 January 1977, before he resigned as Secretary of Revenue, accompanied defendants' summary judgment motion.

On the other hand, plaintiffs produced no evidence to support their conclusory allegation that Coble did not sign the final decision or that the decision was not properly signed and entered.

> When the moving party presents an adequately supported motion, the opposing party must come forward with facts, not

mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment.

Connor Co. v. Spanish Inns, 294 N.C. 661, 675, 242 S.E. 2d 785, 793 (1978). Neither plaintiffs' complaint nor their response to defendants' summary judgment motion could be considered as affidavits because neither was verified. The evidence plaintiffs offered consisted of Jan Wood's affidavit concerning the valuation of the property. This evidence was irrelevant because the property valuation was not in issue. Plaintiffs also offered the transmittal letter dated 11 January 1977 and postmarked 13 January 1977 as evidence that Coble did not sign the final decision while he was Secretary of Revenue, but this evidence aids only in establishing when plaintiffs received notice of the final decision rather than when the decision itself was executed. Because plaintiffs were unable to support their claim with facts that Coble did not execute the final decision while he was Secretary of Revenue, summary judgment was properly granted in favor of defendants on this issue.

[2] Plaintiffs' second assignment of error is that the court erred in concluding that there were no genuine issues of material fact, in dismissing plaintiffs' action, and in granting final judgment against plaintiffs on all matters and things raised in pleadings and documents filed. This argument is based on plaintiffs' belief that this lawsuit involves the valuation of the estate's real property. However, plaintiffs' complaint does not set forth real property valuation as a defense to the taxes assessed against them. The complaint must set forth the cause of action on which plaintiffs hope to recover before the court can award recovery, if any. *See Queen v. Jarrett*, 258 N.C. 405, 128 S.E. 2d 894 (1962). "The function of a complaint is to state in a plain and concise manner the material, essential or ultimate facts which constitute the cause of action. . . ." *Jones v. Loan Association*, 252 N.C. 626, 638, 114 S.E. 2d 638, 647 (1960).

In this case, the sole grounds for recovery alleged in plaintiffs' complaint is that the final decision was not validly issued or charged during Howard Coble's term of office as Secretary of Revenue. Defendants responded to the complaint by addressing this sole issue. As previously discussed with plaintiffs' first

assignment of error, defendants' verified answer and affidavit established that Howard Coble did in fact execute the final decision on 7 January 1977 while he was still Secretary of the Department of Revenue. No genuine issue as to material fact existed, because plaintiffs presented no evidence in support of their conclusory allegation that the final decision was not validly executed. Plaintiffs asserted no other grounds for recovery and did not elect to amend their complaint to allege additional grounds on which recovery could be granted. When defendants establish a complete defense to plaintiffs' claim, they are entitled to the quick and final disposition of that claim which summary judgment provides. *See Oakley v. Little*, 49 N.C. App. 650, 272 S.E. 2d 370 (1980). Under these circumstances, summary judgment was properly entered and the judgment of the trial court must be

Affirmed.

Judges WEBB and WHICHARD concur.

LUCILLE POLLOCK FANN, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC1424

(Filed 16 November 1982)

Master and Servant § 68— workers' compensation—absence of occupational disease and disability—sufficiency of evidence

The evidence supported findings by the hearing commissioner that (1) plaintiff has not suffered a compensable occupational disease in that plaintiff's work environment did not cause or exacerbate her bronchiectasis or chronic bronchitis and (2) plaintiff is not disabled.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 14 January 1981. Heard in the Court of Appeals 14 October 1982.

This action involves a claim by plaintiff for disability benefits under the Workers' Compensation Act for bronchiectasis and

chronic bronchitis allegedly aggravated by exposure to cotton dust during her employment at Burlington Industries. Plaintiff was first employed by Burlington Industries in 1954 when she worked in the weave room at their Fayetteville plant. She worked there until June 1961. Then she worked in a sewing room for a year and a half. From March 1964 to June 1975, she worked in the weave room. In September 1975, she began working in the Erwin plant. She quit in April 1977. When plaintiff worked in the Fayetteville plant, the mill processed exclusively synthetic yarns, except for a brief period in the 1950's. The Erwin plant processed cotton.

Plaintiff began to have health problems in 1968, when she experienced hemoptysis (coughing up blood). Since then, she has recurrent episodes of hemoptysis, recurrent respiratory infections, and a chronic productive cough. Plaintiff suffers from bronchiectasis, which is a disease of the large airways resulting in permanent damage to the bronchi. The symptoms are chronic cough, frequent episodes of hemoptysis, and frequent respiratory infections. She also suffers from chronic bronchitis, in which the principal symptom is a chronic productive cough.

The Deputy Commissioner denied plaintiff's claim on two grounds. He found that she failed to show that she suffered from a compensable occupational disease, and she failed to show that she is disabled. He found the following pertinent facts:

> 6. Plaintiff has contracted the disease bronchiectasis, which is a disease of the large airways, unlike obstructive lung disease which is a small airway disease, and which disease (bronchiectasis) results in permanent destructive changes in the bronchi (of the lungs) and, more particularly, dilation and destruction of the wall of the bronchi. The symptoms of such disease are those which the claimant initially began to experience during the year 1968, namely, chronic productive cough, frequent episodes of hemoptysis and frequent respiratory infections. Generally speaking such disease is caused either by a particular individual's susceptibility thereto or by respiratory infection, however, the actual and exact cause in the plaintiff's case is unknown; however this disease (bronchiectasis) was not caused by the disease chronic bronchitis, from which the claimant also suffers, *nor was this*

disease (bronchiectasis) caused by claimant's occupational exposure to either respirable cotton and/or synthetic dusts but rather the underlying disease (bronchiectasis) developed independently of such occupational exposure.

In addition to the disease bronchiectasis and as aforesaid, claimant has contracted the disease chronic bronchitis, a chronic obstructive lung disease of the small airways, whose principal symptoms is chronic productive cough. Although textile mill workers exposed to respirable cotton dust in the carding, spinning and weaving departments of a textile mill are exposed to an increased risk of contracting this disease unlike textile mill workers exposed exclusively to synthetic fibers or those who work in other areas of the mill who are not so exposed to such greater risk, *the claimant's chronic bronchitis developed prior to her initial exposure to the potential hazards of respirable cotton dust,* the development thereof being contemporaneous with and as a direct and natural result and concomitant part of her bronchiectasis which, as aforesaid, developed independently of her work environment. (Emphasis added.)

The Commission affirmed the Deputy Commissioner's findings of fact and conclusion of law.

Hassell, Hudson and Lore, by Robin E. Hudson, for plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by C. Ernest Simons, Jr., and Steven M. Sartorio, for defendant appellees.

ARNOLD, Judge.

Plaintiff's first assignment of error is that the Industrial Commission erred in finding that her claim is not compensable.

In general, the rule is that findings of fact made by the Commission are conclusive on appeal when supported by competent evidence, even when there is evidence to support contrary findings of fact. *Morrison v. Burlington Industries,* 304 N.C. 1, 282 S.E. 2d 458 (1981). G.S. 97-53 lists the occupational diseases which are compensable. Section 13 provides:

> Any disease, other than hearing loss covered in another subdivision of this section, 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.

For an occupational disease to be compensable under G.S. 97-53(13), two conditions must be met: It must be due to causes and conditions characteristic and peculiar to the employment; and the particular employment conditions must place the worker at greater risk than the general public of contracting the disease. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979).

This rule was fully explained in *Morrison v. Burlington Industries*, 304 N.C. 1, 18, 282 S.E. 2d 458, 470 (1981):

> (1) [A]n employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses. (2) 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. (3) 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. (4) When a claimant becomes incapacitated for work and part of that incapacity is caused, accelerated or aggravated by an occupational disease and the remainder of that incapacity for work is not caused, accelerated or aggravated by an occupational disease, the Workers' Compensation Act of North Carolina requires compensation only for that portion of the disability caused, accelerated or aggravated by the occupational disease.

In this case, there was medical evidence tending to show that plaintiff's work environment did not cause or exacerbate her condition. According to the medical report:

> Although it is certainly possible that exposure to dusty environmental conditions of any sort could exacerbate this problem once it has developed, I am not aware of evidence which could link her work environment to the development of this condition. In addition, the history given by Mrs. Fann suggests that she was working with synthetic fabrics during most of the time she was employed in Fayetteville although apparently cotton blends were also produced. It was only during the 1½ years that she was at the Erwin Mill that she was working exclusively with cotton. Therefore the intensity and duration of her exposure to cotton dust is not clear. . . . Therefore Mrs. Fann does not exhibit objective evidence of the obstructive pulmonary impairment which is usually associated with cotton dust related obstructive lung disease or byssinosis. In conclusion it is my opinion that Mrs. Fann does not have pulmonary disease or impairment which can be related to her occupation.

This evidence clearly supports the Commissioner's finding of fact that plaintiff's disease is not compensable.

Plaintiff's second assignment of error is that the Commission erred in finding that she was not disabled. We find that the evidence supported this finding. On cross-examination, the medical doctor said:

> The bronchiectasis, I feel like this plays a limitation on the type of environment she should work but beyond that she could perform any type of work. I think she should try to avoid heavy dust or smoke exposure or things like this. I don't know that she would need to maintain the same type of very strict dust precautions, for instance, of a person who was allergic to house dust. I'm thinking about heavy concentration of airborne dust or smoke, other types of fumes, adverse cold, damp weather, things of this type. She shouldn't be a fire fighter or something like that.

For the reasons stated, we affirm the finding of the Industrial Commission.

Affirmed.

Judges WELLS and HILL concur.

Perdue v. Daniel International

JAMES A. PERDUE, EMPLOYEE/PLAINTIFF v. DANIEL INTERNATIONAL, INC., EMPLOYER, AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC27

(Filed 16 November 1982)

1. **Master and Servant §§ 85, 91.1— claim filed more than two years after accident—Industrial Commission lacking jurisdiction**

The Industrial Commission did not err in dismissing plaintiff's claim due to lack of jurisdiction under G.S. 97-24(a) where plaintiff filed a claim for compensation more than two years after he experienced an accident. The employer's filing of a Form 19 shortly after the accident was not sufficient to invoke jurisdiction.

2. **Master and Servant § 91.1— worker's compensation—accident—time for filing claim runs from date of accident**

Under G.S. 97-24(a) an employee is required to file a claim with the Industrial Commission within two years after his accident regardless of whether he has become aware of his disorder. This is different from G.S. 97-58(b) which deals with occupational diseases.

Judge WELLS concurring.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 18 September 1981. Heard in the Court of Appeals 21 October 1982.

Plaintiff's evidence tends to show that on 20 April 1976, he was repairing a broken bolt on a roller in defendant's machine shop when he passed out and fell to the floor. He reported the incident to his supervisor. The next week, he saw his doctor who told him that he pulled a muscle. He continued to see his doctor regularly. In November 1979, the doctor told him that he had a broken vertebra and was 25% permanently disabled.

After the accident occurred, plaintiff's safety supervisor filed an employee's report, Form 19. Form 19 is captioned: "This report filed only in compliance with section G.S. 97-92 and not employee's claim for compensation." On 18 August 1976, defendant carrier advised plaintiff and the Industrial Commission that he was not entitled to benefits because his injury was not caused by an accident. The Industrial Commission sent plaintiff a letter on 25 August 1976, informing him that he must file a claim within two years of his accident or his right to recover compensation

would be barred. Plaintiff's claim, filed 27 March 1980, was denied by Deputy Commissioner Bryant, and, on appeal, the full North Carolina Industrial Commission, because it was not filed within two years of the accident.

Franklin L. Block, for plaintiff appellant.

Young, Moore, Henderson and Alvis, by John E. Aldridge, Jr., B. T. Henderson II, and William F. Lipscomb, for defendant appellees.

VAUGHN, Judge.

[1] Plaintiff's first argument is that the Industrial Commission was wrong in dismissing his claim due to lack of jurisdiction. G.S. 97-24(a) provides: "The right to compensation under this Article shall be forever barred unless a claim be [*sic*] filed with the Industrial Commission within two years after the accident." The requirement of filing a claim within two years of the accident is not a statute of limitation, but a condition precedent to the right to compensation. *Barham v. Kayser-Roth Hosiery Co., Inc.*, 15 N.C. App. 519, 190 S.E. 2d 306 (1972).

Plaintiff contends that filing Form 19 by his employer was sufficient to invoke jurisdiction. We do not agree. In *Montgomery v. Horneytown Fire Department*, 265 N.C. 553, 144 S.E. 2d 586 (1965), the decedent died on 16 August 1962, immediately after his fire truck was in a collision. Six days later, the fire department filed Form 19 with the Industrial Commission. The Commission twice wrote to plaintiff's attorneys asking that they file a form requesting a hearing. This was not done. The Supreme Court held that since a claim was not filed, the proceedings were properly dismissed.

Plaintiff mistakenly relies on *Hardison v. W. H. Hampton and Son*, 203 N.C. 187, 165 S.E. 355 (1932), and *Smith v. Allied Exterminators, Inc.*, 11 N.C. App. 76, 180 S.E. 2d 390, *reversed on other grounds*, 279 N.C. 583, 184 S.E. 2d 296 (1971), to support his proposition that filing Form 19 is sufficient to invoke jurisdiction. In *Hardison*, the plaintiff was injured on 27 March 1930. He informed his employer, who notified their insurance company, and then reported the accident to the Industrial Commission on Form 19. Negotiations between the employee and the carrier did not result

in a settlement. The carrier informed the Industrial Commission that no settlement had been reached, and requested a hearing. No hearing was held until the employee requested one, a year later. The Supreme Court concluded:

> There is no provision in the North Carolina Workmen's Compensation Act requiring an injured employee to file a claim for compensation . . . with the North Carolina Industrial Commission. . . . [T]he employer is required to report the accident and claim . . . to the Commission on form 19. . . . When the employer has filed with the Commission a report of the accident and claim of the injured employee, the Commission has jurisdiction of the matter, and the claim is filed with the Commission within the meaning of section 24.

Hardison v. W. H. Hampton and Son, 203 N.C. at 188-189, 165 S.E. 355-356.

Although the quoted portion of that decision might seem to support plaintiff's argument, jurisdiction in *Hardison* was actually invoked when the carrier requested a hearing before the Commission, within the time limitation imposed by the statute. This was explained in the concurring opinion in *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 455-456, 46 S.E. 2d 109, 114-115 (1948):

> In the *Hardison case*, after notice of the accident which occurred 27 March, 1930, was filed, there were negotiations between the employee, the employer and the insurance carrier. . . . The negotiations were somewhat drawn out, and the carrier became dissatisfied with the delay. . . . On 12 November, 1930, its agent wrote the Commission detailing the facts and the dispute, and stated: "The employer seems to feel that the injured is entitled to compensation for 350 weeks . . . [.] In view of the injured's attitude and in view of the information which I have, I see nothing to do but have a hearing in the matter, in order that the Commission may decide what compensation benefits the injured is entitled to." Copy of the letter was sent to the employee and his counsel applied for a hearing 27 March, 1931.
>
> The Commission properly found and concluded that this letter in effect admitted liability, presented the claim for decision and requested a hearing. It was upon this conclusion,

and not on the report of the injury, it assumed jurisdiction, over the protest of employer, and made an award. It was the award founded on these facts which was affirmed by this Court. . . .

In *Smith v. Allied Exterminators, Inc.*, 11 N.C. App. 76, 180 S.E. 2d 390, *reversed on other grounds*, 279 N.C. 583, 184 S.E. 2d 296 (1971), the plaintiffs contended that decedent's father was barred from recovery because he did not file a claim within one year of the accident. The proceedings, however, were initiated by the carrier, Bituminous Casualty Corporation, when it filed application for hearing. This Court held: "When the Commissioner held a hearing pursuant to the carrier's request, it had jurisdiction to determine the rights of the father. . . ." 11 N.C. App. at 79, 180 S.E. 2d at 393.

[2] Plaintiff's second argument is that the time within which the employee must file his claim does not begin to run until he becomes aware of his disorder, as is the case for occupational diseases. G.S. 97-24(a) requires filing the claim "within two years after the accident." G.S. 97-58(b), on the other hand, provides: "The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same." Obviously, these two statutes are different. An accident claim must be filed within two years of the accident, not within two years after the claimant becomes aware of his disorder. This is discussed in *Whitted v. Palmer-Bee Company*, 228 N.C. 447, 46 S.E. 2d 109 (1948), where plaintiff's accident caused blindness in one eye eighteen months after his injury. The Industrial Commission dismissed his claim because it was not filed within one year of the accident. The Supreme Court affirmed, noting that it was regrettable that there was no provision in the Workmen's Compensation Act to preserve the rights of employees in cases where the injury is not discovered until after the statutory time period has elapsed, although there is such a provision for certain occupational diseases.

For the reason stated, the opinion of the Industrial Commission is affirmed.

Affirmed.

Judge WHICHARD concurs.

Judge WELLS concurs separately.

Judge WELLS concurring.

I concur in the majority opinion because I believe the result reached therein is mandated by prior decisional law. In doing so, however, I wish to emphasize the fundamental inconsistency, recognized by the majority, between the provisions of G.S. 97-24, relating to injury by accident, and G.S. 97-58, relating to injury from industrial disease. This fundamental inconsistency, and the harsh results which may flow from the provision of section 24, was recognized by our Supreme Court at least as early as 1947 in *Whitted v. Palmer-Bee Company*, relied on by the majority, a classic case of harsh result. Yet the problem abides for victims of insidious injuries, with results that cry out for more sensible and equitable response.

WILLIAM LEXIE NASH v. LEON CHARLES MAYFIELD

No. 8120SC1410

(Filed 16 November 1982)

1. **Assault and Battery § 3.1— civil assault—failure to instruct on provocation in mitigation of damages**

The trial court in a civil assault case did not err in failing to instruct the jury that it could consider any provocation by plaintiff in mitigation of damages where plaintiff's evidence showed an unprovoked assault and battery by defendant, defendant's evidence showed an attack by defendant on plaintiff in self-defense, and there was no evidence to support a finding of provocation.

2. **Assault and Battery § 3.1— civil assault—failure to instruct on mutual combat**

The trial court in a civil assault action did not err in failing to instruct that if the jury found that the parties voluntarily engaged in a mutual combat, each contestant could recover from the other for damages resulting from injuries received where plaintiff's evidence showed an unprovoked assault and battery by defendant, defendant's evidence showed an attack by defendant on plaintiff in self-defense, and no evidence offered by either party tended to establish an encounter by mutual agreement.

3. **Assault and Battery § 3— civil assault—specific acts of violence by defendant**

In a civil assault action in which defendant alleged that he acted in self-defense, the trial court properly excluded testimony by a character witness

that he had not ever known defendant to be involved in any type of assault since the testimony related to specific acts of violence rather than to reputation for peacefulness or violence.

APPEAL by defendant from *Kivett, Judge.* Judgment entered 11 August 1981 in Superior Court, UNION County. Heard in the Court of Appeals 14 October 1982.

Defendant appeals from a judgment awarding plaintiff $10,000 and costs upon a jury finding that defendant committed an assault and battery upon plaintiff.

Taylor and Bower, by H. P. Taylor, Jr. and George C. Bower, for defendant appellant.

Thomas, Harrington & Biedler, by Larry E. Harrington, for plaintiff appellee.

WHICHARD, Judge.

Plaintiff's evidence tended to show the following:

Plaintiff was driving on a four-lane highway on which both lanes in his direction of travel were occupied. Defendant was behind him, blowing his born and blinking his lights. At one point defendant pulled beside plaintiff and shook his fist at him. Plaintiff finally braked to turn, and defendant's vehicle struck plaintiff's in the rear.

Defendant then approached plaintiff on foot "like he was going to get [him] around the throat," and plaintiff struck defendant. Defendant stabbed plaintiff in the back and walked away. He then walked back toward plaintiff with a knife in his hand. When plaintiff saw defendant coming back toward him, he threw a hammer at him.

Defendant's evidence tended to show the following:

Plaintiff was driving ahead of defendant and "wouldn't move up or back and let [defendant] by in the left-hand lane." Defendant blew his horn and blinked his lights. Eventually plaintiff decelerated. Defendant started to pass him, and plaintiff jerked his vehicle sideways forcing defendant onto the shoulder. Later plaintiff suddenly braked, and defendant's vehicle slid into the rear of plaintiff's.

Plaintiff exited his vehicle and struck defendant. He then ran back to his vehicle, obtained a hammer, and came running toward defendant. Defendant ran backward, taking a swing at plaintiff with a knife while he ran. Plaintiff then threw the hammer at defendant, and it hit him.

[1] Defendant first contends the court erred in failing to instruct that the jury could consider any provocation by plaintiff in mitigation of damages. *See Lewis v. Fountain*, 168 N.C. 277, 279, 84 S.E. 278, 279 (1915); *Palmer v. R. R.*, 131 N.C. 250, 251, 42 S.E. 604, 604 (1902); *Frazier v. Glasgow*, 24 N.C. App. 641, 643, 211 S.E. 2d 852, 853, *cert. denied*, 286 N.C. 722, 213 S.E. 2d 721 (1975). The record, however, contains no evidence to support a finding of provocation. Defendant's evidence was entirely to the effect that his attack on plaintiff was a response, in self-defense, to plaintiff's attack on him. The parties presented contradictory versions of the encounter. Neither version suggested provocation leading to an assault. Both, instead, supported only the instructions given on self-defense.

[2] Defendant next contends the court erred in failing to instruct that if the jury found that the parties voluntarily engaged in a mutual combat, each contestant could recover from the other for damages resulting from injuries received. *See Bell v. Hansley*, 48 N.C. 131 (1855); *Lail v. Woods*, 36 N.C. App. 590, 591, 244 S.E. 2d 500, 501, *disc. rev. denied*, 295 N.C. 550, 248 S.E. 2d 727 (1978). Neither version of the encounter supports a finding of mutual combat, however. Plaintiff's evidence showed an unprovoked assault and battery upon plaintiff by defendant. Defendant's evidence showed an attack by defendant on plaintiff in self-defense. No evidence offered by either party tended in any way to establish an encounter by mutual agreement. This contention is thus without merit.

[3] Defendant next contends the court erred in sustaining objection to, and instructing the jury to disregard, the following testimony of a character witness, designed to show defendant's disposition toward peacefulness:

"Q. Have you ever known [defendant] to be involved in any type of assault?

A. Not to my knowledge."

He relies on *Strickland v. Jackson*, 23 N.C. App. 603, 607, 209 S.E. 2d 859, 862-63 (1974), wherein this Court stated: "[W]hen there is a plea of self-defense, or an issue as to who committed the first act of aggression, it is competent to show, through evidence of reputation, the dispositions of the parties."

As phrased the question elicited a response relating to specific acts of violence rather than to reputation for peacefulness or violence. Sustention of the objection thus was proper. *See State v. Morgan*, 245 N.C. 215, 217-18, 95 S.E. 2d 507, 508-09 (1956); *Nance v. Fike*, 244 N.C. 368, 93 S.E. 2d 443 (1956); 1 *Brandis on North Carolina Evidence* § 106 (2d rev. ed. 1982).

Defendant finally contends a portion of the charge was sufficiently unclear to constitute reversible error. The charge must be read contextually; and if as a whole it is such that it is not reasonable to believe the jury could have been misled, it is not prejudicial. *See Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E. 2d 488, 492 (1967); *Hammond v. Bullard*, 267 N.C. 570, 576, 148 S.E. 2d 523, 527 (1966). We have examined the charge as a whole, and we do not believe the jury could have been misled thereby.

No error.

Judges HEDRICK and HILL concur.

RELIANCE INSURANCE COMPANY v. THOMAS MORRISON AND COYOTE TRUCK LINES, INC.

No. 8123SC1402

(Filed 16 November 1982)

Indemnity § 1; Insurance § 112— insurance company not benefited by lease agreement with indemnity clause

In an action in which a negligent driver was driving a tractor-trailer leased to his employer (Metler) by defendant (Coyote), Metler was insured by plaintiff, and Coyote agreed under the lease agreement "to reimburse and otherwise indemnify [Metler] for any and all losses sustained by [Metler] resulting from the use of the [tractor-trailer]," plaintiff was not subrogated to Metler's contractual right of indemnity when it paid a claim under its insurance contract, and a contract of indemnity could not be implied in law between plaintiff and Coyote.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 3 September 1981 in Superior Court, WILKES County. Heard in the Court of Appeals 13 October 1982.

On 27 January 1978, defendant Morrison negligently collided with a car driven by Henry Derrick Ogburn. Morrison was driving a tractor-trailer leased to his employer A. J. Metler Hauling & Rigging, Inc. by the defendant Coyote. Under the lease agreement, Coyote agreed "to reimburse and otherwise indemnify [Metler] for any and all losses sustained by [Metler] resulting from the use of the [tractor-trailer]."

Pursuant to an insurance policy in effect on the date of the accident that it had previously issued to Metler, plaintiff paid Ogburn and his insurer Lumberman's Mutual Casualty Company $10,723.90 for his injuries. Ogburn then executed a release discharging plaintiff, Metler, Coyote and Morrison from any further liability.

Plaintiff brought this suit to recover what it paid to Ogburn and his insurer. Defendants' motion for summary judgment was granted. Plaintiff appealed.

Van Winkle, Buck, Wall, Starnes & Davis, by Philip J. Smith, for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughn, for defendant appellees.

ARNOLD, Judge.

Plaintiff makes two contentions on appeal. First, it seeks to be subrogated to Metler's contractual right of indemnity as a result of the lease between Metler and Coyote. Second, it argues that there was a genuine issue of material fact so as to avoid summary judgment since a contract of indemnity could be implied in law between it and Coyote.

In North Carolina, the general rule is that when an insured claims benefits under a policy, the burden is on him to prove coverage. But the burden of showing an exclusion or exception is on the insurer. *Brevard v. State Farm Ins. Co.*, 262 N.C. 458, 137 S.E. 2d 837 (1964). A showing by an insured that he is covered establishes a prima facie case that shifts the burden to the in-

surer. *Kirk v. Nationwide Mutual Ins. Co.*, 254 N.C. 651, 119 S.E. 2d 645 (1961).

In this case, plaintiff admits that the defendants are covered under the policy and that it made payment to Ogburn and his insurer on behalf of the defendants. But plaintiff claims a right to indemnity based on the agreement between Coyote and Metler. We disagree.

First, there is nothing in the policy or the lease agreement that purports to provide plaintiff with the right to indemnification claimed here. Second, any limitations upon the insurer's liability are to be strictly construed so as to provide the coverage that would be afforded absent the claimed limitation. *Wachovia Bank v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E. 2d 518, 522-23 (1970). Third, exclusions and exceptions to these policies are not favored by the courts. *Allstate Ins. Co. v. Shelby Mutual Ins. Co.*, 269 N.C. 341, 346, 152 S.E. 2d 436, 440 (1966). Finally, plaintiff did not allege in its complaint that the lease agreement in any way affected the extent of its liability. We cannot write in allegations that are not there under the guise of the rule of liberal construction. *Brevard*, 262 N.C. at 461, 137 S.E. 2d at 840. As a result, no issue of fact necessary to withstand summary judgment is present.

We note plaintiff's citation of *Nationwide Mutual Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E. 2d 597 (1977), as authority in support of its position. But that case can be distinguished on its facts. In *Chantos*, the insurer paid an accident victim on behalf of the friend of the son of the insured who was driving the covered vehicle with permission of the son. The court concluded that the insurer had a right of reimbursement because of the operation of the provisions of the Motor Vehicle Safety and Financial Responsibility Act, G.S. 20-279.1-.39, which is a part of every automobile insurance policy in North Carolina.

The case *sub judice* is different from *Chantos* because in this case, the plaintiff voluntarily included the defendants within the policy coverage. It could have only covered Metler under the policy but it chose to extend the coverage and thus, must bear the consequences.

Thus, we find that there is no genuine issue as to any material fact as G.S. 1A-1, Rule 56(c) requires for entry of sum-

mary judgment, and affirm the trial court's grant of defendant's motion.

Affirmed.

Judges HEDRICK and WHICHARD concur.

STATE OF NORTH CAROLINA v. ARDELL R. JORDAN

No. 821SC235

(Filed 16 November 1982)

Arson § 4.1; Property § 4.2— felonious burning of personal property—sufficiency of evidence—failure to submit misdemeanor of willful injury to property

Evidence that defendant set two fires in his jail cell of strips torn from the mattress was sufficient for the jury to find a specific intent to injure or prejudice the owner of the property and to support his conviction of felonious burning of personal property in violation of G.S. 14-66. Furthermore, the evidence did not require the submission of the misdemeanor offense of willful and wanton injury to personal property in violation of G.S. 14-160.

APPEAL by defendant from *Small, Judge*. Judgments entered 3 December 1981 in Superior Court, GATES County. Heard in the Court of Appeals 23 September 1982.

Defendant was charged on 7 July 1981 with felonious burning of personal property and misdemeanor assault on a custodial officer. The State's evidence tends to show that defendant was confined in a segregation unit, an isolated two-person cell, in the Gates County Prison. At about 3:30 p.m., on 3 July 1981, Sergeant Askew, a custodial officer at the prison, saw smoke coming from the segregation unit. Defendant was the only inmate in the cell. Sergeant Askew testified that when he saw the smoke, he yelled for Officer Rawls to come with the keys. Officer Williams heard him and came out of the office and asked if they needed help. Sergeant Askew told him to come along. When the three men opened the door to the segregation cell, they found the unit was completely filled with smoke. The smoke cleared out in a few seconds. They saw that pieces of the mattress were burning in two fires, one in the commode and one on top of the commode.

Sergeant Askew knocked the fire which was on top of the commode into the commode and flushed both fires. Then he asked defendant to take his clothes off for a strip search. Defendant refused, used offensive language, and hit Sergeant Askew in the face.

Officer Williams testified that after defendant hit Askew, he grabbed defendant by the throat and tried to subdue him.

Defendant testified that he had been in solitary confinement for about two weeks. There was a mosquito problem in the cell, and he set the fire to kill the mosquitoes. He said that he burned his aluminum foil plate, not the mattress. According to defendant, Sergeant Askew called him a liar and slapped him. Then Officer Williams called him a "smart nigger" and said "Oh, let me choke him." Officer Rawls was eating peanuts, drinking a soda and laughing. Defendant bent Officer Williams fingers when Officer Williams choked him. Then Officer Williams and Sergeant Askew collided. Defendant said that they were drunk and smelled of alcohol.

Defendant was tried on the misdemeanor assault charge in District Court, and was found guilty. He appealed, and the case was transferred to Superior Court for a trial de novo. He entered a plea of not guilty to both charges and was found guilty of felonious burning of personal property and misdemeanor assault on an officer. He was sentenced to three years for the felony and two years for the misdemeanor.

Attorney General Edmisten, by Assistant Attorney General Lemuel W. Hinton, and Associate Attorney Floyd M. Lewis, for the State.

Taylor and McLean, by Mitchell S. McLean, for defendant appellant.

VAUGHN, Judge.

Defendant's first argument is that the trial court erred in not allowing his motion to dismiss and motion for appropriate relief because of the insufficiency of the evidence.

Upon motion for nonsuit, all the evidence must be considered in the light most favorable to the State, and the State is entitled

to every inference of fact which may be reasonably deduced therefrom. *State v. Lynch*, 301 N.C. 479, 272 S.E. 2d 349 (1980). If more than a scintilla of evidence is presented to support the indictment, the judge must submit the case to the jury. *State v. Agnew*, 294 N.C. 382, 241 S.E. 2d 684, *cert. denied*, 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed. 2d 124 (1978).

The evidence showed that defendant was the only person in his cell; he set two fires, one on top of the commode and one in the commode; torn strips of the mattress were burning; and the wall was charred. Clearly, this is sufficient evidence of felonious burning of personal property to withstand defendant's motion to dismiss.

Defendant contends that the State failed to show an essential element of felonious burning of personal property: the specific intent to injure or prejudice the owner. The felonious burning statute is G.S. 14-66: "If any person shall wantonly and willfully set fire to or burn . . . any . . . chattels or personal property of any kind . . . with intent to injure or prejudice . . . the person owning the property, or any other person . . . he shall be punished as a Class H felon." The specific intent to injure or prejudice the owner of the property may be proven by circumstances from which it may be inferred, such as the nature of the act and the manner in which it was done. *State v. Wesson*, 45 N.C. App. 510, 263 S.E. 2d 298 (1980). In this case, the specific intent could be inferred by the evidence that defendant tore strips of the mattress and set two fires in his cell. There was sufficient evidence to allow the jury to make that determination.

Defendant's second argument is that the trial court erred in not allowing defendant's motion to submit the misdemeanor offense of willful and wanton injury to personal property to the jury. In general, a defendant is entitled to have all lesser degrees of offenses submitted to the jury, but the trial court need not submit the lesser degrees when the State's evidence is positive to each element of the crime, and there is no conflicting evidence relating to any elements of the crime. *State v. Drumgold*, 297 N.C. 267, 254 S.E. 2d 531 (1979).

The misdemeanor offense of willful and wanton injury to personal property is G.S. 14-160: "(a) If any person shall wantonly and

willfully injure the personal property of another he shall be guilty of a misdemeanor. . . ."

Defendant contends that since there is conflicting evidence as to an element of felonious burning, namely whether there was intent to injure the property owner, the misdemeanor offense should have been submitted to the jury. There is, however, no conflicting evidence. The evidence of the torn mattress strips and two fires in the cell is uncontradicted and infers the specific intent.

We have carefully reviewed defendant's assignments of error and find no error.

No error.

Judges WEBB and WELLS concur.

FITZGERALD GIBBS AND IRA B. GIBBS v. HALLET W. GIBBS AND WIFE MAETRICE GIBBS

No. 812SC1405

(Filed 16 November 1982)

1. **Trial § 3.1— motion for continuance—unavailability of witness—discretion of judge**

In an action relating to the transfer of a deed where plaintiffs presented no evidence of the presence of fraud, mistake or undue influence at the execution of the deed, plaintiffs failed to show that the trial court abused its discretion in failing to continue the hearing of the case when one of their witnesses was unable to attend the trial.

2. **Trial § 58.3— findings of fact—supported by evidence—conclusive on appeal**

In an action in which plaintiff sought to have a constructive trust imposed on a piece of property or, alternatively, to have a deed from plaintiff to defendant declared void for lack of capacity in the grantor, the trial court's findings of fact and conclusions of law were supported by evidence in the record.

Gibbs v. Gibbs

APPEAL by plaintiff from *Winberry, Judge.* Judgment signed 30 June 1981 in Superior Court, CHOWAN County.[1] Heard in the Court of Appeals 13 October 1982.

Seth Gibbs died intestate in December of 1969 leaving seven children, his heirs at law, and seized of several tracts of land. Title to one of the tracts is in dispute and is the subject of this lawsuit. Five of his children, including plaintiff Fitzgerald Gibbs, agreed to and did sell and convey their 1/7 interest in the disputed parcel to defendant by general warranty deed dated 2 November 1971. Plaintiff Ira Gibbs and wife conveyed their interests in the disputed parcel to the defendants by general warranty deed dated 17 January 1972.

Neither of the deeds reserved a life estate in favor of Fitzgerald Gibbs or anyone else; further, neither deed made reference to any right of first refusal or option to purchase. Both deeds, absolute on their faces, were properly signed, acknowledged and recorded.

Plaintiffs, by complaint filed on 15 May 1979 and later by amendment filed 12 August 1980, brought this action alleging that defendants reneged on an oral promise to reserve a life estate in the parcel to the plaintiff, and that Fitzgerald Gibbs lacked the requisite mental capacity to deliver a valid deed in 1971. Plaintiffs sought to have a constructive trust imposed on the property with themselves as beneficiaries of a life estate interest or, alternatively, to have the deed from Fitzgerald to Hallet Gibbs declared void for lack of capacity in the grantor.

Charles Winberry, Judge, sitting without a jury, ruled at the close of the evidence that the plaintiffs had failed to carry their burden of proof. He made lengthy findings of fact, concluded that plaintiffs were not entitled to any of the relief sought, entered judgment for the defendants, and dismissed the action.

Franklin B. Johnson for plaintiff appellants.

John S. Fletcher, II, for defendant appellees.

1. Counsel for all parties stipulated that judgment could be entered by the court out of the county and after the conclusion of the session.

BECTON, Judge.

Plaintiffs made eighteen (18) assignments of error and raise two arguments on appeal. We affirm the judgment below.

[1] By assignments of error one and three, Fitzgerald and Ira Gibbs argue that the trial court erred by failing to continue the hearing of the case when their vital witness was unable to attend the trial. This witness, Delma Gibbs Alligood, was to testify that defendant verbally promised Fitzgerald Gibbs a life estate in the property.

It is textbook law that a motion for continuance is addressed to the sound discretion of the trial court. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). In *Shankle*, our Supreme Court, quoting 17 C.J.S. *Continuances* § 5 (1963) said: "The chief consideration to be weighed in passing upon the application is whether the grant or denial of [the] continuance will be in furtherance of substantial justice." *Id.* at 483, 223 S.E. 2d at 386 (1976). Plaintiffs' right to a fair hearing was not abrogated by the denial of the motion since evidence of an oral agreement made prior to the delivery of the deed was and is irrelevant to the construction of the deed in the case *sub judice*. Interests in land can be passed only by a validly executed writing. N.C. Gen. Stat. § 22-2 (1965). This Court ruled earlier, in *Rourk v. Brunswick County*, that:

> It is well settled that except in cases of fraud, mistake, or undue influence, parol trusts or agreements will not be set up or engrafted in favor or the grantor upon a written deed conveying to the grantee the absolute title, and giving clear indication on its face that such title was intended to pass. Testimony tending to show an oral agreement in direct conflict with the deed is incompetent. [Citations omitted.]

46 N.C. App. 795, 796-97, 266 S.E. 2d 401, 403 (1980). Since plaintiffs present no evidence of the presence of fraud, mistake, or undue influence at the execution of the deed, nor make any argument concerning these defenses, we are hard pressed to determine what aid the proffered testimony would have given their case. The trial court did not abuse its discretion in denying the motion for continuance.

[2] Plaintiffs' second contention is that the trial court made findings of fact not supported by the evidence. The record on appeal is replete with evidence to support the trial court's findings of fact and conclusions of law. While some testimony was adduced at the hearing tending to show that Fitzgerald Gibbs lacked sufficient mental capacity to understand the nature and consequences of his execution of the deed, the trial court found, and there is evidence in the record to support its finding, that Fitzgerald Gibbs failed to prove this fact by even the greater weight of the evidence. Assuming, *arguendo*, that Fitzgerald was incompetent on 2 November 1971, his own witnesses produced evidence that he was capable of handling his own affairs by 1974. The statute of limitations for bringing an action for recovery of title to realty based on mental disability is three years after the disability is removed; thus plaintiffs' prayer to void the deed is, in any event, barred by the statute. N.C. Gen. Stat. § 1-17 (1981).

For the above reasons, the judgment below is affirmed.

Affirmed.

Chief Judge MORRIS and Judge JOHNSON concur.

VICTORIA HILDERBRAN SMART v. BOBBY GERALD SMART

No. 8125DC1365

(Filed 16 November 1982)

Appeal and Error § 6.2— temporary order under Domestic Violence Act not immediately appealable

A temporary order entered pursuant to provisions of the Domestic Violence Act, G.S. 50B-2(b) and (c), granting plaintiff emergency relief and temporary child custody pending a hearing did not affect any substantial right of the defendant which could not be protected by timely appeal from the trial court's ultimate disposition of the controversy on the merits and thus was not immediately appealable. G.S. 1-277; G.S. 7A-27.

APPEAL by defendant from *Noble, Judge*. Order entered 3 June 1981 in District Court, CATAWBA County. Heard in the Court of Appeals 20 September 1982.

Plaintiff instituted this action on 3 June 1981, by filing a verified complaint seeking a restraining order, immediate possession of the marital home, alimony, child custody and support and reasonable attorney's fees. Plaintiff alleged, *inter alia*, that she is in fear for her own safety and that of the minor children unless defendant is restrained; that without provocation, defendant endangered the life of plaintiff and assaulted plaintiff in May 1981, rendering the conditions in the home intolerable to plaintiff.

On the same day the complaint was filed, Judge Noble entered an order granting plaintiff emergency relief and the entry of a temporary custody order pending a hearing. The order *inter alia* directed that (1) plaintiff have immediate custody of the minor children; (2) defendant be immediately restrained from assaulting plaintiff; (3) plaintiff have exclusive use of the marital home; and (4) defendant remove his personal effects from the home and turn over his keys to a law enforcement officer within one hour after service of the order upon him. The order further directed defendant to appear and show cause why pendente lite relief should not be granted to plaintiff at a hearing set for 11 June 1981. From entry of this order, defendant appeals.

Rudisill & Brackett, P.A., by J. Richardson Rudisill, Jr. and James B. Trapp, Jr., for defendant appellant.

Randy D. Duncan, for plaintiff appellee.

JOHNSON, Judge.

In his brief, defendant contends (1) that the order is appealable under G.S. 1-277 and G.S. 7A-27(d); (2) that the order is not supported by competent evidence; and (3) that the Domestic Violence Act, G.S. Chap. 50B is unconstitutional per se and as applied to the defendant.

We need to address only defendant's first contention which we find to be dispositive of this appeal.

Defendant has attempted to appeal from an order entered pursuant to the Domestic Violence Act, G.S. 50B. Defendant argues that the order affects substantial rights of his which will be lost if the order is not reviewed before final judgment.

G.S. 1-277 and G.S. 7A-27, taken together, provide that no appeal will lie to an appellate court from an interlocutory order or

ruling of a trial court unless such order or ruling deprives the appellant of a *substantial* right which he will lose if the order or ruling is not reviewed before final judgment. *Clark v. Clark*, 42 N.C. App. 84, 255 S.E. 2d 568 (1979); *Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975). As this Court recently stated, "the avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable." *Stephenson v. Stephenson*, 55 N.C. App. 250, 251, 285 S.E. 2d 281 (1981).

The order defendant here appeals from is interlocutory. An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to final decree. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978); *Green v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961). It is clear that Judge Noble's order does not determine the issues involved but, in compliance with G.S. 50B-2 (b) and (c), sets a hearing date for further proceedings preliminary to a final decree.[1]

The word "substantial" is defined as "of real worth and importance; of considerable value, valuable." Blacks Law Dictionary, 4th Ed. (1968). A *right* is substantial only where appellant would lose it if the ruling or order is not reviewed before final judgment. *Funderburk v. Justice, supra.*

Defendant relies upon *Kearns v. Kearns*, 6 N.C. App. 319, 170 S.E. 2d 132 (1969) and *Peeler v. Peeler*, 7 N.C. App. 456, 172 S.E. 2d 915 (1970). *Kearns* involved a temporary order awarding alimony pendente lite, child custody, counsel fees, and the possession of certain properties. *Peeler* involved alimony pendente lite and counsel fees. In both *Kearns* and *Peeler* this Court held that the temporary orders affected substantial rights and were, therefore, immediately appealable.

However, defendant's reliance is misplaced as this Court expressly overruled *Peeler* and other prior decisions recognizing a

1. G.S. 50B-2(b). A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself. A hearing shall be held within 10 days of the filing of the motion. Prior to the hearing and upon a finding of good cause, the court shall enter such temporary orders as it deems necessary to protect the victim or minor children from acts of domestic violence. Immediate and present danger of such acts against the victim or minor children shall constitute good cause.

right of appeal from orders pendente lite in *Stephenson v. Stephenson, supra.*

The trial court in *Stephenson* entered an order for alimony pendente lite, child support, and attorney's fees. The defendant appealed. In dismissing defendant's appeal, this Court stated:

> "In consideration of fairness to the parties and as a matter of public policy, this Court now overrules *Peeler v. Peeler, supra,* and other prior decisions recognizing a right of immediate appeal from orders and awards pendente lite. We hold, therefore, that orders and awards pendente lite are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27(d)."

55 N.C. App. at 252, 285 S.E. 2d at 282.

Judge Noble's order complies with the provisions of G.S. 50B-2(b) and (c). We hold that the order is interlocutory and the immediate temporary emergency relief granted by the order does not affect any substantial right of the defendant which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits.

Defendant's appeal of this matter was premature. Counsel for defendant conceded during oral argument before this Court that the matters between the parties have been heard in the trial court. The appeal is, therefore, moot.

For reasons stated herein, the appeal is hereby

Dismissed.

Chief Judge MORRIS and Judge BECTON concur.

R. B. DEAL CONSTRUCTION CO. v. JOHN HENRY SPAINHOUR AND ROBERT D. SPAINHOUR, D/B/A SPAINHOUR BROTHERS CONTRACTORS

No. 8121SC1293

(Filed 16 November 1982)

Rules of Civil Procedure § 60.4— setting aside judgment—appeal premature

Defendants' appeal from an order setting aside a judgment and granting a new trial under Rule 60(b) was interlocutory and the appeal was premature.

APPEAL by defendant from *Walker, Judge.* Order entered 31 August 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 September 1982.

Plaintiff, a general contractor, brought an action against defendants for breach of a construction subcontract. Defendants filed an answer and counterclaimed against plaintiff for breach of another contract between the parties involving the same construction project. The case was tried before a jury during the week of 5 March 1979 with Judge Walker presiding. Judge Walker's charge to the jury included an instruction that plaintiff must show a willful and intentional breach of contract. Plaintiff objected to this portion of the charge, but no correction was allowed. The jury, after deliberation, held against the plaintiff on the original claim and on defendants' counterclaim. Immediately following the verdict, plaintiff made an oral motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The court indicated it would consider the motion at a later time.

On 12 March 1979 a hearing was held in Judge Walker's chambers, both parties being represented by counsel. At that time Judge Walker ruled he had erred in his charge to the jury and that plaintiff was entitled to a new trial on the original claim, but that he would allow the verdict to stand as to the counterclaim.

Counsel for both parties prepared documents reflecting the above ruling. However, the order and judgment prepared by defendants stated that the judgment on the counterclaim was "with interest from October 14, 1974." The issue of interest from 14 October 1974 had not been submitted to the jury.

Judge Walker noticed the provision for interest only after signing defendants' judgment. He then instructed the clerk to

hold the judgment and not enter it because of the interest provision. All documents pertaining to the judgment, including defendants' unsigned order, were placed in the court file by the clerk.

As both parties were unaware of this problem, the original claim was recalendared for the week of 11 May 1981, with Judge Mills presiding. During jury selection, Judge Mills pointed out that the order setting aside the prior jury verdict had not been signed, and he continued the case until a further hearing could be held before Judge Walker.

The hearing was held before Judge Walker on 24 August 1981, the earliest date possible since the judge had just returned from a leave of absence due to illness. This initial hearing was continued until 27 August 1981 so that plaintiff could file a formal motion pursuant to Rules 59 and 60. At the hearing Judge Walker set aside the jury verdict, as to the plaintiff's original claim, pursuant to Rules 60(a) and 60(b)(6). The judgment and order previously prepared by defendants were entered on 31 August 1981, absent the language referring to interest payment.

From this ruling, defendants appealed.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and Richard T. Rice, for plaintiff-appellee.

Stover, Dellinger & Browder, by James L. Dellinger, Jr., for defendant-appellants.

MARTIN (Robert M.), Judge.

Defendants have appealed from an order setting aside a judgment and granting a new trial under Rule 60(b) of the North Carolina Rules of Civil Procedure. The order entered pursuant to Rule 60(b), setting aside the judgment, is interlocutory and the appeal is premature. Similar to a grant of a 60(b) motion to set aside a default judgment, this order is not appealable as "it does not finally dispose of the case and requires further action by the trial court." See *Shaw v. Pedersen*, 53 N.C. App. 796, 798, 281 S.E. 2d 700, 701 (1981), quoting *Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E. 2d 431, 434 (1980).

Defendants have adequately preserved the question of the appropriateness of the trial court's order setting aside the judg-

ment and granting a new trial. That question may be raised, if necessary, upon an appeal from the final judgment following the retrial of plaintiff's original claim on its merits. Accordingly, defendants' appeal is

Dismissed.

Judges HEDRICK and HILL concur.

SALLIE M. THOMPSON, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

NO. 8110IC1420

(Filed 16 November 1982)

1. **Master and Servant § 68— absence of occupational disease—supporting evidence**

The medical evidence supported a determination by the Industrial Commission that plaintiff suffers from asthma which was exacerbated by exposure to the conditions of her employment in a textile finishing plant but that she has no compensable occupational disease since she did not retain any permanent functional pulmonary impairment after she quit her job.

2. **Master and Servant § 94.4— workers' compensation—refusal to hear newly discovered evidence—no abuse of discretion**

The Industrial Commission did not abuse its discretion in denying plaintiff's motion under G.S. 97-85 to present newly discovered evidence where such evidence consisted of medical evaluations which were consistent with medical testimony already before the Commission.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 7 July 1981. Heard in the Court of Appeals 14 October 1982.

This case involves a claim by plaintiff for disability benefits under the Workers' Compensation Act. Plaintiff was employed in defendant's House of Fabric finishing plant as a ticket clerk in March 1965. She inspected rolls of cloth for eight years. The cloth was made of various fabrics including cotton, rayon, acetate, polyester and flax. She worked in a very dusty environment. The dust would get in plaintiff's eyes, clothes, and hair. There was no

dust collection system. The windows and doors in the plant remained closed, and the air-conditioning vents were often clogged with dust.

The Commission concluded that plaintiff did not incur any compensable disability and denied her claim. The Commission found the following facts which are pertinent to this appeal:

> 5. Prior to beginning her employment with the defendant employer, claimant had no respiratory problems. Claimant noted an initial onset of her respiratory problems in 1970 when she was out of work because of illness for a period of four weeks. Upon her return to work thereafter, she noted that upon breathing the dust within her employer's premises she would become ill.
>
> From the inception of her respiratory problems, claimant was frequently tired on Monday, would start sneezing shortly after beginning work and by the end of the work week was tired. Her symptoms became more severe until October of 1976 when she again became ill noting symptomology in the nature of sneezing, her eyes running, chest tightness, hoarseness, cough and shortness of breath, at which time she was referred to Dr. Stevens in Greensboro and thereafter to Duke University.
>
> 6. In July of 1979 claimant was seen for pulmonary evaluation for possible byssinosis by Dr. D. Allen Hayes of Raleigh, a member of the Textile Occupational Disease Panel, giving a work history of having been employed as an inspector for a period of eleven and one-half years in the finishing room of the defendant employer and of seven years prior having begun to experience intermittent bouts of bronchitis with shortness of breath, temperature and sputum production. Claimant gave a further history of being frequently fatigued on Mondays when she first went to work and of developing sneezing and lacrimation shortly after exposure to dust and of being very tired and weak at the end of the work week and of shortness of breath which became more prominent toward the end of her employment.
>
> On the basis of the claimant's history and his examination including laboratory tests and pulmonary function stud-

ies, Dr. Hayes was of the opinion that claimant had mild asthma by history; however, without present physical radiographic or physiologic abnormality of lung function other than that compatible with her size (Dr. Hayes having diagnosed obesity on the part of the claimant).

With regard to the etiology thereof, Dr. Hayes was of the opinion that any dusty environment or exposure to various irritating fumes could trigger an asthmatic attack but could not relate a direct cause and effect relationship between claimant's cotton dust exposure and her symptoms; Dr. Hayes further noting that the typical symptoms of Monday morning chest tightness progressing to fixed airway obstruction that have been classically called byssinosis were not historically present.

7. Plaintiff has asthma which was exacerbated by exposure to causes and conditions in her employment with the defendant employer; however, she does not retain any permanent functional pulmonary impairment as a result thereof nor did she incur any compensable disability attributable thereto following her removal (in October of 1976) from the exacerbating causes and conditions to which she was exposed in her textile employment.

Hassell, Hudson and Lore, by Charles R. Hassell, Jr., for plaintiff appellant.

Smith, Moore, Smith, Schell and Hunter, by J. Donald Cowan, Jr., for defendant appellees.

ARNOLD, Judge.

[1] Plaintiff's first argument is that the Industrial Commission erred in denying her claim for temporary total disability and medical expenses resulting from her occupational disease.

An occupational disease must be "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." G.S. 97-53(13). If the medical evidence tends to show that plaintiff suffers from an ordinary disease of life to which the general public is equally exposed,

which is not proven to be due to causes and conditions which are characteristic of and peculiar to any particular trade, occupation or employment and which is not aggravated or accelerated by an occupational disease, her claim is not compensable. *Walston v. Burlington Industries,* 304 N.C. 670, 285 S.E. 2d 822 (1982).

Dr. Hayes' medical evaluation was that plaintiff had asthma and was allergic to grass, trees, house dust, tobacco, feathers, and fungi. The doctor concluded:

> This patient by history has mild asthma. I expect that any dusty environment or exposure to various irritating fumes could trigger an asthmatic attack. In such cases, it is frequently impossible to discern a direct cause and effect relationship between cotton dust exposure and symptoms. It should, however, be noted that the typical symptoms of Monday morning chest tightness progressing to fixed airway obstruction that have been classically called byssinosis are not historically present in this case.

Except as to questions of jurisdiction, findings of fact made by the Commission are conclusive on appeal when supported by evidence, even if there is evidence which supports a contrary finding of fact. *Morrison v. Burlington Industries,* 304 N.C. 1, 282 S.E. 2d 458 (1981). The medical evidence in this case overwhelmingly supports the Commission's findings that "plaintiff has asthma which was exacerbated by exposure to cause and conditions in her employment . . . however, she does not retain any permanent functional pulmonary impairment as a result thereof nor did she incur any compensable disability attributable thereto following her removal . . . from . . . textile employment." Since plaintiff suffered from asthma, an ordinary disease of life, and did not retain any permanent functional pulmonary impairment after she quit her job, she did not have an occupational disease.

[2] Plaintiff's second argument is that the Industrial Commission erred in denying her motion to present newly discovered evidence. Plaintiff contends that the new evidence must be received if good ground is shown. The pertinent portion of G.S. 97-85 provides:

> If application is made to the Commission within 15 days from the date when notice of the award shall have been

given, the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award. . . .

Whether good ground is shown is within the sound discretion of the Commission, and the Commission's determination in that regard will not be reviewed on appeal absent abuse of discretion. *Lynch v. M. B. Kahn Construction Co.*, 41 N.C. App. 127, 254 S.E. 2d 236, *review denied*, 298 N.C. 298, 259 S.E. 2d 914 (1979).

The so-called newly discovered evidence was Dr. Rhodes' evaluations which were made on 14 February 1977 and 2 November 1976. That evidence was used by Dr. Hayes in his evaluation, which was admitted into evidence. Dr. Rhodes concluded that plaintiff was allergic to dust, animal danders, cottonseed, flaxseed, and soybean, and a dusty environment exacerbates her symptoms. This is no different from Dr. Hayes' conclusions. In these circumstances, we find no abuse of discretion.

We have carefully considered plaintiff's assignments of error, and the order of the full Commission is affirmed.

Affirmed.

Judges WELLS and HILL concur.

STATE OF NORTH CAROLINA v. WILLIAM F. BURBANK

No. 8228SC345

(Filed 16 November 1982)

1. Criminal Law § 80— document used to illustrate testimony without being admitted into evidence—no prejudicial error

In a prosecution for driving while his operator's license was revoked in violation of G.S. 20-28, the district attorney erred in showing his I.D. card to a defense witness and using it to illustrate or clarify testimony without admitting the I.D. into evidence. However, the error was not prejudicial as (1) there was other competent evidence of defendant's guilt adduced at trial on which the jury could base its verdict, and (2) the evidence elicited by the State that the defendant complained of was helpful to his case.

2. Criminal Law § 114— no duty of judge to state he has no opinion in case

Neither former G.S. 1-180 nor its successor, G.S. 15A-1232, has ever been construed to impose a duty on the trial court to tell the jury that it has no opinion in the case.

3. Criminal Law § 138.11— appeal de novo—more severe sentence

There was no merit to defendant's argument that his sentence imposed by the superior court on his *de novo* appeal had a chilling effect on his right to appeal and right to a trial by jury since on a *de novo* appeal from the district court to the superior court, the possibility of a more severe sentence being imposed is a risk inherent to this type of review.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 5 November 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 19 October 1982.

On 9 April 1981, the defendant was arrested by Trooper Gary Robinson of the North Carolina Highway Patrol for driving while his operator's license was revoked, in violation of N.C. Gen. Stat. § 20-28 (1981). He was found guilty in District Court and appealed to the Superior Court. From a verdict of guilty, a judgment imposing a fine of $500 and costs, and a sentence of 2 years, 23 months of which was suspended, defendant appeals to this Court.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for the State.

Riddle, Shackleford & Hyler, P.A., by George B. Hyler, Jr., for defendant appellant.

BECTON, Judge.

The defendant brings forth five assignments of error and makes three arguments on appeal.

I

[1] Defendant first argues that the outcome of his trial was adversely affected by the District Attorney's examination of a defense witness concerning his (the District Attorney's) I.D. card which was not in evidence at the time; by the exhibition of the card to the jury during the trial; and by his showing the card to the jury during final argument.

Generally, documents must be admitted into evidence before they can be used to illustrate or clarify testimony. *See State v. Rich*, 13 N.C. App. 60, 63, 185 S.E. 2d 288, 291 (1971); N.C. Gen. Stat. § 15A-1233 (1978). The trial court erred when it allowed the following colloquy and exhibition of the I.D. over defendant's objection:

Q. I want to show you something. This is my State I.D. I would like for you to look at this picture. Do you see the glasses on my face, the same glasses?

A. I suppose they are.

Q. Do you see that bright reflection?

. . .

Q. It's very bright, isn't it, very shiney [sic]?

A. Seems to be.

. . .

Q. Can you see my face through those glasses in this photo?

. . .

A. I can see a portion of your eyes behind the glasses?

Q. It's blocked out by the glare, though, isn't it?

A. Yeah.

Q. Do you agree that light reflecting off glass or a glassy surface such as sunlight or the light in the room such as this can affect being able to see through glass?

A. Yes, as far as I know.

However, we will not disturb a judgment for error below unless that error is harmful or prejudicial resulting in the denial of a substantial right. *Whaley v. Marshburn*, 262 N.C. 623, 138 S.E. 2d 291 (1964). We find the error to have had no adverse effect on the jury's decision for two reasons.

First, there was other, competent evidence of defendant's guilt adduced at trial by the State on which the jury could base its verdict of guilty. Second, the evidence elicited by the State that the defendant complains of was helpful, not detrimental, to

his case. The witness testified that light being reflected off glass or a window affects one's ability to see through it. Since the trooper's opportunity to observe was a key issue at trial, evidence tending to show that the trooper was mistaken bolstered defendant's cause. We are not convinced that defendant was prejudiced by this error.

II

[2] Next, defendant contends that the trial court had a duty to tell the jury that it had no opinion in the case. N.C. Gen. Stat. § 15A-1232 (1978) requires:

> In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

We agree that the trial court is, and should be, prohibited from divulging its opinion of the evidence or case of either party to the jury. However, our research discloses no requirement that the court affirmatively state to the jury that it has no opinion; rather, its duty is scrupulously to avoid stating, intimating, or in any other manner revealing its opinion to the jury. N.C. Gen. Stat. § 1-180, *repealed by* N.C. Gen. Stat. § 15A-1232 (1978). Neither former G.S. § 1-180 nor its successor, G.S. § 15A-1232, has ever been construed to impose the requirement on the trial court that defendant urges today. While it may be the better practice for the trial court to affirmatively state, "I have no opinion," or words of similar meaning, to the jury, we find no such duty imposed by G.S. § 15A-1232. This argument, too, is without merit.

III

[3] Defendant's final argument is that the sentence imposed by the superior court on his *de novo* appeal, because of its increased severity, had a chilling effect on his right to appeal and right to trial by jury. This argument is also unpersuasive. He cites N.C. Gen. Stat. § 15A-1335 (1978) as support for his assertion that a court cannot impose a more severe sentence for the same offense on remand from appellate review. That statute is inapposite here since the case *sub judice* concerns a *de novo* appeal from the district court to the superior court. On appeal *de novo*, "the slate

is clean;" the possibility of a more severe sentence being imposed is a risk inherent to this type of review. *State v. Sparrow*, 276 N.C. 499, 508, 173 S.E. 2d 897, 903 (1970).

For the foregoing reasons, we find no prejudicial error in the trial below.

No error.

Judges HEDRICK and WEBB concur.

IN THE MATTER OF: DORIS LOUISE JONES

No. 8226DC316

(Filed 16 November 1982)

Infants § 18— probation violation—noncriminal acts—no adjudication of delinquency

Noncriminal acts which constitute a willful violation of the terms of a court order by an undisciplined juvenile cannot be grounds for an adjudication that the juvenile is delinquent within the meaning of G.S. 7A-517(12).

APPEAL by respondent from *Lanning, Judge.* Judgment entered 11 February 1982 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 October 1982.

This is an appeal from an order citing respondent for criminal contempt of court and committing her to the Division of Youth Services for a period not to exceed thirty days. The facts are as follows. On 10 December 1981, respondent, fifteen years old, was found to be an undisciplined juvenile, as defined in G.S. 7A-517(28), for being unlawfully absent from school forty-three times. The trial judge ordered that the matter be reviewed on 13 January 1982, and in the meantime, ordered respondent to attend school every day, to be at her grandmother's home by 8:00 p.m. on weeknights and 11:00 p.m. on weekends, and to notify her grandmother where she is at all times.

On 12 January 1982, the juvenile counselor filed a petition alleging that respondent violated the trial court's order by staying out all night on 10 December 1981, spending the following

weekend away from home, and missing school on 14 December 1981. On 27 January 1982, the court dismissed the allegation in the petition that respondent was required to attend school.

On 11 February 1982, a hearing was conducted on the charge:

> That the child is a delinquent child as defined under G.S. 7A-517(12) in that said child has willfully violated Order of the Court entered on December 10, 1981. That at the time of entry on December 10, 1981, the juvenile was present in Court and had notice of Order.

The trial judge found that respondent willfully violated the prior order of the court and adjudicated that she was a delinquent juvenile. He first indicated that he would place her on probation. Respondent said that she would not obey the probation order. The judge then ordered her committed to the Division of Youth Services for not more than thirty days.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

Assistant Public Defender Stephen W. Ward, for respondent appellant.

VAUGHN, Judge.

The question presented is whether noncriminal activities which constitute a willful violation of the terms of a court order by an undisciplined juvenile can be grounds for an adjudication that the child is delinquent within the meaning of G.S. 7A-517(12). The statute is as follows:

> Delinquent Juvenile.—Any juvenile less than 16 years of age who has committed a criminal offense under State law or under an ordinance of local government, including violation of the motor vehicle laws.

The former statute, G.S. 7A-278(2) [amended in 1975, effective 1 July 1978 to delete violation of probation as a definition of delinquency; repealed effective 1 January 1980] defined delinquent child as "any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or *a child who has violated the conditions of his probation* under this article." (Emphasis

added.) The provision which would allow an undisciplined child to become a delinquent by merely violating probation without committing a crime was deleted from the statute effective 1 July 1978.

The intent of the legislature controls statutory interpretation. *Jolly v. Wright*, 300 N.C. 83, 265 S.E. 2d 135 (1980). The amendment of former statute G.S. 7A-278(2), removing the violation of probation from the definition of delinquent child, indicates an intent that only criminal activity could provide the basis for an adjudication of delinquency. The legislative purpose in removing probation violations as the basis for adjudications of delinquency would be frustrated if the courts take those very same violations, treat them as criminal contempt, and then base adjudications of delinquency on the contempt proceedings.

The order from which respondent appeals is

Reversed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES LEWIS WILLIAMS

No. 8210SC100

(Filed 16 November 1982)

Criminal Law § 117— character evidence—instructions—consideration on credibility

In a rape case in which defendant testified and in which the evidence was conflicting, the trial court erred in failing to instruct the jury that defendant's character evidence could be considered as bearing on his credibility. Since the jury was required, in reaching a verdict, to pass on defendant's credibility, the error was material and prejudicial.

APPEAL by defendant from *Preston, Judge.* Judgment entered 3 September 1981, Superior Court, WAKE County. Heard in the Court of Appeals 13 September 1982.

Defendant was charged with and convicted of rape in the second degree, a violation of G.S. 14-27.3. From judgment entered on the verdict, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William R. Shenton, for the state.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

MORRIS, Chief Judge.

Evidence was conflicting. State's evidence tended to show that defendant invited the prosecuting witness to the Halifax Community Center in Raleigh, purportedly for a job interview. She testified that after waiting some three hours for the person who was supposed to interview her, she asked defendant to call a cab for her. Shortly thereafter the sexual offense occurred. She testified that she submitted only because of fear of defendant who had said, "don't make me hurt you" and who had, against her wishes, unbuttoned her dress, raised it, and lowered her stockings and underwear. Defendant testified that intercourse did occur, but that it was with her consent. Defendant introduced evidence of his good character.

He assigns as error the following portion of the judge's charge to the jury.

> The evidence has been received with regard to the defendant's reputation. Although good character or good reputation is not an excuse for crime, the law recognizes that a person of good character may be less likely to commit a crime than one who lacks that character. Therefore, if you believe from the evidence that the defendant has a good character you may consider this fact in your determination of the defendant's guilt or innocence, and give it such weight as you decide it should receive in the case, with all the other evidence.

Defendant contends the instruction is incomplete and constitutes prejudicial error, because the court failed to instruct the jury that his character evidence could also be considered as bearing on his credibility. We agree.

State v. Jones, 35 N.C. App. 388, 241 S.E. 2d 523 (1978), is controlling. Defendant was charged with rape in the second degree and with obtaining carnal knowledge of a virtuous girl between 12 and 16 years old. Defendant testified in his own behalf

and offered witnesses who testified as to his good character. On appeal, he assigned as error the failure of the court to instruct the jury that his character evidence could also be considered by them as bearing on his credibility. We said:

> Character evidence is a subordinate and not a substantive feature of the trial. The trial court, in the absence of a specific request, need not give any instruction relative to the significance of character evidence. *State v. Burell*, 252 N.C. 115, 113 S.E. 2d 16 (1960). When the trial court instructs the jury as to the significance of character evidence, however, the instructions must be correct and complete.
>
> The defendant testified in his own behalf. Thus, it was error for the trial court to instruct the jury that character evidence offered in his behalf could be considered as substantive evidence without additionally instructing that it could also be considered as bearing upon his credibility. *State v. Wortham*, 240 N.C. 132, 81 S.E. 2d 254 (1954); *State v. Moore*, 185 N.C. 637, 116 S.E. 161 (1923), and cases therein cited. The trial court's omission in this regard was identical to those we have previously disapproved and will necessitate a new trial. *State v. Adams*, 11 N.C. App. 420, 421, 181 S.E. 2d 194, 195 (1971).

Nor can we say that the omission was not prejudicial. Defendant's testimony contradicted that of the prosecuting witness. The jury was required, in reaching a verdict, to pass on defendant's credibility. The error was, therefore, material and prejudicial.

New trial.

Judges BECTON and JOHNSON concur.

MAX R. WHITESELL, JR. v. PAMELA CHERYL GARNER WHITESELL

No. 8220DC23

(Filed 16 November 1982)

Divorce and Alimony § 16.9— award of alimony for specified period—lump sum alimony

An award of alimony in the sum of $30.00 per week for a six-month period constituted an award of lump sum alimony which was proper under G.S. 50-16.1(1) and G.S. 50-16.7(a).

APPEAL by defendant from *Huffman, Judge*. Judgment entered 18 August 1981 in District Court, MOORE County. Heard in the Court of Appeals 21 October 1982.

Defendant appeals from a judgment which awarded her custody of the parties' minor child, support for the child, and alimony.

Hurley E. Thompson, Jr., for plaintiff appellee.

Ottway Burton, P.A., for defendant appellant.

WHICHARD, Judge.

The court awarded alimony to defendant in the sum of $30.00 per week, "beginning Friday, July 3, 1981 and each and every Friday thereafter until and including January 1, 1982." Defendant contends the court erred in providing for termination of the payments after a specified period. The contention is without merit.

Alimony is "payment for the support and maintenance of a spouse, *either in lump sum* or on a continuing basis." G.S. 50-16.1(1) (emphasis supplied). It may be "by *lump sum payment*, periodic payments, or by transfer of title or possession of . . . property, as the court may order." G.S. 50-16.7(a) (emphasis supplied).

Our Supreme Court has described an award of alimony for a specified period only, such as that here, as "indu[bit]ably alimony in gross or 'lump sum alimony.'" *Mitchell v. Mitchell*, 270 N.C. 253, 257, 154 S.E. 2d 71, 74 (1967). This Court has stated that the statutes cited above "authorize the court, in a proper case, to

order alimony to be paid in a lump sum." *Taylor v. Taylor*, 46 N.C. App. 438, 444, 265 S.E. 2d 626, 630 (1980). *See also Markham v. Markham*, 53 N.C. App. 18, 279 S.E. 2d 905 (1981) (question not explicitly presented, but order of periodic payments for a specified period implicitly approved). This Court has also stated:

> Under the statutory authority vested in the trial judge he could award a lump payment or monthly payments. The amount of the allowance for subsistence is a matter for the trial judge. The exercise of his discretion in this respect is not reviewable except in case of an abuse of discretion.

Austin v. Austin, 12 N.C. App. 390, 392, 183 S.E. 2d 428, 430 (1971).

Pursuant to the foregoing authorities, the court in its discretion could award lump sum alimony for a specified period only. The amount of the award was also in its discretion, subject to review only for abuse. We find no abuse of discretion in the sum awarded.

Counsel for defendant indicated in oral argument that he would not seriously pursue the other two contentions argued in his brief. We have examined the contentions, and we find them without merit.

Affirmed.

Judges VAUGHN and WELLS concur.

HELEN COFFEY CRUMP v. CHARLES ODELL COFFEY

No. 8225DC38

(Filed 16 November 1982)

1. Appeal and Error § 45.1 — failure to argue assignment of error — deemed abandoned

Where defendant noted in the record several exceptions to the admission of evidence, and made these exceptions on the basis of an assignment of error in the record, but did not bring forward and argue this assignment of error in his brief, it was deemed abandoned.

2. Rules of Civil Procedure § 41— trial without jury—motion to dismiss pursuant to Rule 41

The defendant erred in arguing that the trial judge erred in denying his "motion to dismiss pursuant to Rule 50," since in actions tried before a judge without a jury, a motion to dismiss is made pursuant to Rule 41(b).

3. Appeal and Error § 26— findings of fact and supporting conclusions of law

Although defendant failed to refer to an exception or assignment of error when arguing that the trial court erred in entering judgment for the plaintiff, the Court could consider the argument because the defendant did except to the judgment. App. Rule 10(a). However, a review of the findings of fact show they support the conclusions of law drawn therefrom.

APPEAL by defendant from *Mullinax, Judge*. Judgment entered 2 September 1981 in District Court, CALDWELL County. Heard in Court of Appeals 9 November 1982.

This is a civil action wherein plaintiff seeks to recover one-half of the amount paid by her on a promissory note of which she and the defendant were co-makers.

After a trial by the judge without a jury, the court made the following pertinent findings and conclusions:

. . .

(2) That on or about November 26, 1965, the Plaintiff and Defendant executed a promissory note in favor of the Equitable Life Assurance Society of the United States in the principal amount of $17,500.00.

(3) That the Plaintiff and Defendant separated on or about November, 1969 and entered into a final Judgment by consent in an action . . . that a portion of that Consent Judgment reads as follows with regard to the note executed by the parties on or about November 26, 1965:

". . . Defendant shall pay one-half of said total amount as the same shall become due."

. . .

(4) That the Defendant signed said note as a co-maker.

(5) That on or about March 1, 1976, the Plaintiff made a payment due under said note to the Equitable Life Assurance Society of the United States in the amount of $350.00. That

on or about June 1, 1976, the Plaintiff made a payment due under said note to the Equitable Life Assurance Society of the United States in the sum of $346.72.

(6) That on or about June 29, 1976 the Plaintiff made a payment to the Equitable Life Assurance Society of the United States in the amount of $8,352.13, which sum represented a final payoff of said note; that as a result of said payment, the note executed by the parties on or about November 26, 1965 was fully paid and satisfied.

(7) That demand has been made by the Plaintiff on the Defendant for payment of one-half of the amounts paid by the Plaintiff, which amounts represent his liability on the note.

(8) That with the exception of $1,200.00 which was paid by the Defendant and credited by the Plaintiff against said obligations, the Defendant has failed and refused to make any payment on said liability to Plaintiff and said refusal was without just cause or legal defense.

(9) That the total sum now due and owing from the Defendant to the Plaintiff is the sum of $3,924.42.

From a judgment that plaintiff recover of the defendant the sum of $3,924.42 plus interest at the rate of eight (8%) percent interest from 29 June 1976, defendant appealed.

Sigmon, Clark and Mackie, by Jeffrey T. Mackie, for plaintiff, appellee.

Wilson, Palmer & Cannon, by Bruce L. Cannon, for defendant, appellant.

HEDRICK, Judge.

[1] Although defendant has noted in the record several exceptions to the admission of evidence, and has made these exceptions the basis of an Assignment of Error in the record, he has not brought forward and argued this Assignment of Error in his brief. It is, therefore, deemed abandoned.

[2] The defendant argues in his brief, without reference to an Exception or Assignment of Error, that the trial judge erred in denying his "motion to dismiss pursuant to Rule 50." Rule 50 has

no application to trials before the Judge without a jury. In actions tried before the judge without a jury a motion to dismiss is made pursuant to Rule 41(b).

[3] The defendant argues in his brief, again without reference to an Exception or Assignment of Error, that the trial court erred in entering judgment for the plaintiff. We consider this argument because the defendant did except to the judgment. Appellate Rule 10(a).

An exception to the judgment presents the question of whether the facts found support the conclusions of law made, and whether the judgment is in proper form. We have carefully considered the Findings of Fact and hold they support the Conclusions of Law drawn therefrom, and support the judgment entered. The finding that the plaintiff and the defendant were co-makers of the note coupled with the finding that the plaintiff paid the entire balance due on the note support the conclusion that the defendant is indebted to the plaintiff for one-half of the amount paid. *Grimes v. Grimes*, 47 N.C. App. 353, 267 S.E. 2d 372 (1980).

Affirmed.

Judges WEBB and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 NOVEMBER 1982

BROWN v. MOODY No. 8219DC37	Randolph (80CVD716)	Affirmed
FORD v. FORD No. 824DC28	Onslow (70CVD2260)	Dismissed
IN RE WARREN No. 8228DC422	Buncombe (81J175)	Affirmed
LAUTENSCHLAGER v. McC BUILDERS No. 8120SC1265	Moore (79CVS348)	Affirmed
MILLER v. FELTS No. 8110IC1387	Industrial Commission (H-3623)	Affirmed
PEARSON v. PEARSON No. 8110SC1364	Wake (80CVS3062)	Affirmed
STATE v. MERCER No. 8211SC68	Johnston (81CR8595) (81CR8619) (81CR8620)	No Error
STATE v. POLK No. 8220SC295	Anson (81CRS3005)	No Error
STATE v. SWINK & EVANS No. 8218SC392	Guilford (81CRS16274) (81CRS16281) (81CRS16282) (81CRS16296) (81CRS16273) (81CRS16278) (81CRS16279) (81CRS16295)	Affirmed
WEST v. LOWE'S OF WAYNESVILLE No. 8130SC1425	Haywood (78CVS495)	No Error

STATE OF NORTH CAROLINA v. CHRIS LEE RICHARDSON

No. 8214SC227

(Filed 7 December 1982)

1. Witnesses § 10— modification of subpoenas duces tecum—no violation of right of compulsory process

In a murder, robbery and assault prosecution in which defendant issued subpoenas *duces tecum* directing officials of two television stations to produce copies of certain videotaped news reports and written transcripts of certain news telecasts, the trial court's modification of the subpoenas to require that only written transcripts be produced and to permit delivery of the transcripts without personal appearances by station officials did not violate defendant's Sixth and Fourteenth Amendment right of compulsory process on the ground that persons named in the subpoenas could have testified to matters beyond the scope of the subpoenaed material since (1) a subpoena *duces tecum* compels production of documents, papers or chattels, (2) the person named in a subpoena *duces tecum* merely authenticates the records produced, and (3) had defendant wished to obtain additional testimony from the station officials, he should have sought issuance of subpoenas *ad testificandum.* G.S. 1A-1, Rule 45(c); G.S. 15A-802.

2. Criminal Law § 15.1— pretrial publicity—denial of change of venue

The trial court did not abuse its discretion in the denial of defendant's motion for a change of venue pursuant to G.S. 15A-957 on the ground of pretrial publicity where the various television newscasts, newspaper articles and editorials, and letters to the editor offered by defendant in support of his motion were not inflammatory but accurately reported the circumstances of the case.

3. Jury § 7.9— denial of challenge of juror for bias

The trial court did not err in the denial of defendant's challenge for cause of a prospective juror who testified to having avidly followed the case in the media where she also stated that she would decide the case without bias on the basis of evidence presented at trial and the law as explained by the court. Furthermore, defendant failed to preserve his exception to the denial of his challenge for cause when he did not exercise his remaining peremptory challenge.

4. Criminal Law § 22— arraignment—name not on arraignment calendar

The trial court did not err in arraigning defendant on 21 September 1981 when his case had not appeared on the arraignment calendar for that week where defendant's name appeared on the 21 September 1981 trial calendar; the matter had appeared on previous arraignment calendars; at a prior hearing on defendant's pretrial motions, the district attorney, with defendant's knowledge and acquiescence, had said he would call the matter for trial at the 21 September 1981 session; the trial court arraigned defendant and continued trial until 28 October 1981; and defendant entered a plea of not guilty and was not tried for a full week following arraignment. G.S. 15A-943(b).

5. Criminal Law § 101— failure to admonish jury at each recess

Defendant was not prejudiced by failure of the trial court to instruct the jury as completely and fully as required by G.S. 15A-1236 prior to each recess where the court, at least once during the trial, fully admonished the entire jury concerning proper conduct during recesses, and the court did instruct the jury before each recess but merely failed to give detailed instructions on every occasion.

6. Robbery § 4.3— armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for the armed robbery of a victim who threw his duffle bag containing money at defendant in the course of an assault on him by defendant with a stick.

7. Criminal Law § 117.2— instructions on testimony of interested witnesses

The trial court's instructions on the scrutiny and consideration to be given the testimony of interested witnesses were proper.

8. Homicide § 16— competency of statements as dying declarations

Statements made by deceased were properly admitted as dying declarations pursuant to G.S. 8-51.1 where the trial court determined upon supporting evidence that at the time deceased made the statements he did anticipate his death in that he believed he was dying. It was unnecessary for the court to find further that deceased believed there was no hope of recovery since deceased obviously had such a belief if he believed he was going to die.

Judge HEDRICK concurring in part and dissenting in part.

Judge WEBB concurring.

APPEAL by defendant from *Martin, Judge.* Judgment entered 6 October 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 23 September 1982.

Defendant appeals from the judgment entered on his conviction of second degree murder, armed robbery, and assault with a deadly weapon inflicting serious injury.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Robert Brown, Jr., for defendant-appellant.

HILL, Judge.

This matter includes three cases consolidated for trial involving incidents that occurred 12 April 1981 at the Little River in Durham County, North Carolina. In the early afternoon of 12

April 1981, defendant, State's witness Guy Osbahr and their wives went to the Little River for an outing. They chose a site some distance upriver from a group of male sunbathers, some of whom were nude.

In the first case consolidated for trial, defendant was charged with assault with a deadly weapon, inflicting serious injury in violation of G.S. 14-32. The State's evidence tends to show that defendant quarreled with Jerry Michael Penny, apparently over whether the sunbathers should clothe themselves. In the course of the discussion, defendant struck Penny with a stick. Defendant denied having provoked the altercation.

In the second case consolidated for trial, defendant was charged with robbery with a dangerous weapon in violation of G.S. 14-87(a). The State's evidence shows that shortly after his argument with Penny, defendant threatened with a stick and struck Mark Demarias whom defendant believed to be associated with the party of sunbathers, as Demarias was leaving the area. In self-defense, Demarias threw his duffel bag at defendant. Because of defendant's continued threats, however, Demarias was unable to retrieve his bag or the seventeen dollars it contained.

In the final case consolidated for trial, defendant was charged with second degree murder in violation of G.S. 14-17. In a purportedly unprovoked assault, defendant struck Ronald Antonevitch about the head with a stick. Antonevitch, who was with the group of sunbathers, apparently did not retaliate. He was treated at Durham County General Hospital where he also was questioned by two deputy sheriffs. He died three days later of an intracranial hematoma.

The jury found defendant guilty as charged. Defendant assigns as error the trial court's: (1) modification of defendant's subpoena *duces tecum*, (2) denial of defendant's motion for change of venue, (3) refusal to excuse a juror for cause, (4) arraignment of defendant, (5) failure to instruct the jury correctly, (6) denial of defendant's motion to dismiss the armed robbery charge, and (7) admission of hearsay evidence. We find no error.

[1] On 22 May 1981, defendant filed a motion for a change of venue from Durham County to Vance County. He later issued subpoenas *duces tecum* directing the News and Station Managers of

Raleigh station WRAL-TV and Greensboro station WFMY to produce copies of all videotaped news reports and written transcripts concerning "the alleged assault and killing of Ronald Antonevitch on the Little River on 12 April 1981 and . . . of [the] Public Protest involving homosexual rights since 12 April 1981 . . . ." In response to the State's motion to quash, the court entered an order modifying the subpoenas to require that only written transcripts be produced and to permit delivery of the transcripts without personal appearances by station officials.

Defendant contends this modification constituted a denial of his Sixth and Fourteenth Amendment right of compulsory process to obtain pertinent testimony and evidence. He argues that persons named in the subpoenas could have testified to matters beyond the scope of the subpoenaed material and that written transcripts only dimly reflect the effect of the telecasts. We find defendant's contentions are without merit.

A subpoena *duces tecum* compels production of documents, papers or chattels. *Vaughan v. Broadfoot*, 267 N.C. 691, 149 S.E. 2d 37 (1966); Brandis on North Carolina Evidence (Rev. Ed. 2d) § 17; G.S. 1A-1, Rule 45(c); G.S. 15A-802. The person named in the subpoena *duces tecum* merely authenticates the records produced. *Vaughan v. Broadfoot, id.* Had defendant wished to obtain additional testimony from station officials, he should have sought issuance of subpoenas *ad testificandum* in the time between the 24 July 1981 entry of the modification order and the 25 August 1981 hearing on defendant's motion for change of venue. The court properly modified the subpoenas.

[2] Defendant further contends that denial of his motion for a change of venue pursuant to G.S. 15A-957 violated his constitutional right to due process and was an abuse of judicial discretion. We disagree.

In support of his motion, defendant introduced affidavits of news directors from Raleigh station WRAL-TV and Greensboro station WFMY-TV. He introduced seventeen pertinent newscripts altogether from WRAL-TV, WFMY-TV and WPTF-Raleigh, an affidavit concerning circulation of the Raleigh *News and Observer*, and videotapes of news broadcasts from WTVD-Durham and WPTF-Raleigh. Defendant offered evidence of a public demonstration that described the crime as one motivated by anti-homosex-

ual bias. In addition to evidence of newspaper editorials excoriating violent crime and letters to the editor, defendant introduced results of a survey indicating that 87 percent of the people polled had formed opinions about the crime.

This Court set forth the test of defendant's motion in *State v. McDougald*, 38 N.C. App. 244, 248, 248 S.E. 2d 72, 77-78, *disc. rev. denied*, 296 N.C. 413, 251 S.E. 2d 472 (1979):

> The burden of proof in a hearing on a motion for change of venue is upon the defendant. In order to prevail the defendant must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. The determination of whether the defendant has met this burden rests within the sound discretion of the trial court. Absent a showing of abuse of discretion, its ruling will not be overturned on appeal. (Citations omitted.)

Nowhere does defendant contend the publicity generated by the crime was inflammatory. Without allegations and proof that the news articles were inflammatory, the trial judge acted within his discretion in denying a change of venue. *State v. Matthews*, 295 N.C. 265, 245 S.E. 2d 727 (1978), *cert. denied*, 439 U.S. 1128, 99 S.Ct. 1046, 59 L.Ed. 2d 90 (1979). Having examined the pertinent television transcripts and newspaper clippings, we find that none contain incitive statements. As did the Supreme Court in *State v. Matthews*, "[w]e specifically reject as devoid of merit defendant's argument that news coverage which accurately reports the circumstances of the case . . . can be so 'innately conducive to the inciting of local prejudices' as to require a change of venue." *Id.*, at 279, 245 S.E. 2d at 736.

The passage of time cools the blood and permits reason to rule. This, together with the jury selection process, tends to create a climate in which fair trials may be conducted. Although public outrage and misunderstanding arose just after commission of the crime, we find the trial court considered these circumstances and acted within its discretion in denying the motion for change of venue. The assignment is overruled.

[3] Defendant next contends the trial court erred in refusing to excuse a juror whom he challenged for cause. In the alternative, defendant contends the trial court erred in refusing to grant him a seventh peremptory challenge. These contentions are meritless.

When the trial court denied his challenge of a juror for cause, defendant failed to exercise his remaining peremptory challenge. He accepted the juror instead. Defendant therefore failed to preserve his exception to the denial of his challenge for cause. *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). We find, in addition, that the trial court properly exercised its discretion in denying defendant's challenge for cause. Although the juror testified to having avidly followed the case in the media, she also said she would decide the case without bias, based on the evidence presented at trial and the law as explained by the court. *See State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970). This assignment is overruled.

[4] Defendant complains the trial court committed prejudicial error in arraigning him on 21 September 1981 when his case had not appeared on the arraignment calendar for that week. Defendant's contention is meritless.

Defendant's name appeared on the 21 September 1981 trial calendar. When his case was called, defendant announced he wished to be arraigned at a later date. The trial court found the matter had appeared on previous arraignment calendars; and that at a prior hearing on defendant's pretrial motions, the district attorney, with defendant's knowledge and acquiescence, had said he would call the matter for trial at the 21 September 1981 session. The trial court arraigned defendant and continued trial until 28 September 1981. Defendant pleaded not guilty.

We find no prejudicial error. Defendant was in court. He entered his plea. He was not tried for a full week following arraignment. *See* G.S. 15A-943(b).

[5] By his next assignment of error, defendant argues that the trial court failed to instruct the jury as completely and fully as required by G.S. 15A-1236. By this statute, the court must admonish jury members against discussion of the case with nonjurors, or among themselves except in the jury room, and against forming an opinion or receiving outside information about the case. Defendant's trial was long. There were many recesses. The court instructed the jury before each recess but failed to give detailed instructions on every occasion. Nevertheless, we find defendant suffered no prejudice. Failure by the trial court to fully admonish the jury on every occasion does not of itself constitute prejudicial

error. The trial court at least once during the trial fully admonished the entire jury concerning proper conduct during recesses. In any event, defendant must show prejudice, and when counsel for defendant is in the courtroom, he or she must object to any failure to instruct the jury properly. *State v. Chambers*, 52 N.C. App. 713, 280 S.E. 2d 175 (1981). This assignment is overruled.

Regarding assignments of error pertaining to the court's charge to the jury, defendant first argues the trial court failed to fully charge on self-defense. He also claims the trial court failed to charge properly on second degree murder. We find no error. When read in context, the charge of the court is adequate. This assignment is overruled.

[6] By his next assignment of error, defendant urges the trial court erred in refusing to dismiss the charge of armed robbery. We find no error.

The record tends to show that in the course of an assault by defendant, the prosecuting witness, Mark Demarias, threw his duffel bag at defendant. The bag contained seventeen dollars and some personal effects. The witness testified that while no demand for the bag or its contents had been made of him, he voluntarily threw it to fend off further assault. The State's evidence tends to show that when the witness later attempted to retrieve the bag, defendant, still holding his club, taunted: "Come on, you want some more . . . ." Intimidated, the witness never recovered his bag. He returned several days later to find the duffel bag intact but the seventeen dollars missing. There was conflicting evidence about whether defendant or his wife took the money.

G.S. 14-87(a) defines armed robbery as follows:

> Any person or persons who, having in possession, or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a . . . felony.

Although defendant apparently did not initially intend to commit armed robbery, the evidence was sufficient for a jury to

find that defendant, armed with a club and in possession of the duffel bag, prevented the witness from recovering his property. We find, therefore, sufficient evidence to justify submission of the charge of armed robbery.

[7] Two of the participants in the matter *sub judice* became State's witnesses. The trial court instructed the jury on the credibility of these two witnesses as follows:

> Now you may find that a witness is interested in the outcome of the trial. In determining whether or not to believe such a witness it is entirely proper for you to take the witness's interest into account. If after you have done so you believe the testimony of the witness in whole or in part, then you should treat what you believe the same as any other believable evidence in the case.
>
> * * * * * * *
>
> If you find that either of the witnesses testified in whole or in part for this reason, then you should examine the testimony of each with great care and caution in deciding whether or not to believe him. If after doing so you believe the testimony of the witness in whole or in part, then you should treat what you believe the same as any other believable evidence in the case.

Defendant contends the court committed prejudicial error in submitting the instruction on grounds that it usurped the province of the jury to determine the weight and credibility of the evidence, tended to confuse the jury as to the weight and credibility it could give testimony of witnesses, and tended to keep the jury from finding defendant or his witnesses more believable than some of the State's witnesses. We disagree. The charge is plain. The trial court must instruct that the testimony of an interested party be scrutinized and received with caution, but if the jury finds the testimony worthy of belief, it should be accorded the same weight as would be given other credible testimony. 4 Strong's N.C. Index 3d, Criminal Law § 86, p. 385. The instruction was correct. The assignment is overruled.

[8] In his final assignment, defendant argues that the court erred in admitting as dying declarations statements made by the deceased Ronald Antonevitch. G.S. 8-51.1 allows as an exception

to the hearsay rule admission of statements made by a deceased person, provided the declarant made them voluntarily with conscious awareness of impending death and without hope of recovery.

On the day of the assault, two deputy sheriffs spoke to Antonevitch in the emergency room at Durham County General Hospital where Antonevitch told them repeatedly, "Oh, God, help me, I am dying." He had just received a severe head wound and recently had undergone major heart surgery. On the evening of 12 April 1981, after repeating several times that he was dying, Antonevitch went into a coma and never regained consciousness. He died three days later.

After a *voir dire* regarding Antonevitch's statements, the trial court concluded:

> Ronald Antonevitch did at five o'clock p.m. on April 12, 1981, and again at 7:00 o'clock p.m. on April 12, 1981, anticipate his death in that he believed he was dying.

Questioning the sufficiency of this conclusion, defendant claims the trial court must find that, in addition to anticipating his death, Antonevitch believed there was no hope of recovery. Chief Justice Sharp addressed the question in *State v. Stevens*, 295 N.C. 21, 29, 243 S.E. 2d 771, 776 (1978), in which she said for the Court: "Obviously, if one believes he is going to die, he believes there is 'no hope of recovery'." The statements made to the deputy sheriffs were properly admitted as dying declarations.

The defendant received a fair trial, free from prejudicial error.

No error.

Judge HEDRICK concurs in part and dissents in part.

Judge WEBB concurs in the result.

Judge HEDRICK concurring in part and dissenting in part.

I concur in the decision that defendant's trial in the cases charging second degree murder and assault with a deadly weapon

inflicting serious injury was free from prejudicial error; however, I dissent from the decision in the case charging armed robbery, because, in my opinion, the evidence does not support the conviction for armed robbery.

Judge WEBB concurring.

I concur in the result but I do not agree with the majority as to what evidence supported a conviction of armed robbery. The majority reasons that although the defendant did not initially intend to take the duffel bag, the evidence that the defendant, armed with a club, prevented Mr. Demarias from recovering the duffel bag supports a conviction of armed robbery. With this I disagree. I believe the evidence that Mr. Demarias was being assaulted with a deadly weapon at which time he threw his duffel bag toward the defendant and which duffel bag the defendant took into his possession and refused to return a short while later, supports a finding by the jury that at the time the duffel bag changed hands, the defendant intended to deprive Mr. Demarias of this personal property.

STATE OF NORTH CAROLINA v. ROBIN HALL

No. 828SC182

(Filed 7 December 1982)

1. **Assault and Battery § 15.2; Criminal Law § 111.1— assault with a deadly weapon with intent to kill—pre-trial remark to jury—equating charge with attempted murder—error**

The trial judge committed prejudicial error by attempting to paraphrase a portion of defendant's indictment in pre-trial remarks to the jury by stating that defendant was charged with the "North Carolina equivalent of attempted murder." Defendant was charged with the statutory offense of assault with a deadly weapon with intent to kill, inflicting serious injury, G.S. 14-32(a), and the crimes of "attempted murder" and "assault with intent to kill" differ in an important manner in their respective mental state requirements. G.S. 15A-1213.

2. **Assault and Battery § 15.2; Criminal Law § 113.8— assault with a deadly weapon with intent to kill—error in summarizing evidence—prejudicial**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death, the trial judge committed

prejudicial error in his charge to the jury by summarizing the evidence as showing that defendant told the victim "that he was going home and get his gun and kill him" since there was no evidence that defendant had said "and kill him" at that point in time. Defendant made no effort to call the misstatement to the trial court's attention; however, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention.

Chief Judge MORRIS concurs in the result.

APPEAL by defendant from *Bruce, J.* Judgment entered 25 September 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 September 1982.

The defendant, Robin Hall, was charged in a bill of indictment with assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death. Defendant pled not guilty, asserting self-defense. From a verdict of guilty of assault with a deadly weapon inflicting serious injury and the imposition of an active sentence, defendant appealed.

The issues dispositive of this appeal are whether the trial court erred in its pre-trial remarks and during its charge to the jury by misstating the evidence.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Duke and Brown, by John E. Duke, for defendant appellant.

JOHNSON, Judge.

The State's evidence tended to show that on 23 March 1981 at about 8:00 p.m., in a parking lot in Goldsboro, North Carolina, there was an argument between the defendant and Edward Thomas Locklear, Jr., over the defendant's treatment of Locklear's sister, Theresa Locklear. At this time, the defendant and Theresa Locklear were seated in defendant's car. Edward Locklear approached the vehicle and tried to engage defendant in a fist fight. The defendant left the scene in his car with Theresa. Edward Locklear testified that defendant, "said he was going to get his gun," called the Locklear home about 15 minutes later, and "threatened me and my daddy." Locklear did not speak with defendant on the phone himself. Locklear's father testified that "he (defendant) said I'm going to get that son of yourn [sic]. That's

all he said. I said if you got a gun, you better keep it hidden because a gun is going to get you in trouble." Within 30 minutes after the initial incident, the defendant drove Locklear's sister toward her father's house and parked about a block away, letting her off. As defendant was pulling away, Locklear yelled for him to stop, came running up, and while defendant was seated in the vehicle again attempted to engage defendant in a fight. Randy Locklear, a younger brother, was also present and Theresa Locklear, at this time, was standing behind her brother. Edward Locklear testified that defendant threw his arm out the car window and that defendant had a gun in his hand. Locklear again offered to fight the defendant. The defendant let the clutch off his car and started rolling away. Locklear testified that defendant shot him while the car was rolling away. After Locklear saw the car going down the road he fell to the ground. Locklear testified that he never threatened to kill and never touched the defendant during the two incidents.

Defendant's evidence tended to show that he had known the Locklear family for many years. Theresa Locklear had had a child by defendant, and Theresa had been living with defendant's mother on and off for a few years. There was some ill will between the members of the Locklear family and defendant.

Defendant testified that during the first incident Locklear threatened to kill him and broke defendant's windshield by beating on it. Defendant stated that he did not threaten to go home for his gun in order to get Locklear. In fact, the gun was in his car at that time. Defendant left the scene with Theresa and drove to his mother's house. His mother was on the telephone with Locklear's father, Edward Locklear, Sr., when they arrived. She handed defendant the phone. Defendant testified that Locklear's father threatened him, stating, "Well, if I go get my gun, I am going to use it" and defendant could hear Edward, Jr. in the background, threatening him. Defendant and Theresa then drove toward the Locklear home and parked about a block away.

Theresa got out of the car. Edward Locklear, Jr. came running up to the defendant's car as he let out the clutch. Defendant testified that Locklear reached into the car, grabbed him from behind and started choking him. Defendant then tried to get the gun off the dashboard. In the struggle the gun went off. Defend-

ant testified that he never aimed the gun at Locklear, that the bullet must have hit the street and then struck Locklear in the chest, but that defendant did not know that Locklear had been hit.

Theresa Locklear's testimony, for the most part, corroborated defendant's version of the two incidents. Theresa stated that after she heard the gunshot, the defendant pulled away. Her brother remained standing, talking to her, and he never screamed. No blood was visible even after Locklear fell to the ground.

[1] In pretrial remarks to the jury, the trial court stated, "It (sic) is a criminal proceeding wherein the defendant stands charged with the North Carolina equivalent of attempted murder, assault with a deadly weapon with intent to kill inflicting serious injury." Defendant contends that it was prejudicial error for the trial judge to advise the jury that the defendant, in effect, was charged with attempted murder.

G.S. 15A-1213 provides:

> Prior to selection of jurors, the judge must identify the parties and their counsel and briefly inform the prospective jurors, as to each defendant, of the charge, the date of the alleged offense, the name of any victim alleged in the pleading, the defendant's plea to the charge, and any affirmative defense of which the defendant has given pretrial notice as required by Article 52, Motions Practice. The judge may not read the pleadings to the jury.

"The purpose of the statute, when read as a whole and considered together with the Official Commentary, apparently is to avoid giving jurors 'a distorted view of the case' through the 'stilted language of indictments.' " *State v. Laughinghouse*, 39 N.C. App. 655, 657, 251 S.E. 2d 667, 668, *appeal dismissed*, 297 N.C. 615, 257 S.E. 2d 438 (1979). The trial judge does not violate G.S. 15A-1213 by reading a portion of the indictment to the jury as a part of his charge after the close of the evidence. *Id.* However, reading the indictments at the very *beginning* of the trial is the very evil sought to be prevented, giving the jury a distorted view of the case through the stilted language of indictments, and constitutes prejudicial error. *State v. Hill*, 45 N.C. App. 136, 263 S.E. 2d 14 (1980).

In the case *sub judice* the indictment contains the following language:

> That Robin Hall . . . did, unlawfully, willfully and feloniously assault Edward Thomas Locklear, Jr. with a certain deadly weapon, to wit: a small caliber handgun with the felonious *intent to kill and murder.* (Emphasis added.)

The statement that defendant was charged with the "North Carolina equivalent of attempted murder" came at the very beginning of defendant's trial. It was not repeated in the court's charge to the jury. The statement was an apparent attempt to paraphrase a portion of the indictment. While it cannot be said that the trial court gave the jury a distorted view of the case through the use of the "stilted" language of the indictment, a distorted view was given through the use of an inaccurate and misleading paraphrase.

Defendant was charged with the statutory offense of assault with a deadly weapon with intent to kill, inflicting serious injury. G.S. 14-32(a). The State contends that in this statute, "intent to kill" and "attempted murder" mean the same thing. We do not agree.

G.S. 14-32(a) is contained in G.S., Chap. 14, Art. 8, Assaults. By the passing of G.S. 14-32 the Legislature intended to create a new offense of higher degree than the common law crime of assault with intent to kill. *State v. Jones,* 258 N.C. 89, 128 S.E. 2d 1 (1962). The felony described in G.S. 14-32 is often referred to as felonious assault. *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177 (1968). Hence, a proper shorthand expression of the offense involved in this case would be "felonious assault."

The crimes of "attempted murder" and "assault with intent to kill" differ in an important manner in their respective mental state requirements. The various degrees of homicide recognized in this State have been defined by our Supreme Court time and again.

> Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation . . . Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. (Citations omitted.)

State v. Wilkerson, 295 N.C. 559, 577, 247 S.E. 2d 905, 915 (1978), *quoting, State v. Wrenn*, 279 N.C. 676, 681-82, 185 S.E. 2d 129, 132 (1971) (Huskins, J.). In *State v. Hill*, 287 N.C. 207, 214 S.E. 2d 67 (1975) the Supreme Court compared the elements of G.S. 14-31, the crime of secret assault, with those of G.S. 14-32(a), the crime of felonious assault.

> The felony described in G.S. 14-32(a) is often referred to as felonious assault . . . The following elements therefore must be proven beyond a reasonable doubt in order to establish the crime of felonious assault: (1) assault; (2) deadly weapon; (3) intent to kill; and (4) infliction of serious injury . . . G.S. 14-31, *supra*, in addition to the above common elements, requires proof of *secret manner* and of *malice*. These elements must be proven in order to support a conviction under G.S. 14-31; but they need not be shown at all in a prosecution under G.S. 14-32(a). (Emphasis original.)

Id. at 217, 214 S.E. 2d at 74. The mental state required for felonious assault has been defined in the following manner:

> A specific intent to kill is an essential element of the offense of assault with intent to kill . . . Hence an intent to kill the victim by means of assault, as opposed to an intent merely to intimidate, must accompany the assault. (Citations omitted.)

State v. Irwin, 55 N.C. App. 305, 309, 285 S.E. 2d 345, 349 (1982). It is clear therefore, that while malice is not an element of felonious assault, it is an element of both first and second degree murder. The elements of an assault with intent to kill may be in an attempt to commit murder, but that alone does not render the two offenses equivalent.

The State argues that the trial court complied with the requirements of G.S. 15A-1213 because the bill of indictment charges the defendant with "intent to kill and murder." The implication being that the prospective jurors were, therefore, correctly informed of the charge against the defendant.

The purpose of G.S. 15A-1213, with its admonition against reading the pleadings to the jury, is to avoid giving jurors a distorted view of the case through the stilted language of the indictment. *State v. Laughinghouse, supra; State v. Hill, supra.* The

language of the indictment in this case characterizes the offense involved in a distorted manner. First, in common usage, "murder" is a value-laden term while "kill" carries no specific connotation of the same nature. Second, and more importantly, "murder" has a distinct legal meaning, and it is one which is *not* embodied in the statute defining the offense with which defendant is charged. The following statement is illustrative of this point:

> There is a well recognized distinction between an assault with intent to murder and an assault with intent to kill. Malice is a necessary element to constitute an assault with intent to murder but is absent in an assault with intent to kill or commit manslaughter, or, as it is said, the assault with intent to kill may be committed without malice. If malice is lacking and yet the assault is unlawful, the crime committed is of a lower degree than assault with intent to murder.

40 C.J.S., Homicide, § 73, p. 938.[1]

Defendant was charged with the statutory offense of assault with a deadly weapon with *intent to kill*, inflicting serious injury. *Malice* is not an element of this offense in North Carolina, *State v. Hill, supra*, while it is an element of the offense of murder, *State v. Wilkerson, supra*, and is commonly an element of the offense of assault with *intent to murder*. In view of the fact that the indictment itself gives a distorted view of the charge, the incorporation of a portion of it in the court's pretrial statement to the prospective jurors could only have the same effect. The bet-

1. It is true that our Supreme Court, in *State v. Gregory*, 223 N.C. 415, 421, 27 S.E. 2d 140, 143 (1943), stated that no distinction is commonly made between the expressions "intent to murder" and "intent to kill." However, the statement in *Gregory* is *dicta*. The issues before the Supreme Court in *Gregory* concerned alleged defects in the indictment and verdict returned upon the offense charged therein. As in the case under discussion, the indictment charged defendant Gregory with felonious assault with a deadly weapon, to wit, a pocket knife, inflicting serious injuries not resulting in death, "with intent to kill and murder." *Id.* at 416, 27 S.E. 2d at 141. The jury found the defendant guilty of an assault with intent to kill. The Supreme Court stated that "intent to kill" and "intent to murder" are designated "*in ipssissimis verbis*" in the course of its discussion whether assault with intent to kill is a lesser grade of assault with a deadly weapon with intent to kill inflicting serious injury and further, whether both offenses were expressly excepted from the punishment then assigned to simple assault. In view of the Supreme Court's later definitive statement in *State v. Hill, supra*, regarding the lack of an element of malice in assault with intent to kill, we do not find *Gregory* controlling on the issue presented by the facts of this case.

ter practice under G.S. 15A-1213 would be to simply read the statutory language of the offense charged with no additions. The trial court's statement that defendant was charged with the "equivalent of attempted murder" was prejudicial error.

[2] Defendant argues the trial judge also committed prejudicial error in his charge to the jury. In summarizing the evidence, the trial judge stated, "the State's evidence tends to show that Robin Hall told Edward Locklear that he was going home and get his gun and kill him." Defendant argues the portion "and kill him" is a misstatement of material fact as there is no evidence that defendant made such a statement.

The trial court inaccurately summarized this evidence of the defendant's intent. Edward Locklear testified that defendant "said he was going to get his gun" during the first incident. Locklear did not testify that defendant said "and kill him" at that point in time. Locklear did testify that during the second incident defendant said, "if I touched him he was going to kill me." While this was further evidence on the issue of defendant's intent, the court failed to summarize any statements made by defendant immediately preceding the shooting during the second incident. This manner of summarizing the evidence could only leave the misleading impression in the minds of the jurors that they should only consider statements made during the first incident as bearing on defendant's intent.

The State argues that errors in stating the evidence must be called to the trial court's attention before the case is submitted to the jury or else be deemed to have been waived. It is true that defendant made no effort to call the misstatement to the trial court's attention. However, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. *State v. Barbour*, 295 N.C. 66, 243 S.E. 2d 380 (1978); *State v. McCoy*, 236 N.C. 121, 71 S.E. 2d 921 (1952).

In *State v. Barbour*, the trial court erred in summarizing the evidence in its charge by stating, "that he had a pistol in his hand" when the defendant had first arrived, where the State's only eyewitness nowhere testified that she saw a gun in defendant's hand when he first returned. 295 N.C. at 74-5, 243 S.E. 2d at 385. The court in *Barbour* found the instruction to be "highly

misleading and prejudicial in that it strongly reinforces the State's position that defendant came to the room armed and prepared to get his money or kill the deceased, when there was no evidence that defendant had a gun in his hand until after the deceased had been shot once." *Id.* While it is true that a misstatement of a collateral matter must be called to the court's attention or be deemed waived, *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed. 2d 306, 97 S.Ct. 2339 (1977), the defendant's intent to kill Locklear is an element of the offense to be proven beyond a reasonable doubt by the State. Both the defendant and Theresa Locklear testified that no mention of going to get a gun was made during the initial incident. Sergeant Lewis testified about his interview with Locklear after the shooting. Locklear told Sergeant Lewis only that "he had a verbal confrontation with Mr. Hall and at which time he was, he had intentions of fighting with Mr. Hall, but Mr. Hall rolled the windows up on the car and drove away." The defendant testified "at that time the gun was in the car. It was in the car I was driving. I did not have to go home to get the gun."

As in *State v. Barbour*, the court's inclusion of a material fact not in evidence is highly misleading and prejudicial in that it strongly reinforces the State's position that defendant returned to the vicinity of the Locklear home to kill Edward Locklear. This instruction, together with the previously noted erroneous pretrial remark to the jury regarding "attempted murder," constitute manifest prejudice to this defendant. As a consequence, he must be afforded a new trial.

As the events which form the basis of defendant's remaining assignments of error may not recur on retrial, we deem it unnecessary to discuss them.

New trial.

Chief Judge MORRIS concurs in the result.

Judge BECTON concurs.

STATE OF NORTH CAROLINA v. PHYLLIS HORNE

No. 8225SC214

(Filed 7 December 1982)

1. **Searches and Seizures § 23— probable cause for search warrant—sufficiency of affidavit**

An officer's affidavit based upon information reported to him by other officers and by two robbery victims was sufficient to support a finding of probable cause for the issuance of a warrant to search defendant's residence for items taken in the robbery.

2. **Criminal Law § 73.4— statements during robbery—admissibility as part of res gestae**

In a prosecution of defendant for armed robbery, statements made by one of defendant's companions during the robbery that defendant had hired him and the other companion to do "this job" and they were going "to do it right" and that one of the victims had "ripped off" his girlfriend were admissible as part of the *res gestae* and were relevant to establish the intent of defendant and her companions.

3. **Criminal Law §§ 33.2, 89.6— threats to defendant—competency for rebuttal and to show motive**

In a prosecution for armed robbery, cross-examination of defendant about threats made to her by her marijuana supplier after marijuana in her possession was allegedly replaced by one robbery victim with moldy marijuana was proper to elicit testimony to rebut defendant's prior testimony that she did not intend to participate in the robbery and to show defendant's motive for the robbery.

4. **Robbery § 5.4— armed robbery case—failure to instruct on lesser offenses**

The evidence in an armed robbery case concerning the use of a firearm was not conflicting so as to require the trial court to instruct the jury on the lesser included offenses of common law robbery and larceny where defendant admitted that she wielded both a knife and a gun while she was at the victims' residence, and the evidence showed that both of defendant's accomplices in the robbery held guns during the robbery.

5. **Robbery § 6— robbery of husband and wife—two separate robberies**

Where defendant was charged in separate armed robbery indictments with taking guns and money belonging to the husband and with taking jewelry belonging to the wife, the property was not taken from only one entity so as to constitute only a single offense of armed robbery, and defendant could be convicted and sentenced for two offenses of armed robbery.

6. **Criminal Law § 138— aggravating and mitigating factors—imposition of presumptive sentence**

There was no merit to defendant's contention that the trial court apparently overlooked evidence of mitigating factors listed in G.S.

15A-1340.4(a)(2) in sentencing her to consecutive terms of 14 years each upon two charges of armed robbery; furthermore, since the court imposed the presumptive sentence specified in G.S. 14-87(d), it was not required to make any findings regarding aggravating and mitigating factors. G.S. 15A-1340.4(b).

APPEAL by defendant from *Sitton, Judge*. Judgment entered 1 October 1981 in Superior Court, CALDWELL County. Heard in the Court of Appeals 22 September 1982.

Defendant was charged in bills of indictment with the armed robberies of Wayne and Donna Vines.

Evidence for the State tends to show that on 13 July 1981 Wayne and Donna Vines and their child were living with Wayne's mother, Mae. In the late afternoon of 13 July, defendant came to the Vineses' house accompanied by William Lawrence and Ronald Hanks. When Mae informed the defendant and the two men that Wayne and Donna were not home, the three indicated they would wait. Approximately twenty minutes later Wayne, Donna, and their child returned to the house. As Wayne walked in, Lawrence hit him on the head with a gun and threatened to shoot him and his family. He demanded both money and guns from Wayne. At this time Hanks was holding a gun to Mae's head. Defendant was holding a hunting knife and a long stick with a knob on one end. When the Vineses' telephone began ringing, Lawrence instructed defendant to cut the cord and to tie Mae with this cord. Lawrence then demanded Donna's jewelry. When she told him her jewelry boxes were in a nearby trailer, Lawrence instructed defendant to accompany Donna to the trailer. After defendant and Donna had obtained the jewelry boxes, defendant informed her that if she and her family did everything they were told, no one would be killed. Defendant, Hanks, and Lawrence then left the house with the property belonging to the Vines family. None of the Vineses saw Lawrence or Hanks threaten defendant in any way. Two days after the alleged robberies, defendant was arrested. A number of the articles taken from Donna and Wayne were found in defendant's residence.

Other evidence presented for the State tends to show that several days prior to the alleged robberies, defendant asked Wayne if he wanted to purchase some marijuana. She then showed Wayne a bag of marijuana. Wayne examined the mari-

juana and noted that it was "low grade leaf." He agreed to buy only one pound. Donna paid for the marijuana by removing $300 from a roll of money containing approximately $2,000. The $300 was removed from the roll in defendant's presence.

Defendant admitted that she sold marijuana to Wayne prior to the alleged robberies. She asserted, however, that the marijuana she intended to sell him was surreptitiously replaced with bags of moldy marijuana by Wayne and Donna. When she returned the moldy marijuana to her supplier, he threatened to harm her unless something was done about the switch. Defendant then discussed the switch with Lawrence and Hanks. The two men agreed to help defendant obtain either money or the marijuana from Wayne. She acquired guns for Hanks and Lawrence after they indicated they might need them when confronting Wayne. Defendant testified that she told the two men she wanted no violence; that she tried to stop Lawrence when he first hit Wayne; and that Lawrence told her he would kill her unless she did as he said.

The jury found defendant guilty on both counts of armed robbery. From an imposition of consecutive sentences of 14 years each, defendant appeals.

Attorney General Edmisten, by Associate Attorney John W. Lassiter, for the State.

Tuttle and Thomas, by Bryce O. Thomas, Jr., for defendant appellant.

MORRIS, Chief Judge.

[1] On the first day of trial defendant filed a motion to suppress evidence seized pursuant to a search warrant issued two days after the alleged robberies. In her motion defendant alleged as grounds for suppression that the warrant was void and unconstitutional on its face and that no probable cause was established for its issuance. The trial court denied the motion, and defendant has assigned error. She asserts in her brief that the evidence seized should be suppressed because the warrant was not based on the personal observations of the applicant for the warrant, but was instead based on the observations of the Vineses whose reliability and trustworthiness were not demon-

strated. Defendant further alleges that there was nothing to indicate that the items sought would be found in the place described. We find no merit to this assignment of error.

In his application for the search warrant Detective Richard Matheson attached a detailed list of property sought and specifically described the residence to be searched. Detective Matheson then swore to the following grounds upon which he believed the evidence might be found in the described residence:

> That on July 13, 1981 the residence of Wayne Vines, located at Rt. 10, Box 398; Lenoir, N.C. was broken into and the items listed in the attached list were taken by force. During this occurrence, Mr. Wayne Vines and other occupants of the house were victims of the Assault with Deadly Weapon. A report was filed with the Caldwell County Sheriff's Dept. . . . and the applicant was assigned as the investigating officer. On this same date this applicant interviewed two of the victims, Wayne Vines and his wife, Donna Vines. The Vines advised this applicant that they were both acquainted with one of the perpetrators; same being one Phyllis Stout, aka—Red, and they both have personal knowledge of Stout living in Harmony, N.C. and working in Mocksville, N.C.
>
> Further, that this applicant contacted Lt. Cotton Edwards of the Mocksville Police Department and was advised that he was familiar with Phyllis Stout and that she did work in Mocksville, N.C.
>
> Further, that this applicant contacted S. E. Wallace of the Iredell County Sheriff's Department and was advised by Wallace that Phyllis Stout does re(side) at the above described residence.
>
> That the property described herein was last seen in the possession of Phyllis Stout by the Vines as Stout left their residence on the night of July 13, 1981. Also that approximately $2,500.00 was taken from the Vines residence.

We find that this application for the search warrant clearly satisfies the definition of probable cause as defined by statute and interpreted by our courts. Judge Parker summarized these well-established principles in *State v. Dailey*, 33 N.C. App. 600, 235

S.E. 2d 917, *appeal dismissed and disc. review denied*, 293 N.C. 362, 237 S.E. 2d 849 (1977).

> Probable cause, as that expression is used in the Fourth Amendment and in our statutes, G.S. 15A-244 and 245, "means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Campbell*, 282 N.C. 125, 128-29, 191 S.E. 2d 752, 755 (1972). Probable cause does not deal in certainties but deals rather in probabilities "which are factual and practical considerations of everyday life upon which reasonable and prudent men may act." *State v. Spillars*, 280 N.C. 341, 350, 185 S.E. 2d 881, 887 (1972). Moreover, a valid search warrant may be issued on the basis of an affidavit setting forth information which may not be competent as evidence in a criminal trial. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). Thus, "[t]he affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant; but the affidavit in such case must contain some of the underlying circumstances from which the affiant's informer concluded that the articles sought were where the informer claimed they were, and some of the underlying circumstances from which the affiant concluded that the informer, whose identity need not be disclosed, was credible and his information reliable." *State v. Campbell, supra* at 129. In this connection, the police officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Vestal, supra; State v. Banks*, 250 N.C. 728, 110 S.E. 2d 322 (1959).

Id. at 602, 235 S.E. 2d at 919. In the affidavit before us Detective Matheson relied upon information reported to him by other officers and the named victims of the alleged robberies. We hold that the facts stated in the application support a finding of probable cause.

[2] Defendant has also assigned error to the admission of "certain inadmissible and prejudicial evidence" and to the non-

admission of "certain proper and significant evidence." Under this assignment of error defendant has noted exceptions to testimony regarding statements made by Lawrence and Hanks during the alleged robberies. The majority of these exceptions refer to Mae Vines' testimony that she heard Lawrence tell defendant that she had hired him and Hanks to do "this job" and they were going "to do it right." Wayne Vines testified that Lawrence hit him and then told him that he had "ripped off" his girlfriend. Defendant alleges that these statements were hearsay and therefore inadmissible. The court allowed the statements of Lawrence into evidence on the basis that they were all made in the presence of defendant and were competent. We find no error in the admission of this evidence. The statements of Lawrence were relevant to the charges of armed robbery, since they appeared to be part of the *res gestae*. To be part of the *res gestae*, a declaration must meet three qualifying conditions: The declaration must be of a spontaneous character, it must be contemporaneous with the transaction at issue or so closely connected as to be practically inseparable, and it must possess some relevancy to the facts sought to be proved. *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757 (1944). The statements of Lawrence were also relevant to establish the intent of defendant and her cohorts. Intent was directly in issue since the crimes charged require a showing of felonious intent. *See State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978).

This Court also finds no error in the disallowance of two questions posed to defendant. An examination of the record reveals that the court sustained objections to these questions because they were leading. Traditionally the judge's ruling as to the admissibility of leading questions has been reversible only for abuse of discretion. No such abuse was shown here. 1 Brandis on N.C. Evidence § 31 (2d Rev. Ed. 1982).

[3] Defendant has further excepted to questions posed to her on cross-examination concerning threats made to her by her supplier of marijuana after the marijuana was allegedly switched. She argues that these questions constitute impermissible forms of impeachment. The record on appeal shows that this line of questioning was initially opened by defense counsel during his examination of defendant. Furthermore, the questions were admissible to rebut defendant's prior testimony, that she did not intend to participate in the armed robberies. These questions

elicited testimony tending to show defendant's motive for the crimes. A defendant may be asked questions on cross-examination which discredit his testimony, no matter how disparaging the questions. The defendant, however, may not be needlessly badgered by questions which the examiner knows will not elicit competent or relevant evidence. *State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972). The questions here were relevant to show motive. Defendant's contention, that they were elicited to bring out purely prejudicial matters, is baseless.

We have carefully examined defendant's remaining exceptions to the judge's rulings on the admissibility of evidence and find no prejudicial error.

[4] In Assignment of Error No. 3 defendant excepts to the failure of the trial court to instruct on the offenses of common law robbery and larceny. She argues that the jury could have found from her testimony that there was no evidence to support all of the elements necessary for a conviction of armed robbery. She specifically contends that her testimony shows that she neither used nor threatened use of any firearm. Our examination of defendant's testimony leads us to the opposite conclusion. Defendant admitted that while she was at the Vineses' residence, she wielded both a knife and a gun. When the evidence discloses no conflicting evidence as to the elements of the greater offense, the lesser included offense need not be submitted. *State v. Brown,* 300 N.C. 41, 265 S.E. 2d 191 (1980). We further note that since the State presented evidence of aiding and abetting by defendant, the court properly instructed the jury on the law of aiding and abetting.

> A person aids when, being present at the time and place, he does some act to render aid to the actual perpetrator of the crime though he takes no direct share in its commission; and an abettor is one who gives aid and comfort, or either commands, advises, instigates or encourages, another to commit a crime. (Citation omitted.) By its express terms G.S. 14-87 extends to one who aids and abets in an attempt to commit armed robbery.

State v. Dowd, 28 N.C. App. 32, 38, 220 S.E. 2d 393, 397 (1975). Under the law of aiding and abetting, the State was not required to present evidence that defendant personally committed each

essential element of armed robbery. This assignment of error is overruled.

Defendant has assigned error to the denial of her motions for directed verdict, to set aside the verdict and for new trial. She argues that the evidence failed to prove anything as to her involvement. When ruling on a motion for directed verdict, the trial judge is required to consider the evidence in the light most favorable to the State and to give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Hood*, 294 N.C. 30, 239 S.E. 2d 802 (1978). The State presented considerable evidence that defendant was an aider and abettor to the armed robberies. These motions were properly denied.

[5] Defendant has also assigned error to the court's denial of her motion to dismiss one of the charges of armed robbery. She argues that since the property taken belonged to a husband and wife, it was then taken from "only *one* entity." She cites *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974), as supporting authority. In *Potter* the Court held that the taking of an employer's property from two employees at gunpoint constituted a single offense of armed robbery. We find this case to be inapplicable to the situation here. A more apposite case is *State v. Johnson*, 23 N.C. App. 52, 208 S.E. 2d 206, *cert. denied*, 286 N.C. 339, 210 S.E. 2d 59 (1974). We held therein that the taking of property by threatened use of force from two persons constituted separate and distinct offenses. In the matter before us defendant was charged in separate bills of indictment with the taking of guns and money belonging to Wayne Vines and with the taking of jewelry belonging to Donna Vines. The evidence was consistent with these indictments. This assignment of error is overruled.

[6] Defendant's final assignment of error is directed to the sentence imposed by the court. Defendant argues that when the court sentenced her to consecutive terms of 14 years each, the court apparently overlooked evidence of many of the mitigating factors listed under G.S. 15A-1340.4(a)(2). She further implies that the court punished her for exercising her right to a jury trial. These allegations are based upon sheer speculation. Evidence of both mitigating and aggravating factors was before the court, and we must presume that each of these factors was considered. Moreover, since the court imposed the presumptive sentence

specified in G.S. 14-87(d), it was not required to make any findings regarding aggravating and mitigating factors. *See* G.S. 15A-1340.4(b) and *State v. Morris*, No. 8218SC180 (filed 19 October 1982). This assignment of error is, therefore, overruled.

No error.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. ERMEL GEORGE THOBOURNE

No. 8221SC335

(Filed 7 December 1982)

1. **Criminal Law § 92.1— denial of motion for separate trials—no abuse of discretion**

Joinder of defendant's case with another was proper under G.S. 15A-926(b)(2)b.1 and 3 in that the offenses charged were part of a common plan or scheme and were so closely connected in time, place, and occasion that it was difficult to separate proof of one charge from proof of the other. Even though the evidence against the other defendant was overwhelming, severance of the two cases was not necessary for a fair determination of defendant's guilt or innocence.

2. **Searches and Seizures § 19— search of motel room with warrant—standing of defendant to object**

Where defendant denied any interest, possessive or otherwise, in two motel rooms, he had no standing to challenge the validity of a search warrant or of the search itself.

3. **Narcotics § 4— possession with intent to sell and deliver marijuana—sufficiency of evidence**

The evidence was sufficient to go to the jury on the charge of possession with intent to sell and deliver marijuana where the evidence tended to show that defendant and another man rented two rooms at a motel; that upon going to defendant's room to collect rent, the motel manager saw two bags of marijuana and both defendant and the other man were present; that another tenant in the motel testified that she saw defendant in his room and that there were marijuana cigarettes lying on the table; that when police searched the two rooms of the motel, they found approximately three pounds of marijuana in defendant's room; and in the other man's room were found approximately 41 pounds of marijuana, together with two insurance receipts made out to defendant and the other man; and that defendant was present when the other man's girlfriend took a tenant to her room and accused the tenant of being an informant and beat her up.

4. Criminal Law § 175.2— denial of recess to locate witness—no error

There was no merit to defendant's contention that the trial court erred in refusing to grant a recess to enable unidentified defense witnesses additional time in which to appear to testify.

5. Criminal Law § 138— sentencing phase—aggravating factors of pecuniary gain and unusually large quantity of contraband properly considered

In a prosecution for possession with intent to sell and deliver marijuana, the trial court did not err in the sentencing phase of defendant's trial by considering as aggravating factors that the offense was committed for pecuniary gain and that the offense involved an unusually large quantity of contraband since the two aggravating factors were not elements of G.S. 90-95(a)(1), the offense of which defendant was convicted. G.S. 14-1.1(a)(9), G.S. 15A-1340.4(f)(7), and G.S. 15A-1340.4(a)(1).

6. Criminal Law § 138— sentencing phase of trial—erroneous aggravating circumstances considered

In a prosecution for possession with intent to sell and deliver marijuana, the trial judge erred in considering as aggravating factors that the defendant did not at any time render assistance to the arresting officer or the district attorney and that the defendant did not offer aid in the apprehension of other felons. There was no evidence in the record that defendant hindered the arresting officer or the district attorney or that he was ever asked to help in apprehending other felons.

APPEAL by defendant from *Walker, Judge.* Judgment entered 13 November 1981, in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 October 1982.

Attorney General Edmisten, by Associate Attorney General G. Criston Windham, for the State.

Gregory W. Schiro for defendant-appellant.

ARNOLD, Judge.

Defendant was indicted for possession with intent to sell and deliver marijuana, a Schedule VI substance under the North Carolina Controlled Substances Act, G.S. 90-86 *et seq.* His trial was consolidated with that of Joel Blackwood. From a verdict of guilty, defendant appeals presenting several questions including those concerning failure of the trial court to sever his trial from that of Blackwood, the admission of certain evidence, and the denial of his motions to dismiss. After a careful review of the record and arguments by counsel, we conclude that there were no errors prejudicial to the defendant in the trial.

I

Defendant's indictment and conviction stemmed from the following events which the State's evidence tended to show. On the night of 22 July 1981, officers of the Winston-Salem Police Department received information from a confidential informant that occupants of a green pickup truck with a white camper were selling marijuana on Liberty Street in Winston-Salem. An agent of the State Bureau of Investigation (S.B.I.) went to the area, approached Danny Wright and Joel Blackwood, the occupants of the vehicle, and negotiated unsuccessfully for the purchase of some marijuana. The S.B.I. agent confirmed the confidential informant's information, and, as the pickup truck left the area, a surveillance team from the police department moved in and stopped it. As one officer approached the vehicle, he observed the occupant of the front passenger seat (Wright) toss a bag out his window; in the truck, the officer discovered other bags containing a substance later identified as marijuana and a telephone bill belonging to the defendant. The vehicle itself was registered to Gosmay and Joel Blackwood.

Early on the morning of 23 July 1981, police officers obtained a search warrant for two rooms at the Salem Manor Motel. According to the motel manager, as well as another occupant of the motel, these two rooms, numbered 201 and 202, were rented and occupied by the defendant and Blackwood, respectively. In the first room searched, officers discovered a brown suitcase with twenty-one large plastic bags of marijuana and two insurance receipts in the name of defendant and Blackwood; a blue carrying case with seven one-quarter pound bags of marijuana; a green carrying case with a large plastic bag of "green vegetable material;" plastic bags; a set of scales, and small brown envelopes. In the other motel room, which was allegedly defendant's, were found fifty-six brown envelopes of marijuana and a blue overnight bag containing two large and two small plastic bags of marijuana. The marijuana in defendant's room weighed three pounds. The total weight of all the marijuana seized in the truck and the two rooms was 44.1 pounds.

Blackwood put on evidence tending to show that, while he was with Danny Wright when Wright tried to sell marijuana to the undercover agent, he had no involvement in possessing or try-

ing to sell the substance. He denied any knowledge of the marijuana found in the motel rooms. The defendant's evidence tended to show that he was not staying in the Salem Manor Motel and that he knew nothing about the marijuana. He explained the location of the telephone bill by stating that he had requested Blackwood, a friend, to pay it for him. The insurance receipts were found among Blackwood's belongings because Blackwood had agreed to insure the automobile of defendant who had no driver's license.

After the jury found defendant guilty of possession with intent to sell and deliver marijuana, the trial court held a sentencing hearing in which aggravating and mitigating factors were presented. As to the defendant, the trial court found the aggravating factors to outweigh the mitigating factors and sentenced him to a maximum term of five years.

II

[1] The defendant first assigns as error the trial court's denial of his motion to sever his case from that of Joel Blackwood. He argues that the joint trial, in which the evidence was so strong against Blackwood, resulted in his being found guilty solely on the basis of his association with Blackwood.

The record shows that, at the same time the trial court denied defendant's motion for a separate trial, it allowed the State's motion to join the cases of the two defendants. Joinder of the two cases was proper under G.S. 15A-926(b)(2)b.1 and 3 in that the offenses charged were part of a common scheme or plan and were so closely connected in time, place, and occasion that it was difficult to separate proof of one charge from proof of the others. Since this was so, severance was necessary in this case only if, before or during trial, it was found necessary for a fair determination of the guilt or innocence of the defendant. G.S. 15A-927(b). The trial court's exercise of authority to consolidate cases for trial is discretionary and will not be disturbed absent a showing that a joint trial deprived a defendant of a fair trial. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

While we agree with the defendant that the evidence against Blackwood was overwhelming, we cannot find that this alone requires severance of the two cases. In the present case, the trial

court limited the admission of certain evidence only to Blackwood, and it was careful in its instructions to warn the jury to consider the evidence as to each defendant separately. In our view, severance of the two cases was not necessary for a fair determination of defendant's guilt or innocence; the trial court took adequate precautions to assure that defendant's trial was not tainted by joinder with Blackwood's trial. *See Blumenthal v. United States*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947).

[2] By his next assignment of error, defendant contests the admission of certain evidence seized as a result of the search of the two rooms of the Salem Manor Motel. In his argument, he attempts to raise undefined questions concerning the legality of the two warrants allowing police officers to search the rooms. Defendant, however, denied any interest, possessive or otherwise, in the two rooms. He, therefore, had no standing to challenge the validity of the search warrant or of the search itself. *State v. Eppley*, 282 N.C. 249, 192 S.E. 2d 441 (1972).

[3] At the close of the State's, as well as at the close of his evidence, defendant made motions to dismiss based on insufficiency of the evidence against him. He now argues that the denial of these motions was error. While we acknowledge that the evidence against Blackwood overshadowed that against defendant, we find nevertheless that, under our standards of determining motions to dismiss, there was sufficient evidence to go to the jury.

In ruling on defendant's motion to dismiss, the trial court is limited to the task of determining whether a reasonable inference of defendant's guilt may be drawn from the evidence. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979). The State is required to produce substantial evidence—more than a scintilla—to prove the allegations contained in the bill of indictment. *Id.* In considering a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *Id.*

Taken in the light most favorable to the State, the evidence at trial tended to show that, in July 1981, both Blackwood and defendant rented two rooms at the Salem Manor Motel. Upon going to defendant's room to collect rent on 22 July, the motel manager saw two bags of marijuana; both Blackwood and defendant were present. Another tenant in the motel, Beverly Goodman,

testified that she saw defendant in his room, and that, at the time, there were marijuana cigarettes lying on a table. During the early morning hours of 23 July, when police searched the two rooms of the motel, they found approximately three pounds of marijuana in defendant's room. In Blackwood's room were found approximately 41 pounds of marijuana, together with two insurance receipts made out to defendant and Blackwood. Later that morning, according to testimony by Goodman, Blackwood's girlfriend took her to the girlfriend's room where she was accused of being an informant and was beat up. Defendant was present during the scuffle. We believe the foregoing was substantial evidence from which the jury could infer defendant's possession with intent to sell or deliver marijuana. The motions to dismiss were properly denied.

[4] Defendant's next argument is that the trial court erred in refusing to grant a recess to enable unidentified defense witnesses additional time in which to appear to testify. The record shows that the case began at 9:00 on the morning in question, that defense counsel had told the witnesses to come at 11:00, but that, at 11:25, they had not appeared. Defendant presented no affidavit in support of his request for a delay; he presented no information from which the trial court could, or this Court can now, find that the testimony of the witnesses for whom delay was sought was material to defendant's defense. *See State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976). We, therefore, find no merit in defendant's contention that the trial court's refusal to allow a recess was error.

[5] Defendant attacks his sentence of five years, which is the maximum time under G.S. 14-1.1(a)(9) for the Class I felony that he committed. The presumptive sentence for this crime is two years under G.S. 15A-1340.4(f)(7).

G.S. 15A-1340.4(a)(1) prohibits using evidence necessary to prove an element of the offense to prove a factor in aggravation. Defendant contends that this provision was violated when the trial judge found the following two aggravating factors:

> 3. The offense was committed for hire or pecuniary gain. . . .
>
> 13. The offense involved an attempted or actual taking of property of great monetary value or damage causing

great monetary loss, or the offense involved an unusually large quantity of contraband.

We reject this argument because these two aggravating factors are not elements of G.S. 90-95(a)(1), the offense of which defendant was convicted. That offense has two elements: 1) knowing possession of the controlled substance and 2) possession with intent to sell or deliver it.

Although the quantity of drugs seized is evidence of the intent to sell, *State v. Cloninger*, 37 N.C. App. 22, 245 S.E. 2d 192 (1978), it is not an element of G.S. 90-95(a)(1). Consideration of the large quantity of drugs [forty-five pounds] in the case *sub judice* was proper and supported by the evidence.

It was also proper to consider the pecuniary gain factor as aggravating. Possession of a controlled substance with intent to sell it does not necessarily mean that there will be a pecuniary gain.

[6] But the trial court erred in considering the following two aggravating factors:

16. Additional written findings of factors in aggravation.

(A) The defendant did not at any time render assistance to the arresting officer or the District Attorney.

(B) The defendant did not offer aid in the apprehension of other felons.

We find no evidence in the record that defendant hindered the arresting officer or the district attorney or that he was ever asked to help in apprehending other felons. Because it is difficult to ascertain what help that the defendant could have provided without implicating himself, consideration of these two aggravating factors was a potential infringement on his right to plead not guilty. "Defendant had the right to plead not guilty, and he should not and cannot be punished for exercising that right." *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E. 2d 459, 465 (1977). Thus, it was error to consider these two factors under number sixteen and we remand for resentencing.

Although our reduction of the aggravating factors leaves three mitigating and two aggravating factors, the trial judge can

still impose a sentence greater than the presumptive two years. G.S. 15A-1340.4(b) requires that if a judge imposes a sentence greater than the presumptive term, "he must find that the factors in aggravation outweigh the factors in mitigation. . . ."

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. . . . The number of factors found is only one consideration in determining which factors outweigh others. . . . The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Davis, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982).

Because of consideration in sentencing of the two impermissible factors, we remand for resentencing.

No error in the trial; remanded for resentencing.

Judges MARTIN and WHICHARD concur.

SHIRLEY HAYES WRIGHT v. AMERICAN GENERAL LIFE INSURANCE COMPANY

No. 8117SC1343

(Filed 7 December 1982)

1. **Evidence § 24; Rules of Civil Procedure § 32— admissibility of deposition**

The trial court did not err in admitting the deposition of a psychiatrist who had treated decedent in a hospital in Virginia where the court made findings and conclusions based upon supporting evidence that the witness was employed at a Virginia hospital, had his office in Virginia, and resided in Virginia; that counsel had been unable to procure the voluntary appearance of the witness; that the witness was not within the jurisdiction of the court and thus was not amenable to service of its process; and that defendant had been unable to procure attendance of the witness by subpoena. G.S. 1A-1, Rule 32(a)(4); G.S. 8-83.

2. **Evidence § 29.3— information from medical records—admission prior to introduction of records**

Where medical records were properly admitted into evidence, plaintiff was not prejudiced by the admission, prior to the introduction of the records themselves, of testimony regarding information derived from the records.

3. Evidence § 29.3— hospital records—admissibility under business records exception to hearsay rule

Admission and discharge summaries relating to decedent's treatment at a Virginia hospital were properly admitted into evidence under the business records exception to the hearsay rule where the record established that a medical witness was decedent's treating physician; that the witness had practice privileges in the hospital from which the admission and discharge summaries came; that he dictated the admission summary on the date of decedent's admission to the hospital; that the admission summary was prepared under his direction and signed by him; that he identified the discharge summary as a part of the hospital's records; and that the discharge summary was obtained by him and prepared at his direction.

4. Evidence §§ 34.1, 50— statements in hospital records—admission against interest—basis for diagnosis

In an action to recover the proceeds of a life insurance policy, statements in hospital records attributed to plaintiff relating to decedent's drinking habits were admissible as admissions of a party, and statements in the hospital records attributed to plaintiff's father were admissible for the purpose of showing the basis of a medical witness's diagnosis.

5. Evidence § 14— physician-patient privilege—waiver in insurance application

Decedent waived the physician-patient privilege by his execution of an application for life insurance containing an authorization for any licensed physician to give information concerning his health to defendant insurer, and this waiver was binding upon plaintiff as beneficiary of the life insurance policy. Therefore, testimony by a medical witness regarding his diagnosis and the medical history he obtained from decedent was admissible without a finding by the court that disclosure of such information was "necessary to a proper administration of justice." G.S. 8-53.

6. Insurance § 18.1— life insurance—insured's use of alcohol after application—evidence not prejudicial

Although hospital records and testimony by a physician relating to decedent's use of alcohol during the period between his application for life insurance and his death over two years later may have been irrelevant to the issue before the jury as to whether decedent misrepresented that he was not an excessive user of alcohol when he applied for the insurance, the admission of such evidence was not prejudicial error where plaintiff herself testified to decedent's heavy drinking in the months preceding his death.

7. Insurance § 18.1— life insurance—misrepresentation as to excessive use of alcohol

In an action to recover the proceeds of an insurance policy on the life of plaintiff's deceased husband, the evidence was sufficient to support the jury's finding that decedent had misrepresented to defendant insurer in his insurance application that he was not an excessive user of alcohol.

8. Insurance § 18.1— life insurance application—no waiver of misrepresentation as to alcohol use

Defendant insurer did not waive a misrepresentation in decedent's life insurance application as to his excessive use of alcohol by its failure to make inquiries of decedent's doctors concerning his alcohol use.

APPEAL by plaintiff from *Albright, Judge.* Judgment entered 24 July 1981 in Superior Court, SURRY County. Heard in the Court of Appeals 22 September 1982.

Plaintiff sought to recover the proceeds of an insurance policy on the life of her deceased husband (hereafter "decedent"). A single issue was submitted to and answered by the jury as follows:

"Was the representation by [decedent] to the defendant that he had not been treated for and had not had any known indication of excessive use of alcohol false?

Answer: Yes."

Plaintiff appeals from a judgment on the verdict denying recovery and taxing her with the costs.

Faw, Folger, Sharpe and White, by W. Thomas White and T. Richard Pardue, Jr., for plaintiff appellant.

Gardner, Gardner, Johnson, Etringer & Donnelly, by G. L. Donnelly, Sr., for defendant appellee.

WHICHARD, Judge.

Plaintiff's contentions relate primarily to evidentiary rulings. We find no error.

[1] Plaintiff first contends the court erred in admitting the deposition of a psychiatrist at a hospital in Virginia who had treated decedent for withdrawal from alcohol use. She argues that defendant failed to establish any of the conditions for use of depositions in court proceedings provided by G.S. 1A-1, Rule 32(a)(4).

G.S. 1A-1, Rule 32(a)(4) (Cum. Supp. 1981) provides, *inter alia,* that a deposition may be used in court proceedings when "the party offering the deposition has been unable to procure the attendance of the witness by subpoena." G.S. 8-83(2) provides that a

deposition may be read at trial "[i]f the witness is a resident of . . . another state, and is not present at the trial." Insofar as it does not conflict with G.S. 1A-1, Rule 32, G.S. 8-83 remains in effect. *See Nytco Leasing v. Southeastern Motels*, 40 N.C. App. 120, 124-26, 252 S.E. 2d 826, 830 (1979).

While the record does not clearly establish that the witness in question resides in Virginia, it contains indications that he does, and it presents no evidence to the contrary. Further, it is uncontroverted that at time of trial the witness was licensed to practice medicine in Virginia, had privileges to practice in the Virginia hospital where decedent had been treated, had offices in Virginia, and was then present in Virginia. Counsel for defendant represented to the court that at the time the deposition was taken the witness had "indicated that he would not care to come to North Carolina to testify voluntarily." Counsel also represented that he had written the witness requesting his voluntary attendance at trial, and that the witness had replied that counsel "already ha[d] the record and [his] deposition so [he felt] that [he] would have little to offer as a witness."

The foregoing sufficed to support the court's findings and conclusions that the witness was employed at a Virginia hospital, had his office in Virginia, and resided in Virginia; that the witness had declined to appear voluntarily to testify at trial; that counsel had been unable to procure the voluntary appearance of the witness; that the witness was not within the jurisdiction of the court and thus was not amenable to service of its process; and that defendant had been unable to procure attendance of the witness by subpoena. These findings and conclusions in turn sufficed to establish that "[n]othing else appearing, [the witness] being beyond the reach of a subpoena, the defendant [could] take his deposition for use at the trial." *Transportation, Inc. v. Strick Corp.*, 291 N.C. 618, 624, 231 S.E. 2d 597, 601 (1977). Given the facts established and found, defendant's failure formally to subpoena the witness is immaterial. "The law will not require a vain thing." *R.R. v. R.R.*, 240 N.C. 495, 515, 82 S.E. 2d 771, 785 (1954). *See also State v. Dawkins*, 262 N.C. 298, 301, 136 S.E. 2d 632, 635 (1964). Defendant sufficiently established "that a reasonable effort [had] been made to . . . get [the witness] to court," W. Shuford, *North Carolina Civil Practice and Procedure* § 32-8 (2d ed. 1981),

and under the circumstances presented it was not error to admit the deposition.

[2] Plaintiff next contends the court erred in admitting the deposition testimony of this witness regarding decedent's drinking habits. The witness was asked, "What information, if any, concerning [decedent's] prior drinking habits did you obtain from [decedent] himself?" He answered, over objection:

> Okay, all that I can do, I can't say that I remember specifically asking over what period of months or years that you have used alcohol and how but the way that I dictated this about all that I got out of him and the other people was that this was an episode of some few months and if I asked it I didn't record it so—

Plaintiff's counsel lodged a further objection, which was overruled, and the answer continued:

> That is all that I can say is five to eight fifths of booze for the past few months and evidently I was not impressed with anything else because I was not suspicious enough to write down, "In spite of what they say I suspect otherwise," whatever, so I can do no more than say that I go by what I wrote down.

Plaintiff argues this testimony should not have been admitted because (1) the witness had no independent recollection of decedent's drinking habits, and (2) defendant failed to lay a proper foundation for introduction of the medical records from which the witness derived the information to which he testified. In light of our holding, *infra*, that the medical records themselves were properly admitted, we perceive no possible prejudice to plaintiff in the admission, prior to introduction of the records themselves, of this testimony regarding information derived from the records.

[3] Plaintiff next contends the court erred in admitting the admission and discharge summaries from the Virginia hospital. She argues that they constituted hearsay evidence, and that defendant failed to lay a proper foundation for their introduction pursuant to the business records exception to the hearsay rule.

Hospital records are properly admitted as exceptions to the hearsay rule when they qualify as entries in the regular course of

business. *E.g., Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 328-29 (1962). Business records are admissible if the entries are made in the regular course of business at or near the time of the events recorded, are original entries, are based on the personal knowledge of the individual making the entries, and are authenticated when introduced by a witness familiar with the system under which they were made. *Sims, supra*, 257 N.C. at 35, 125 S.E. 2d at 329; *Piedmont Plastics v. Mize Co.*, 58 N.C. App. 135, 137, 293 S.E. 2d 219, 221 (1982); 1 *Brandis on North Carolina Evidence* § 155 (2d rev. ed. 1982).

The record establishes that the deposed medical witness was decedent's treating physician; that he had practice privileges in the hospital from which the admission and discharge summaries came; that he dictated the admission summary on the date of decedent's admission to the hospital; that the admission summary was prepared under his direction and signed by him; that he identified the discharge summary as a part of the hospital's records; that the discharge summary was obtained by him and prepared at his direction; and that he testified to these matters in his deposition. The summaries thus were properly admitted under the business records exception to the hearsay rule.

[4] Plaintiff further contends that, even if these records were generally admissible, they contained statements by plaintiff and her father relating to decedent's drinking habits which should have been excluded as "hearsay on hearsay." "Anything that a party to the action has done, said or written, if relevant to the issues and not subject to some specific exclusionary statute or rule, is admissible against him as an admission." 2 *Brandis on North Carolina Evidence* § 167, p. 6 (2d rev. ed. 1982). *See, e.g., Ballance v. Wentz*, 286 N.C. 294, 301-02, 210 S.E. 2d 390, 394-95 (1974); *Board of Education v. Lamm*, 276 N.C. 487, 491, 173 S.E. 2d 281, 284 (1970). The statements attributed to plaintiff were thus admissible as admissions of a party. The statements attributed to plaintiff's father were admissible for the purpose of showing, in part, the basis for the deposed medical witness' diagnosis.

> A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable

> even though it is not independently admissible into evidence. . . . If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.

State v. Wade, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979). This medical witness testified that decedent "was admitted primarily on the information gained when [plaintiff] and [her father], and myself were in the . . . room." The court on two occasions instructed the jury that the statements of plaintiff's father were to be considered only insofar as they tended to show the basis for this medical witness' diagnosis, and that they were not to be considered as substantive evidence. The statements, with these limiting instructions, were properly admitted.

Plaintiff further contends it is unclear whether some statements were attributed to plaintiff or to her father; that whether the statements were admissible as substantive evidence or only as the basis for medical diagnosis thus was indeterminable; and that the statements therefore should have been excluded entirely. Because the records contained substantially identical statements attributed to plaintiff and her father individually, we perceive no prejudice from the admission of the statements attributed to them collectively.

[5] Plaintiff next contends that testimony by a second medical witness regarding his diagnosis and the medical history he obtained from decedent fell within the physician-patient privilege, and was improperly admitted because the court failed to find that disclosure was "necessary to a proper administration of justice." G.S. 8-53. The application for the policy, which was executed by decedent and witnessed by plaintiff, contained the following authorization: "I hereby authorize any licensed physician . . . that has any records or knowledge of me or my health . . . to give to [defendant] any such information." By execution of this authorization decedent waived the physician-patient privilege, and this waiver was binding upon plaintiff as beneficiary of the policy. *See Fuller v. Knights of Pythias*, 129 N.C. 318, 40 S.E. 65 (1901) (waiver there expressly bound beneficiaries and expressly allowed physician to disclose information at trial). The physician-patient privilege thus did not bar this testimony, and the court was not required as a prerequisite to its admission to find that disclosure

of the information was "necessary to a proper administration of justice."

Plaintiff also contends that decedent's statements to this medical witness were not relevant to the witness' diagnosis and consequently were not admissible as a basis for the diagnosis. The witness testified that decedent had told him he "had drunk about two fifths a week." He further testified that this

> medical history aided me in the diagnosis of this case. My diagnosis of leukoplakia was one of direct vision along with the history obtained in this particular case that he was smoking and consuming alcohol. Both of these are quite important in arriving at the diagnosis. . . . I subsequently treated [decedent] for leukoplakia and the treatment consisted of . . . [*inter alia*], stopping drinking . . . .

This demonstrates the clear relevance of this evidence to the witness' diagnosis. The evidence thus was properly admitted. *See State v. Wade, supra.*

[6] Plaintiff next contends the court erred in admitting the admission and death summaries, as well as testimony by an attending physician, insofar as they related to decedent's use of alcohol during the period between his application for insurance and his death over two years later. She argues that this evidence was irrelevant to the issue before the jury, *viz.*, whether decedent was an excessive user of alcohol when he applied for the insurance.

Assuming, without deciding, that this evidence related to a time too remote to the application to be relevant, we nevertheless perceive no prejudice from its admission, because plaintiff herself testified to decedent's heavy drinking in the months preceding his death. Evidence of the same import was thus before the jury even if this evidence had been excluded.

Plaintiff next contends the court erred in admitting a medical witness' testimony on redirect that plaintiff had, at an unspecified time, sought his advice regarding decedent's drinking. This witness had, however, testified without objection to the same information on direct examination. "It is the well established rule . . . that when incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily

lost . . . ." *State v. Rogers*, 275 N.C. 411, 432, 168 S.E. 2d 345, 358 (1969), *cert. denied*, 396 U.S. 1024, 90 S.Ct. 599, 24 L.Ed. 2d 518 (1970), *quoting Jones v. Bailey*, 246 N.C. 599, 602, 99 S.E. 2d 768, 771 (1957). The objection here thus was ineffectual.

Plaintiff next contends that, even if the testimony of the medical witnesses was relevant, its prejudicial effect outweighed its probative value. The contention is without merit.

[7] Plaintiff next contends the court erred in failing to grant judgment notwithstanding the verdict or, alternatively, a new trial on the ground of insufficient evidence to support the jury's conclusion. We find ample competent evidence to support the finding that decedent falsely represented his excessive use of alcohol.

[8] Plaintiff next contends that "defendant could have discovered [decedent's alcohol use] upon reasonable inquiry of [his] doctors . . . [and its] failure to make such inquiry constitutes a waiver of the defect in the application." She relies on the following principle:

> 'In general, any act, declaration, or course of dealing by the insurer, with knowledge of the facts constituting a cause of forfeiture . . . which recognizes and treats the policy as still in force and leads the person insured to regard himself as still protected thereby will amount to a waiver of the forfeiture . . . and will estop the insurer from insisting on the forfeiture or setting up the same as a defense when sued for a subsequent loss. Such waiver may be inferred from acts as well as from words. Acts of an insurance company in recognizing a policy as a valid and subsisting contract, and inducing the insured to act in that belief and incur trouble or expense, is a waiver of the condition under which the forfeiture arose.' [Citation omitted.]

Gouldin v. Insurance Co., 248 N.C. 161, 164, 102 S.E. 2d 846, 848 (1958).

No evidence was offered at trial which tended to show that defendant engaged in "any act, declaration, or course of dealing" with knowledge or notice of decedent's misrepresentations. Nor was any waiver or estoppel issue requested or submitted to the jury. *See Foods, Inc. v. Super Markets*, 288 N.C. 213, 225, 217 S.E.

2d 566, 575 (1975) ("[T]he right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires."). There is thus no basis for this contention.

Plaintiff finally contends the court erred in awarding expert witness fees, since the witnesses were not under subpoena, "a condition precedent to the taxing of expert witness fees." *Redevelopment Comm. v. Weatherman*, 23 N.C. App. 136, 139, 208 S.E. 2d 412, 414 (1974). *See* G.S. 7A-314. The subpoenas to these witnesses have been added to the original record on appeal, and plaintiff on oral argument waived this contention.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. VANCE JEROME PARKER

No. 826SC423

(Filed 7 December 1982)

1. **Criminal Law § 34— evidence linking defendant to prior break-in at victim's house—irrelevant and prejudicial**

Where there was not a scintilla of evidence linking defendant to a prior break-in in the victim's home, the erroneous admission of evidence concerning the prior break-in was prejudicial error entitling defendant to a new trial.

2. **Criminal Law § 75.9— denial of motion to suppress—statements volunteered or spontaneous**

The trial court properly denied defendant's motion to suppress certain statements made to a police officer where the evidence showed that defendant voluntarily got into a patrol car and voluntarily agreed to accompany the officer to the scene of the crime and where there was no restriction of defendant's freedom so as to render him in custody until the officer saw defendant remove an article from his coat that was noted as missing from the crime scene. Further, it was equally clear that a statement by defendant "That's my hat in the driveway on the ground" was not the product of interrogation, but rather a spontaneous utterance.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 18 December 1981 in Superior Court, HALIFAX County. Heard in the Court of Appeals 20 October 1982.

Defendant was indicted for second degree burglary. He pled not guilty and was tried by a jury.

State's evidence tended to show that Nathaniel Britt lives at 207 Littleton Road, Roanoke Rapids, North Carolina and operates Britt's Flower Shop out of this residence. Around 9:30 p.m., Sunday, 25 October 1981, he placed a gold chain with a cross attached to it on top of a chest in his bedroom. He then went out to dinner, but before leaving, turned on all the lights, locked the back door and placed a bucket of apple cores against the door. Upon returning home, shortly after 11:00 p.m., Britt observed that the bucket of apple cores had been moved, the back door opened and the lights turned off. Britt observed a black man come out of the back door and run east toward Highway 158. Britt called the police. Officer Stainback arrived within five minutes of the call. Britt told him that the man he saw running from his house was black, medium height, wearing gray pants and a dark coat and that the man dropped his hat in the driveway as he ran east in the direction of Highway 158.

At about 11:19 p.m., Stainback made a radio broadcast giving this description and the direction in which the suspect ran. Officer Moody heard the broadcast and within three minutes observed defendant walking east on Highway 158, two blocks from Britt's Flower Shop. Defendant was wearing a dark coat, was of medium height and was not wearing a hat. Defendant voluntarily returned with Moody to Britt's Flower Shop. En route to the shop, defendant removed from his coat a gold chain with a cross attached and attempted to hide it. Upon arriving there defendant saw a hat lying in Britt's driveway and stated, "That's my hat in the driveway on the ground." Britt then identified the gold chain and cross shown to him by Officer Moody as the one he left on the chest. On cross-examination Britt stated that he had never known defendant before that night.

Defendant testified that he met Britt one week before 25 October 1981, visited Britt's house twice before this date and had a homosexual affair, for which he was paid, with Britt. Between 1:30 and 2:00 p.m., Sunday, 25 October he went to Britt's house to collect the money owed him. Britt told him to return at 11:00 p.m. Defendant returned between 9:30 and 10:00 p.m. but never entered the house. It appeared to defendant as if someone had already been in the house. The door was open, a gold chain was

lying on the doorstep and apple cores were spilled around the steps. He put the gold chain in his pocket. While standing outside, Britt drove up with another man. Defendant decided to run because he feared Britt might think that he broke into the house.

Defendant was convicted of second degree burglary and sentenced to imprisonment. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Michael Rivers Morgan, for the State.

Crew and Stevenson, by Phyllis B. Stevenson, for defendant.

JOHNSON, Judge.

[1] During direct examination, Britt testified that upon observing that the bucket of apple cores had been moved from the back door, he said to his cousin who was with him, "Oh my God, somebody has been in my house again." Over defendant's objection, Britt was allowed to testify as follows regarding the prior break-in of 24 October 1981:

> On this Saturday night my place had been broken into and that was the reason I placed that bucket of apple cores there so I could tell if someone had entered again . . .
>
> . . .
>
> When I unlocked my back door to get—enter in, I discovered the lock to my other door was laying on the floor and the door was open . . .
>
> . . .
>
> I just kept walking and I went on up into my office and, when I did, my cash register had been damaged. The outside had been taken off and it looked like a screw-driver or something had been used to try to get into it—into the drawer, and it had torn it up. And I then picked up the phone and called the police.

Defendant contends the court erred in allowing this testimony and that this error was compounded by the State's cross-examination of defendant and defendant's mother, Beulah Parker, concerning defendant's activities of Saturday night, 24 October 1981. We note from the record the State cross-examined

defendant and his mother regarding defendant's activities on that evening. While the effect of this examination was to link defendant to the break-in of 24 October 1981 in the minds of the jurors, the State produced no evidence connecting defendant with that break-in. The evidence admitted was irrelevant and purely prejudicial.

The general rule is that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, even though the other offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954).

In *State v. Fowler*, 172 N.C. 905, 90 S.E. 408 (1916), the defendant was charged with the crimes of breaking and entering and larceny. Over defendant's objection, the State was allowed to introduce testimony regarding other recent house breakings within the community. There was no evidence showing any connection between the other house breakings and the crimes for which defendant was being tried, nor any evidence that the defendant had anything to do with the other recent crimes. The Supreme Court awarded the defendant a new trial, stating that the evidence of unrelated crimes

> was irrelevant to the issue, as it did not tend to prove the fact of guilt, and was certainly prejudicial to the prisoner. Nothing could be more harmful than such evidence. It was calculated to inflame the minds of the jurors against the prisoner, and to prevent that calm and impartial consideration of his case to which he was entitled.

Id. at 908, 90 S.E. at 409-10.

In the case *sub judice* not a scintilla of evidence linking defendant to the crime of 24 October 1981 was produced at trial. We therefore hold that the erroneous admission of this evidence regarding the break-in of 24 October 1981 was prejudicial error entitling defendant to a new trial.

Although we grant defendant a new trial, we will examine defendant's remaining assignments as they are likely to be raised at a retrial of this case.

[2] Defendant next contends that the trial court erred in failing to exclude statements made by defendant before he was advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). We disagree.

The evidence shows that within three minutes of hearing Officer Stainback's radio broadcast regarding the break-in Officer Moody saw defendant, who fit the broadcasted description, two blocks from Britt's house. Moody testified that he stopped his car in front of the defendant, and defendant walked up to the window. Moody asked, "would you mind having a seat in the car? I'd like to ask you a few questions." Defendant responded, "fine," walked around, and sat in the car.

Q. What happened then?

A. I then asked him his name and he gave his name as Vance Parker. I asked him his address and he gave a Route Two address. I've forgot [sic] the box number. And I asked him a general question, had he been in the area of Britt's Flower Shop. He started—all of a sudden just blurted out, I've just been talking to a man just before you stopped me and he said you all were after me because my hat was in the driveway of Britt's Flower Shop and you all were accusing me of breaking into Britt's Flower Shop.

Q. Did you ask him anything other than those three questions which you've just mentioned?

A. No sir, I did not.

Q. And he made that response to you at that time.

A. Yes sir.

Q. What did you say when he told you that?

A. I asked him again had he been in the area of Britt's Flower Shop. He said approximately two or two and a half hours ago.

Q. What happened then?

A. He got back on the subject that he had lost his hat in the area of Britt's Flower Shop. I asked him to describe the hat to me and he said it was a blue denim hat with a patch on the

front with a blazer on it with a yellow stripe in it. I then asked Mr. Parker would he willingly go with me back to Britt's Flower Shop. He said, yes, I will. En route to Britt's Flower Shop, Mr. Parker asked me could he smoke a cigarette. I said, yes, he could. And I noticed Mr. Parker was trying to take something out of his coat underneath his coat trying to hide it and I looked over at him and he was taking a gold chain out from under his coat. Asked him what he had and he pulled it out and showed it to me and it was a gold chain with a gold cross on it. I then asked him where did he find it—where did he get it from and he said he found it in the road about a half a block up. I then asked could I see it and he said, yes, and handed it to me. And then I arrived at Britt's Flower Shop and I got out of my patrol car and Parker stayed in. I walked up to Officer Stainback, in turn, took the chain with the cross and Officer Stainback, in turn, took the chain and Mr. Parker got out of my patrol car and started walking forward and said, that's my hat laying on the ground.

Q. At the time you asked him the first question about being in the vicinity of Britt's Flower Shop, had you mentioned a break-in at the Flower Shop?

A. No, sir, I had not.

Q. At anytime before you stopped at Britt's Flower Shop and got out of the car leaving him there, had you said anything to him about a break-in?

A. No, sir, I had not.

Q. What did you say to him when you parked your car and got out to go to Officer Stainback?

A. I asked him to wait there just for one minute . . .

. . .

Q. He was not a suspect even though he matched the description perfectly that came over the radio?

A. I had no direct evidence that he was the one . . .

. . .

Q. And it is your testimony before this court that if he had refused to talk to you, you would not have stopped him and put him under arrest, that you would have let him keep right on going?

A. Yes, ma'am.

Officer Moody further testified that once he saw defendant pull the gold chain out, he would not have permitted defendant to leave the car even if defendant had requested.

The trial court conducted *voir dire* on defendant's motion to suppress his statements and concluded that defendant voluntarily got into Moody's patrol car and voluntarily agreed to accompany Moody to Britt's Flower Shop, finding that from the time Moody stopped defendant until he observed defendant remove a gold chain from his jacket, defendant was not in custody, and any statements defendant made during this time frame were not in response to custodial interrogation. Therefore, the *Miranda* warnings were not required. From the moment Officer Moody observed defendant remove the gold chain and cross from his coat, defendant was in custody. Defendant's statement, "That's my hat" was not the result of interrogation but was spontaneous and voluntarily made.

The trial court excluded defendant's statement that he found the gold chain and cross about a half block away from the Flower Shop. The trial court denied defendant's motion to suppress certain statements made by defendant, including the statement that he had been stopped by a person just before being stopped by Moody, who told him the police were looking for him and had accused him of breaking into Britt's Flower Shop because his hat was in the driveway at Britt's Flower Shop. The court also denied defendant's motion to suppress defendant's statement, "That's my hat in the driveway on the ground."

It is well established that an inculpatory statement obtained as a result of a custodial interrogation, without *Miranda* warnings, is inadmissible. 2 Stansbury's N.C. Evidence § 184 (Brandis Rev. 1973). However, such warnings are not required when defendant is not in custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona, supra; State v. Sykes*, 285 N.C. 202, 203 S.E. 2d 849 (1974).

Police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction of a person's freedom so as to render him in custody. *Oregon v. Mathiason*, 429 U.S. 492, 50 L.Ed. 2d 714, 97 S.Ct. 711 (1977).

Volunteered and spontaneous statements made by a defendant to a police officer without any interrogation on the part of the officer are not barred by any theory of our law. *Miranda v. Arizona, supra; State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981); *State v. Bell*, 279 N.C. 173, 181 S.E. 2d 461 (1971); 4 Strong's N.C. Index 3d, Criminal Law, 75.9.

In the case *sub judice* the evidence shows that defendant voluntarily got into the patrol car and voluntarily agreed to accompany Officer Moody to Britt's Flower Shop. From the time defendant was stopped until the time Officer Moody saw defendant remove the gold chain and cross from his coat, there had been no restriction of defendant's freedom so as to render him in custody. It is equally clear that the statement, "That's my hat in the driveway on the ground" was not the product of interrogation, but rather a spontaneous utterance by defendant. We therefore hold that the trial court correctly denied defendant's motion to suppress.

We have examined defendant's remaining assignments of error and find them to be without merit.

New trial.

Judges ARNOLD and HILL concur.

SANDRA ASHLEY, GUARDIAN OF LURA EDITH DELP v. HOBERT DELP AND WIFE, CLYDE DELP

No. 8123SC1336

(Filed 7 December 1982)

1. **Rules of Civil Procedure § 42— severance of issues for separate trials—discretion of court**

The severance of issues for separate trials is in the trial court's discretion, and its decision will not be reviewed absent abuse of discretion or a showing that the order affects a substantial right.

2. **Evidence § 43— opinion of mental competency of ward—absence of contact with ward—harmless error**

The admission of opinion testimony as to the competency of plaintiff's ward on the date she executed a deed by witnesses who had not had contact with the ward in close proximity to execution of the deed was not prejudicial error where such testimony was merely cumulative in that it was consistent with proper testimony by other witnesses who had been with the ward on the date she executed the deed or within a month thereof and who had known her for twenty to forty years.

3. **Evidence § 43— mental capacity of grantor—propriety of questions**

Questions asked witnesses regarding the mental capacity of a grantor to execute a deed sufficiently inquired into the opinion of each witness as to whether the grantor had the ability to understand the nature and consequences of her acts.

4. **Evidence § 12— testimony not violation of husband-wife privilege**

In an action to set aside a deed by plaintiff's ward, testimony by defendant's estranged wife concerning the relationship and transactions between the witness and the ward and between defendant and the ward did not violate the husband-wife privilege of G.S. 8-56.

5. **Cancellation and Rescission of Instruments § 3— rescission of deed for mental incapacity of grantor**

Plaintiff's evidence was sufficient to support rescission of a deed from plaintiff's ward on the ground that the ward was mentally incompetent on the date of the conveyance.

6. **Cancellation and Rescission of Instruments § 9.1— rescission of deed—mental incapacity—relevancy of unexecuted trust agreement**

In an action to set aside a deed from plaintiff's ward on the ground of mental incapacity, an unexecuted trust agreement under which defendant was to be trustee of certain property belonging to the ward and which provided specific powers to the trustee effective in the event of institutionalization of the ward was relevant to show defendant's state of mind concerning the ward's mental capacity.

7. Conspiracy § 2.1— civil conspiracy—insufficiency of evidence

The trial court properly directed a verdict against defendant on his claim against plaintiff and his codefendant for injuries allegedly resulting from their conspiracy in bringing an action to set aside a deed from plaintiff's ward to defendant on the ground of mental incapacity.

APPEAL by defendant Hobert Delp from *Davis, Judge.* Judgment entered 25 August 1981 in Superior Court, ALLEGHANY County. Heard in the Court of Appeals 22 September 1982.

Plaintiff was appointed guardian of Lura Edith Delp, sister of defendant Hobert Delp, after judicial determination that her ward was incompetent. She instituted this action seeking rescission on the ground, among others, that her ward was incompetent on the date of conveyance, of a deed by which her ward had conveyed real property to defendants, the ward's brother and his wife.

The court directed a verdict against defendant Hobert Delp on his cross-claim against defendant Clyde Delp and his counterclaim against plaintiff. The jury found plaintiff's ward incompetent at the time of conveyance, and the court entered judgment setting aside the deed.

Defendant Hobert Delp (hereafter "appellant") appeals.

Dan R. Murray for plaintiff appellee.

Franklin Smith for defendant appellant Hobert Delp.

Vannoy & Reeves, by Jimmy D. Reeves, for defendant appellee Clyde Delp.

WHICHARD, Judge.

I.

Plaintiff's ward is the sister of appellant. In 1966 a psychologist examined her and determined that she had an intelligence quotient of 44.

The ward lived with her parents until her mother's death in 1966 and her father's death in 1968. She never married or held a job outside the home, though she did perform simple tasks about the house for her parents.

Approximately six months after her father's death the ward moved to a house across the road from appellant and his wife to

enable them to care for her. In 1972 she began living in a mobile home in their yard.

The father of appellant and of the ward devised his real property to appellant, the ward, and the surviving children of a deceased son. On 6 May 1976 the ward executed a warranty deed conveying her interest to defendants, appellant and his wife. In January 1979 defendants separated, and on 5 February 1979 the ward was placed in a nursing center.

A psychologist with the North Carolina Division of Social Services examined the ward on 28 August 1979, and her observation and tests indicated the ward was not mentally competent. On 31 October 1979 the ward was judicially declared incompetent, and plaintiff became her legal guardian. Plaintiff, as guardian, instituted this action to recover the real property which her ward had deeded to defendants.

In his answer, in addition to defending the conveyance on the ground of the ward's competency, appellant (1) cross-claimed against his wife to have their deed of separation set aside, or, alternatively, to recover a sum of money on the ground that this action created a cloud on the title to property conveyed by that contract; (2) cross-claimed against his wife and counterclaimed against plaintiff for injuries from their alleged conspiracy in bringing this action; and (3) counterclaimed against plaintiff for monies allegedly due him for services rendered to her ward and betterments placed on her ward's property. The trial court severed the issues and limited trial to plaintiff's action to set aside the deed and appellant's conspiracy claim.

II.

Appellant contends this severance of issues was prejudicial error. Before submission of the case to the jury, he entered a voluntary dismissal as to his claim for betterments; and he does not contend that severance of these claims was error. The only error asserted is severance of his claim concerning the deed of separation.

[1] The severance of issues for separate trials is in the trial court's discretion, and its decision will not be reviewed absent abuse of discretion or a showing that the order affects a substantial right. *Insurance Co. v. Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E. 2d 612, 614 (1972). The appellant must show that he suf-

fered injury or prejudice from the severance. *See In re Moore*, 11 N.C. App. 320, 322, 181 S.E. 2d 118, 120 (1971). Appellant here has not shown injury or prejudice from the severance, and no abuse of discretion appears.

III.

[2] Appellant contends the court erred in allowing certain witnesses to testify concerning the ward's competency on the date she executed the deed. The first basis for the contention is that these witnesses had not seen or talked with the ward for as long as eight years prior to, or three years after, the time at which she executed the deed; and that this evidence thus was too remote to justify the inference that she was in the same condition when she executed the deed as when observed by the witnesses.

A witness may give his opinion of a person's mental condition on a given date when the witness has had sufficient opportunity to observe the person within a reasonable time before or after the date in question. *Moore v. Insurance Co.*, 266 N.C. 440, 448, 146 S.E. 2d 492, 499 (1966). "Evidence of mental condition before and after the critical time is admissible, provided it is not too remote to justify an inference that the same condition existed at the latter time." 1 *Brandis on North Carolina Evidence*, § 127, pp. 490-91 (2d rev. ed. 1982).

Prior to introduction of the evidence to which error is assigned, three witnesses had testified that they had been with the ward on the date she executed the deed or within a month thereof; that they had known her for 20 to 40 years; that in their opinion she was capable of performing simple tasks, but lacked mental and physical ability to care for herself properly; and that her mental condition had remained essentially the same during all the years they had known her. The subsequent testimony, from witnesses who had not had contact with the ward in close proximity to execution of the deed, was basically of the same import, *i.e.*, that their observation indicated that she was mentally and physically capable of caring for herself only to a very minimal extent. Because this testimony was merely cumulative, we find no prejudice in its admission. The last witness to whose testimony appellant assigns error was a psychologist, qualified as an expert, who discussed his evaluation and testing of the ward and opined that her mental deficiency was ongoing in nature. In light of the

consistency of his testimony with other, properly admitted, evidence, its admission was not prejudicial error. *See Winborne v. Lloyd*, 209 N.C. 483, 486, 183 S.E. 756, 757-58 (1936).

[3] The second basis for this contention relates to the form of the question by which these witnesses were asked their opinion. The question to each was,

> . . . based upon your acquaintance with and observation of [the ward], do you have an opinion satisfactory to yourself as to whether or not [the ward] had sufficient mental capacity to understand the nature and consequences of her act in signing a deed on May 6, 1976, which said deed had the intended effect of conveying her interest in certain real property to the defendants?

No particular form is required for a question regarding mental capacity to execute a deed. *See Goins v. McLoud*, 231 N.C. 655, 658, 58 S.E. 2d 634, 636-37 (1950); *Ludwig v. Hart*, 40 N.C. App. 188, 191, 252 S.E. 2d 270, 273, *disc. rev. denied*, 297 N.C. 454, 256 S.E. 2d 807 (1979). The test is whether the question sufficiently inquires as to the witness' opinion of whether the grantor had the ability to understand the nature and consequences of her act. *Id.* The question here met that test.

IV.

[4] Appellant next contends the court erred by allowing his estranged wife, defendant Clyde Delp, to testify in violation of G.S. 8-56. This testimony did not relate to confidential communications between the witness and her husband during their marriage, however, but to the relationship and transactions between the witness and the ward and between defendant and the ward. There thus was no error in admitting it.

At one point in her testimony this witness did state, in an unresponsive answer, that the ward had been placed in a rest home because appellant had been an unfaithful husband. In light of the court's sustention of the motion to strike this statement, and of its caution to the jury not to consider it as to any problems between the witness and her husband, there was no abuse of discretion in the denial of appellant's motion for mistrial. *Apel v. Coach Co.*, 267 N.C. 25, 31, 147 S.E. 2d 566, 570 (1966); *Clemons v. Lewis*, 23 N.C. App. 488, 489-90, 209 S.E. 2d 291, 292 (1974).

V.

[5] Appellant's contention that the court erred in denying his motion for directed verdict at the close of plaintiff's evidence is without merit. Viewed in the light most favorable to the party opposing the motion, evidence of the ward's mental incapacity on 6 May 1976 was more than sufficient to withstand directed verdict.

VI.

Appellant's contention that the ward's original claim to the property she conveyed was based on a faulty chain of title due to vagueness of the description in the devise from her father is not relevant to this action.

VII.

Appellant asserts prejudicial error in certain evidentiary rulings which he argues prevented his witnesses from testifying as to the ward's mental competency and the facts surrounding her execution of the deed. Each witness asked an opinion of the ward's mental competency was allowed to answer. The court properly sustained objections when answers would have violated the hearsay rule and, in instances concerning preparation and execution of the deed, would have violated the attorney-client privilege between the ward and her attorney. It was equally correct in not allowing appellant to testify regarding certain communications between him and his estranged wife. G.S. 8-56.

We find no error in the rulings complained of.

VIII.

We also find no error in exclusion of certain of appellant's exhibits. Three of these exhibits were documents relating to the separation between the defendants, an issue raised in the pleadings but severed before trial. Another was a deed from defendants to their son which was irrelevant to the issues at trial.

IX.

[6] We also find no error in the introduction by plaintiff of an unexecuted Trust Agreement, prepared at the request of appellant, under which appellant was to be trustee of certain property belonging to the ward. The document provided specific powers to the trustee effective in the event of institutionalization

of the ward. It was relevant to appellant's state of mind concerning the ward's mental capacity.

X.

[7] Appellant contends the court erred in directing a verdict in favor of plaintiff and defendant Clyde Delp on the alleged claim for conspiracy. Citing *Burns v. Oil Corporation*, 246 N.C. 266, 271-72, 98 S.E. 2d 339, 343 (1957), he acknowledges that the gist of an action for civil conspiracy lies in the presence of an overt act or acts committed by one or more of the conspirators according to the conspiracy plan and in furtherance of its purpose. While recognizing the basis of such a claim, however, he fails to point to any evidence to substantiate an overt act performed according to the alleged conspiracy. We find the directed verdict proper.

XI.

Appellant asserts error in the jury instructions. He first objects that portions of the charge conveyed to the jury that the will of the ward's father was an authentic devise to her, a circumstance which appellant disputes. We find no prejudicial error, since the validity of the will was not at issue.

Nor do we find error in the recitation of plaintiff's evidence. The court stated that the "evidence for the plaintiff . . . tended to show" that psychologists had determined the ward to be mentally incompetent, that a jury had judged her to be incompetent, and that prior to the making of the deed in 1976 she was not of sufficient mental capacity to execute the deed. It then charged that this "is what some of the evidence for the plaintiff tends to show. . . . [W]hat it does show is for you and you, alone, to say and determine . . . ." It then recapitulated the evidence for appellant and stated that it tended to show that "[the ward's] mental capacity was such that she was able to make a deed." We find this a fair and impartial recitation of the evidence for all parties.

The court did err when it referred to the conveyance as comprising 100 acres. This error had no prejudicial effect as to the issue of the mental competency of the ward to execute a deed on 6 May 1976, however.

We find no error in the court's explanation of the legal definition of mental capacity to execute a deed as applied to the facts of this case.

XII.

Appellant finally challenges the allowance of expert witness fees for two psychologists who testified for plaintiff. Appellant did not object when the first witness was received as an expert. We conclude that both were properly received as experts, and that allowance of expert witness fees was proper.

We find the trial free of prejudicial error. The judgment is

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. ROBERT C. JACKSON AND MICHAEL WARE

No. 8212SC302

(Filed 7 December 1982)

1. **Criminal Law § 91.6— denial of continuance to review transcript—error**

The trial court erred in not allowing defendants' motion for a continuance prior to their third trial on charges of breaking and entering where (1) the trial judge determined defendants needed a transcript of the most recent mistrial to prepare adequately for trial, (2) the case was tried for a week before the mistrial was declared, (3) the State's case against defendants consisted of testimony by eight witnesses, two of whom did not testify at the first trial, (4) each witness was examined by three attorneys, and (5) a period of less than a day was clearly insufficient to allow defendants' attorneys adequate time to review the transcript for impeachment purposes and to compare it to the first trial for further discrepancies.

2. **Criminal Law §§ 73.1, 162.6— exceptions not covered by general objections—no prejudicial error**

Without deciding whether the rule expressed in G.S. 15A-1446(d)(10), concerning general objections, may be stretched to cover a specified line of questioning for 47 pages of testimony by the State's principal witness, the Court examined defendant's exceptions and found either that they were not covered by the general objection or that they resulted in no prejudicial error.

APPEAL by defendants from *Farmer, Judge.* Judgments entered 18 September 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 October 1982.

Each defendant appeals from a conviction of three counts of felonious breaking or entering and three counts of felonious larceny and judgments imposing maximum prison sentences of three years.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney Philip A. Telfer, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant Jackson.

Brady, Jackson & Peck, by Richard W. Jackson, for defendant appellant Ware.

BECTON, Judge.

I

Defendants assign error to the trial court's denial of a motion for continuance, to evidentiary rulings of the trial court, and to the court's charge to the jury. Our review of the assignments of error discloses prejudicial error requiring a new trial.

II

This appeal arises from the third trial of defendant appellants on charges of breaking and entering three unoccupied trailers in the Fairlane Acres Mobile Home City in Fayetteville, North Carolina, and stealing from them over $2,800 worth of furniture and appliances. The first two trials ended in mistrials when the juries could not reach unanimous verdicts. The second mistrial was declared on Friday, 11 September 1981. Upon motion by defendants, the court reporter was ordered to provide defendants with a transcript of that trial.

The third trial was calendared to begin on Monday, 14 September 1981. Upon the call of the case for trial on that date, defendants moved for a continuance because two of their witnesses would not be available until the following week, because they needed time to investigate new evidence disclosed in the second trial, and because they had not yet been furnished a copy of the transcript of the second trial. State opposed the motions on the ground that its principal witness would be unavailable after seven days due to military orders and that the

transcript would be available to defendants "very shortly." The court ordered a continuance until 9:30 the following morning so that defendants might review the transcript of the previous trial. On the following morning, defendants renewed their motions for a continuance because they had not received the transcript until noon the day before and had not had sufficient time to review it. The motions were denied, and the case proceeded to trial.

At trial, the State's evidence tended to show that on the evening of 15 February 1981 defendants, along with State's principal witness, Angel Velez, broke and entered three vacant trailers in the trailer park where defendant Jackson lived, and removed appliances and furniture from those trailers. Velez paid defendants $150 for some of the stolen furniture; the remainder was delivered by defendants and Velez to two other persons. Velez subsequently pawned his stolen furniture at the A & B Thrift Shop where they were discovered by the manager of the mobile home park. The furniture was traced to Velez, who was arrested and who gave a statement to police implicating defendants Jackson and Ware.

Both defendants took the stand and denied breaking into the trailers and stealing the furniture therein. The two people to whom defendants allegedly delivered some of the stolen furniture denied receiving it.

III

In their first assignment of error defendants contend that the trial court erred in denying their motion for a further continuance to review the transcript of the most recent mistrial.

[1] A motion for a continuance is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed absent an abuse of discretion. *State v. Weimer*, 300 N.C. 642, 268 S.E. 2d 216 (1980). "However, when a motion to continue is based on a constitutional right, the question presented is a reviewable question of law." *State v. McFadden*, 292 N.C. 609, 611, 234 S.E. 2d 742, 744 (1977); *State v. Huffman*, 38 N.C. App. 584, 248 S.E. 2d 407 (1978). The defendants in this case argue that the trial court's allowance of less than 24 hours to review a 300-page transcript failed to provide defendants with the *effective use* of that transcript and thereby denied them their constitutional right to

the assistance of counsel who has had a reasonable opportunity to prepare for trial. We agree.

The Supreme Court of the United States has determined that indigents are to be provided free transcripts of prior proceedings if the trial court determines it necessary for an effective defense or appeal. *Britt v. North Carolina*, 404 U.S. 226, 30 L.Ed. 2d 400, 92 S.Ct. 431 (1971). This determination by the trial court requires a consideration of two factors: (1) the value of the transcript to the defendant in connection with the matters for which it is sought; and (2) whether alternative devices are available which are substantially equivalent to a transcript. *Id.* at 227, 30 L.Ed. 2d at 403, 92 S.Ct. at 434. *State v. Rankin*, --- N.C. ---, 295 S.E. 2d 416 (1982).

A trial judge in the present case determined that defendants needed a transcript of the most recent mistrial to prepare adequately for trial. Indeed, before continuing the case from 12:00 noon one day until 9:30 the following morning, the trial court, during the hearing on the motion for continuance, said: "I was under the impression that the transcript was going to be prepared over the weekend and furnished to counsel over the weekend . . . . [T]here is not any point of issuing an order to write up the transcript unless you have the opportunity to look at it." With this "point," we agree. As we stated in *State v. McNeill*, 33 N.C. App. 317, 323, 235 S.E. 2d 274, 277-78 (1977):

> The benefits of the availability of a transcript of the first trial, to the State as well as the defendant, are manifest. No longer should the appellate courts be called upon to consider the casuistic arguments advanced to justify the absence of what has come to be a common tool in preparation for an appeal or retrial. Henceforth, if the State intends to retry an indigent defendant after a mistrial, the defendant, upon his timely request, should be provided with the *effective use* of the trial transcript. [Emphasis added.]

The trial court in the present case did not, however, afford defendants *effective use* of the lengthy transcript. The case was tried for a week before the mistrial was declared. The State's case against defendants consisted of testimony by eight witnesses, two of whom did not testify at the first trial. Each witness was examined by three attorneys. A period of less than a

day was clearly insufficient to allow defendants' attorneys adequate time, not only to review the transcript for impeachment purposes, but also to compare it to the transcript of the first trial for further discrepancies. The law requiring that mistrial transcripts be made available to indigent defendants prior to retrial would be of little consequence if those same defendants were not allowed sufficient time to study and use the transcripts in preparing their defense.

The facts of this case are distinguishable from those in *State v. Williams*, 51 N.C. App. 613, 277 S.E. 2d 546 (1981). There, we found no abuse of discretion by the trial court in the denial of the defendant's motion for a continuance to enable him to obtain a transcript of his third mistrial, because there was no finding of need for the transcript by the trial court and our review of the record revealed none. The record in the case *sub judice* fully supports the conclusion that these defendants needed the transcript and were denied meaningful access to it.

We do not consider the other reasons advanced by defendants in support of their motion for continuance as they are unlikely to recur upon retrial of this matter. For denial of the *effective use* of the transcript of the previous mistrial, defendants must have a new trial.

IV

[2] Defendant appellant Ware also maintains that he was denied a fair trial by the trial court's admission, over his general objection, of hearsay testimony by Angel Velez regarding statements made to him by Robert Jackson out of the presence of defendant Ware. This assignment of error is supported by twelve exceptions, only two of which were preceded by objections and none of which was followed by motions to strike. In his first objection, however, Ware entered a general objection "with respect to any statement made to Robert Jackson for the Defendant Michael Ware if they were not made in his presence." Relying upon N.C. Gen. Stat. § 15A-1446(d)(10), Ware contends that this general objection rendered unnecessary any further objections with regard to the specified line of questioning for the remaining 47 pages of testimony by Velez on direct examination. Without deciding whether the rule expressed in G.S. § 15A-1446(d)(10) may be stretched to such lengths, we have examined defendant's excep-

tions and find either that they were not covered by the general objection or that they resulted in no prejudicial error to defendant Ware.

Exceptions four and five concern testimony by Velez that Jackson told him he could get him a stove or refrigerator for $90 or $100 and to bring his own truck to Jackson's house on Sunday, the 15th, to pick up these items. These statements in no way imply that Jackson intended to steal the items and thus were not prejudicial to Ware. Exceptions six, nine, and ten concern statements by Jackson to Velez which the record reveals were made in the presence of defendant Ware. Exception seven involves a statement by a person other than defendant Jackson and thus is not within the line of questioning objected to by defendant. Exception eight concerns an alleged statement by Jackson to Velez that Jackson was going to deliver some of the furniture to a specified person. Subsequent testimony by Velez, unobjected to by defendant Ware, tended to show that Ware and Velez accompanied Jackson on that delivery. Any prejudice to Ware from the preceding hearsay testimony is thus not apparent. Exception eleven is to testimony by Velez that Jackson came and asked him for his money. Earlier negotiations between Velez and Jackson regarding payment by Velez for the stolen furniture took place in the presence of Ware, according to prior testimony by Velez; hence, we fail to perceive undue prejudice from admission of this testimony. We also perceive no prejudice in exception twelve, which concerns an alleged statement by Jackson to Velez that Jackson wanted to store some of the furniture in Velez' house because Jackson was leaving for Germany soon. Other testimony, unobjected to by Ware, reveals that Ware helped Jackson and Velez place this furniture in Velez' house. Exception thirteen follows the reading by Velez of the statement which he gave police following his arrest. The statement corroborates his previous testimony and was therefore properly admitted. Exceptions fourteen and fifteen concern testimony, unobjected to, offered by witnesses other than Velez, which clearly was not covered by defendant's general objection during the testimony by Velez. This assignment of error is overruled.

V

The remaining assignments of error will probably not recur at retrial and we do not discuss them.

For the foregoing reasons, defendants must have a

New trial.

Chief Judge MORRIS and Judge JOHNSON concur.

OHIO CASUALTY INSURANCE COMPANY, PLAINTIFF v. JOSEPH LEON ANDERSON AND LEISA J. WATKINS, DEFENDANTS, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, INTERVENOR DEFENDANT

No. 8125SC1395

(Filed 7 December 1982)

Insurance § 79— purchase of automobile for own use—title in another—owner for purpose of automobile liability insurance

Where defendant purchased a motor vehicle for his own exclusive possession and use but registered legal title in the name of his son without the son's knowledge, and defendant obtained insurance coverage for the vehicle and paid the premiums therefor, defendant had an equitable interest in the vehicle which sufficed to make him an "owner" of the vehicle within the coverage intent of an owner's liability policy issued to defendant by plaintiff insurer when such policy is interpreted in light of the purpose and intent of the Financial Responsibility Act. G.S. 20-4.01(26); G.S. 20-279.21(b).

APPEAL by intervenor defendant from *Ferrell, Judge.* Judgment entered 16 October 1981 in Superior Court, CATAWBA County. Heard in the Court of Appeals 13 October 1982.

Sigmon, Clark and Mackie, by Jeffrey T. Mackie, for plaintiff appellee.

Patrick, Harper & Dixon, by Stephen M. Thomas, for intervenor defendant appellant.

Mullen, Holland & Cooper, P.A., by R. T. Wilder, Jr., for defendant Joseph Leon Anderson.

WHICHARD, Judge.

Defendant Joseph Leon Anderson, Sr. (hereafter "Senior") purchased a motor vehicle for his own exclusive possession and use, but registered legal title in the name of his son, Joseph Leon Anderson, Jr. (hereafter "Junior"). Plaintiff issued to "Joseph

Leon Anderson" an owner's policy of liability insurance, *see* G.S. 20-279.21(b), which described this vehicle, among others, by make and identification number. Plaintiff's agent charged Senior a specific premium for this vehicle, which Senior paid. The policy was certified to the Commissioner of Motor Vehicles as an owner's policy of liability insurance. *See* G.S. 20-309.

Senior, while driving the vehicle, collided with a vehicle driven by defendant Watkins and insured by intervenor defendant. Junior at that time was unaware that the vehicle was titled in his name.

Plaintiff sought and obtained a declaratory judgment that its policy provided no coverage of the collision. Intervenor defendant appealed. We reverse.

The Motor Vehicle Safety and Financial Responsibility Act of 1953, now G.S. 20-279.1 to .39, provides the statutory framework for issuance of automobile liability policies in this jurisdiction. "The provisions of the Financial Responsibility Act are 'written' into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail." *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E. 2d 597, 604 (1977). *Accord, Harrelson v. Insurance Co.*, 272 N.C. 603, 609-10, 158 S.E. 2d 812, 817-18 (1968); *Engle v. Insurance Co.*, 37 N.C. App. 126, 132, 245 S.E. 2d 532, 535, *disc. rev. denied*, 295 N.C. 645, 248 S.E. 2d 250 (1978).

This Act provides for two kinds of policies—owner's, G.S. 20-279.21(b), and operator's, G.S. 20-279.21(c). "Whether . . . [one is] insured . . . as an owner or as an operator depends on the intent of the parties." *Lofquist v. Insurance Co.*, 263 N.C. 615, 618, 140 S.E. 2d 12, 14 (1965).

The parties stipulated that the policy here was certified to the Commissioner of Motor Vehicles, pursuant to G.S. 20-279. 21 and -309, as an owner's policy; and the accuracy of that certification is uncontroverted. The clear intent thus was to issue an owner's policy insuring Senior.

"An owner's policy protects the *owner, as the named insured*; it also protects any other person using the insured vehicle, with the owner's permission . . . ." *Lofquist, supra*, 263 N.C. at 618, 140 S.E. 2d at 14 (emphasis supplied). Issuance of an owner's

policy thus is generally to a "named insured" who is the "owner" of the described vehicle.

The policy here defines "owned automobile" as "a private passenger . . . automobile described in this policy for which a specific premium charge indicates that coverage is afforded." The vehicle involved in the collision clearly falls within this definition. The policy does not define "owner," however; and whether Senior was the "owner" of the "owned automobile" so as to establish coverage under the owner's policy is the dispositive issue.

G.S. 20-4.01(26) defines "owner" as "[a] person holding the legal title to a vehicle." This definition applies throughout Chapter 20, and thus to G.S. 20-279.1 to .39, the Financial Responsibility Act, "[u]nless the context otherwise requires." G.S. 20-4.01. It thus must be read into every liability insurance policy within the purview of the Act, *see Chantos, supra,* unless the context otherwise requires.

Prior to 1973 the G.S. 20-4.01(26) definition of "owner" appeared in a definition section applicable solely to the Financial Responsibility Act. G.S. 20-279.1(9) (repealed 1973). The 1973 General Assembly repealed the definition in G.S. 20-279.1(9), 1973 N.C. Sess. Laws, c. 1330, s. 39, and placed it in G.S. 20-4.01. The apparent purpose was to eliminate unnecessary repetition of this definition in separate articles of Chapter 20, not to make the definition inapplicable to the Financial Responsibility Act.

Prior to repeal of G.S. 20-279.1(9), the provision of the Financial Responsibility Act which defined "owner" as the legal title holder, our Supreme Court held that "for purposes of tort law *and liability insurance coverage,* no ownership passes to the purchaser of a motor vehicle which requires registration" until transfer of legal title is effected as provided in G.S. 20-72(b). *Insurance Co. v. Hayes,* 276 N.C. 620, 640, 174 S.E. 2d 511, 524 (1970) (emphasis supplied). No reason appears for concluding that the holding of *Hayes* was altered by the 1973 legislation eliminating the duplicative definition of owner then in the Financial Responsibility Act (G.S. 20-279.1(9)). Thus, as between a vendor and vendee of a vehicle, the vendee cannot acquire valid owner's liability insurance until legal title has been transferred or assigned to him by or at the direction of the vendor. The case here

does not involve whether or when legal title passed from a vendor to a vendee, however; and we do not find *Hayes* controlling.

In *Younts v. Insurance Co.*, 281 N.C. 582, 189 S.E. 2d 137 (1972), while the only competent evidence before the Court showed legal title to the vehicle in question in one Charles, one Myers had obtained an owner's policy thereon. Evidence held properly excluded because of the "best evidence rule" would have shown that one Wright had legal title, which he transferred to Charles; that Charles defaulted on his note with the bank which financed the purchase of the vehicle, whereupon Wright paid the note; that the bank subsequently transferred title to Myers; and that Wright received the title certificate from the bank and gave it to Myers. *Id.* at 586-87, 189 S.E. 2d at 140.

The court expressly relied on the holding in *Hayes, supra,* that no ownership passes to the vendee until legal title is transferred to him by the person who holds it at time of sale. *Id.* at 586-87, 189 S.E. 2d at 140. It thus held that Myers did not have coverage under the policy because Charles was still the owner of the vehicle, there being "no evidence that Myers was the holder of a legal title to the [vehicle] in question." *Id.*

Plaintiff would have us view *Younts* as mandating that one who does not hold legal title to a vehicle cannot under any circumstances obtain owner's liability insurance thereon. *See Norris v. Insurance Co.*, 26 N.C. App. 91, 102, 215 S.E. 2d 379, 388, *cert. denied,* 288 N.C. 242, 217 S.E. 2d 666 (1975) (The Court stated that in *Younts* the Supreme Court "held that the policy [there] was a contract between the insurance company and the owner of the vehicle involved and that since the person against whom plaintiff had obtained judgment was not the owner, plaintiff could not recover from the insurance company."). "A decision of the Supreme Court [, however,] must be interpreted within the framework of the facts of that particular case." *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 249, 182 S.E. 2d 571, 577 (1971), *quoting Howard v. Boyce*, 254 N.C. 255, 265, 118 S.E. 2d 897, 905 (1961). We believe the situation here differs considerably from that in *Younts*, and we thus do not find *Younts* controlling.

Here, neither the vendor nor the vendee had legal title subsequent to sale of the vehicle. Legal title, instead, was transferred simultaneously and in connection with the vendee's

purchase of the vehicle, from the vendor to a third party, the vendee's son. That transfer was accomplished at the vendee's direction and without the knowledge or approval of his son. The vendee, however, paid the entire purchase price, had exclusive possession and use of the vehicle, obtained the insurance coverage for it, and paid the premiums therefor. This sufficed to give him a clear equitable interest in the vehicle, *see Insurance Co. v. Insurance Co., supra* (son of legal owner may have had equitable interest in vehicle); and that equitable interest sufficed, under the particular facts and circumstances, to make him the "owner" of the vehicle within the coverage intent of the policy, interpreted in light of the purpose and intent of the Financial Responsibility Act.

In *Engle v. Insurance Co., supra*, 37 N.C. App. at 132, 245 S.E. 2d at 535, this Court reiterated the following from *Chantos, supra*, 293 N.C. at 440-41, 238 S.E. 2d at 604:

> The primary purpose of . . . compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. The victim's rights against the insurer are not derived through the insured . . . . Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving with his permission, or by one driving while in lawful possession of the named insured's car, regardless of whether or not the nature and circumstances of the injury are covered by the contractual terms of the policy.

Our Supreme Court stated in *Insurance Co. v. Insurance Co., supra:* "The purpose of the Act is to provide protection to the public from damages resulting from the negligent operation of automobiles by irresponsible persons. By its definition of an 'owner,' the legislature attempted to close all avenues of escape from its provisions." 279 N.C. at 247, 182 S.E. 2d at 576. *Cf. Norris, supra*, 26 N.C. App. at 101, 215 S.E. 2d at 387 (purpose of aircraft liability insurance).

The policy here was clearly intended, by both the issuer and the purchaser, to cover the purchaser while operating the vehicle involved in the collision in question. To allow defeat of coverage by the technicality of placement of legal title in the purchaser's son, at the purchaser's direction and without the son's knowledge,

while the purchaser retained all equitable interest in the vehicle, would defy the legislative intent "to close all avenues of escape from [the] provisions [of the Financial Responsibility Act]." *Insurance Co. v. Insurance Co.*, 279 N.C. at 247, 182 S.E. 2d at 576. We note that in at least two cases in which courts have refused to acknowledge the holder of an equitable interest as the "owner" of the vehicle for liability purposes, the legal titleholder was the named insured; and the result was thus to uphold coverage under the policy. *Insurance Co. v. Insurance Co.*, 279 N.C. 240, 182 S.E. 2d 571 (1971); *Indiana Lumbermens Mutual Insurance Co. v. Parton*, 147 F. Supp. 887, 889-90 (M.D.N.C. 1957) (The "Act explicitly defines the owner as the person who holds the legal title of a motor vehicle rather than one who merely has an equitable claim or title thereto . . . . If the insurer could escape liability by proof that the holder of the legal title was not the owner, it would afford a dangerous avenue by which the public would still be without the Financial Responsibility Provision which the Legislature intended for the protection of the public.").

The "owner" of a vehicle is the holder of the legal title "[u]nless the context otherwise requires." G.S. 20-4.01. If the oft expressed purpose of the Financial Responsibility Act is to be effectuated, the context in which the word "owner" is to be interpreted and applied here otherwise requires. The discrete facts and circumstances dictate that Senior be held the "owner" of the vehicle so as to afford coverage under the policy to compensate the innocent victims of his negligence while operating the vehicle, if such is established.

We therefore so hold, and the judgment declaring the contrary is

Reversed.

Judges HEDRICK and ARNOLD concur.

CITY OF RALEIGH v. DAVID J. MARTIN AND WIFE, MARILYN B. MARTIN

No. 8110SC1270

(Filed 7 December 1982)

1. **Eminent Domain § 11— condemnation—failure to except in timely manner about notice—waiver of right to raise issue**

In a condemnation action, where defendants entered no exceptions to the commissioners' report based on inadequate notice, made no motion in the cause to set aside the confirmation order because of inadequate notice, failed to indicate on the order that exceptions or appeal concerned inadequate notice, raised no argument of inadequate notice before the judge, and failed to come forward and except in a timely manner on the notice issue, defendants waived their right to raise such an issue on appeal. G.S. 40-19.

2. **Eminent Domain § 11— condemnation proceeding—preserving right to appeal from commissioners' report**

In a condemnation action, absent insufficient notice of proceedings before the clerk, an appealing party must file timely exceptions to the commissioners' report to preserve their right to appeal.

3. **Eminent Domain § 11— condemnation proceeding—guarantee of jury not overriding requirement of G.S. 40-19**

G.S. 40-20, which guarantees the right to have a jury determine the amount of damages in a condemnation proceeding, does not override the requirement of G.S. 40-19 that exceptions be filed within 20 days of the commissioners' report.

4. **Eminent Domain § 11— condemnation proceeding—failure to file timely exceptions—refusal to hear testimony proper**

In an action concerning a condemnation proceeding, the trial court did not err in refusing to allow a defendant to testify or to have his proffered testimony which explained defendants' reason for not giving notice of hearing on appeal summarized for the record. The reason defendants delayed five and one-half years in bringing their appeal was irrelevant since defendants' critical mistake was their failure to comply with G.S. 40-19 and file exceptions to the commissioners' report within the 20 day period.

APPEAL by defendants from *Bailey, Judge.* Order entered 22 September 1981, Superior Court, WAKE County. Heard in the Court of Appeals 15 September 1982.

Plaintiff, City of Raleigh, filed a petition of condemnation against defendants on 20 February 1975. Summons was issued to defendants who were served at 1220 Buck Jones Road, Raleigh, North Carolina. On 9 July 1975, plaintiff notified defendants at 1220 Buck Jones Road, Cary, North Carolina, of Application for

the Appointment of Commissioners. Commissioners of Appraisal were appointed on 17 July 1975 and were ordered to determine fair compensation for the defendants, who were notified of this order at 1220 Buck Jones Road, Cary, North Carolina. The commissioners filed a report on 1 August 1975, allowing damages of $1,327. A copy of the report was mailed to plaintiff's attorney. Plaintiff subsequently filed notice 13 August 1975 that the commissioners had ascertained damages amounting to $1,327 and notified defendants, at 1220 Buck Jones Road, Raleigh, North Carolina, of the commissioners' report. On 4 December 1975, plaintiff filed notice of a hearing on confirmation of the commissioners' report scheduled for 16 December 1975. No certificate of service of this notice, however, is in the record.

Nothing occurred on 16 December 1975, but the clerk signed an order on 30 December 1975 confirming the commissioners' report. From this order, defendants excepted and gave notice of appeal to the Superior Court.

Not until 16 July 1981 did defendants, now represented by counsel, give notice of hearing on appeal and demand for a jury trial. At the hearing held 14 September 1981, the judge declined to receive either David J. Martin's oral testimony or a written summary, both explaining why defendants waited until 16 July 1981 to give their notice of appeal and demand for jury trial. He stated that this issue was purely a matter of law and, therefore, concluded in his order, filed 22 September 1981, that defendants' appeal was not taken in a timely manner and ordered the appeal dismissed. From this order, defendants appeal.

Francis P. Rasberry, Jr., Associate City Attorney, for plaintiff appellee.

Paul Stam, Jr., for defendant appellants.

MORRIS, Chief Judge.

[1] Defendants' first argument is that their right to appeal the 31 December 1975 order of confirmation is preserved because they were not notified in compliance with Rule 4 of the Rules of Civil Procedure requiring service by mail on a party be given "at his last known address." Plaintiff mailed some notices to defendants at 1220 Buck Jones Road, Raleigh, North Carolina, and some

to 1220 Buck Jones Road, Cary, North Carolina. Defendants contend, therefore, that the court erred in not finding that certain orders and notices were improperly served on them. We believe defendants have waived this argument because they failed to take timely and appropriate action.

G.S. 40-19 provides, in part, that "within 20 days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court during a session. . . ." The clerk makes his determination on the exceptions filed after the parties are afforded notice and an opportunity to be heard. Then either party aggrieved by the clerk's decision to confirm or not to confirm the commissioners' report may appeal. *See: Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953); *Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971).

On 13 August 1975, plaintiff filed notice that the commissioners had ascertained damages of $1,327 for defendants and mailed this notice to defendants. Within the following 20-day period, defendants filed no exceptions to the commissioners' report itself or addressed to alleged improper notice of the proceedings. Defendants' only objection was made 30 December 1975 when they excepted to and gave notice of appeal of the clerk's order filed 31 December 1975, confirming the commissioners' report.

Defendants, after receiving notice of the commissioners' report on 13 August 1975 and failing to file exceptions within the 20-day period proscribed by G.S. 40-19, should have raised the issue of notice by a motion in the cause. "To set aside a judgment [because of procedural irregularities] 'it is necessary to make a motion in the cause before the court which rendered the judgment . . . the objection cannot be made by appeal, or an independent action or by collateral attack. The time for such motion is not limited to one year after the judgment is rendered, but it must be made by the party affected and within a reasonable time to show that he has been diligent to protect his rights.' " *Collins*, at 284, 74 S.E. 2d at 715-16. Defendants entered no exceptions to the commissioners' report based on inadequate notice, made no motion in the cause to set aside the confirmation order because of

inadequate notice, failed to indicate on the 31 December 1975 order that exceptions or appeal concerned inadequate notice, and raised no argument of inadequate notice before the judge. Because they failed to come forward and except in a timely manner on the notice issue, defendants have waived their right to raise such an issue at this level of the proceedings.

In their second argument, defendants contend that the court erred in ruling that their appeal was not taken in a timely manner because no exceptions to the commissioners' report were filed as required by G.S. 40-19. Defendants believe, first, that it was unnecessary for them to file exceptions to the 1 August 1975 commissioners' report within 20 days or, indeed, at all; and second, that a notice of appeal from the clerk's order confirming the commissioners' report coupled with the provisions of G.S. 40-20 guarantee them the right to a new trial before a jury.

[2] Defendants rely primarily on *Proctor v. Highway Comm.*, 230 N.C. 687, 55 S.E. 2d 479 (1949), to support their contention that the filing of exceptions is unnecessary to maintain a later right of appeal. *Proctor* involved an inverse condemnation action where the State Highway Commission appealed from the commissioners' report, alleging that damages were excessive. The jury subsequently returned an even greater award for damages. The Highway Commission contended that the landowner could not benefit from the jury award in her favor because she had filed no exceptions to the commissioners' report and had failed to appeal from the clerk's confirmation order. The Court stated, however, that the Superior Court is authorized to enter judgment in the amount of the jury award, regardless of which party properly raises an appeal. The Court did not state or imply, as defendants contend, that compliance with G.S. 40-19 was unnecessary. G.S. 40-19, as previously related, provides that "within 20 days after filing the report . . . [interested parties] may file exceptions . . . and upon determination of the same . . . may appeal." In *Proctor*, the Highway Commission complied with G.S. 40-19 by excepting from the commissioners' report within the specified 20-day period, alleging that the damage award was excessive. The clerk overruled the Highway Commission's exceptions and confirmed the commissioners' report. After the clerk's confirmation of the commissioners' report, the Highway Commission then appealed to the Superior Court, requesting that a jury determine the award of

damages. From these facts, no implication arises that compliance with G.S. 40-19 is unnecessary because the Highway Commission filed timely exceptions to the commissioners' report, awaited the clerk's determination and then appealed to the Superior Court pursuant to G.S. 40-19.

Dicta in two cases support the conclusion that one must file timely exceptions to commissioners' report to preserve the right to appeal. In *Gatling v. Highway Commission*, 245 N.C. 66, 95 S.E. 2d 131 (1956), the Court considered the question of whether the clerk's order confirming the commissioners' report should be set aside because no exceptions were filed within 20 days. The Court concluded that the Superior Court Judge had discretionary authority to preserve the right of appeal by allowing exceptions to be filed, *nunc pro tunc*, 21 days from the date the commissioners' report was filed, since the parties had not been notified of the commissioners' hearing.

Likewise, in *Randleman v. Hinshaw*, 267 N.C. 136, 147 S.E. 2d 902 (1966), defendant was not notified of the clerk's order appointing commissioners and scheduling their first meeting or of the filing of the commissioners' report. The clerk's order was issued 16 days before expiration of the time allowed defendant to answer the petition. The court, therefore, preserved defendants' right to appeal the clerk's determination although no exceptions were filed within 20 days because defendant had not been notified of any proceedings before the clerk.

Both *Gatling* and *Randleman* imply that compliance by appealing parties with G.S. 40-19 by filing exceptions to the commissioners' report is essential. The trial courts dismissed the parties' appeals because of their failure to file exceptions. However, both decisions were reversed on the independent grounds that the parties received inadequate notice of proceedings before the clerk. Thus, the parties' rights to appeal were preserved. The inference is clear that, absent insufficient notice of proceedings before the clerk, an appealing party must file timely exceptions to the commissioners' report to preserve their right to appeal.

[3] Defendants further contend that G.S. 40-20, which guarantees the right to have a jury determine the amount of damages, overrides the requirement of G.S. 40-19, that exceptions be filed within 20 days of the commissioners' report. Both statutes, G.S.

40-19 and G.S. 40-20, have since been repealed but are still in effect for condemnation actions filed before 1 January 1982.

Defendants rely on *Railroad v. Railroad,* 148 N.C. 59, 61 S.E. 683 (1908), for the premise that no statute or court rule requires filing specific exceptions to the clerk's order in the course of proceedings. The *Railroad* case is, however, distinguishable from the facts of this case. First, defendant in *Railroad* properly filed exceptions to the commissioners' report, although they were subsequently overruled and the commissioners' report was confirmed. Second, defendant's exceptions, allegedly too general, did not deal with the commissioners' report itself but rather with preliminary objections to the clerk's initial order appointing commissioners and directing that an appraisal be made. The court, therefore, determined that upon proper denial of matters alleged in the petition, exceptions to the clerk's order appointing commissioners in a condemnation proceeding may be general.

The court did not conclude or imply that compliance with the requirement of filing exceptions to the commissioners' report as set out in G.S. 40-19 is unnecessary. Defendants' second argument lacks merit and is overruled.

[4] Defendants' third argument, based upon their fifth assignment of error, is that the court erred in refusing to allow defendant David J. Martin to testify or to have his proffered testimony summarized for the record, explaining defendants' reason for not giving notice of hearing on appeal and demand for jury trial until five and one-half years after confirmation of the commissioners' report. The refusal was based upon the judge's belief that resolution of the issue was "a pure matter of law." Defendants' critical mistake was their failure to comply with G.S. 40-19 and file exceptions to the commissioners' report within the 20-day period or, indeed, at all. Thus, the reason they delayed five and one-half years in bringing their appeal is irrelevant in determining the case and, therefore, the judge's decision not to hear the proffered testimony or summary was correct. The order dismissing defendants' appeal is

Affirmed.

Judges BECTON and JOHNSON concur.

EMMETT BRUCE KOONCE, II, BY HIS GUARDIAN AD LITEM, JOYCE KOONCE SATTERFIELD v. ANNIE KITE MAY

No. 823SC47

(Filed 7 December 1982)

Automobiles and Other Vehicles § 63.2— negligence in striking child in road—sufficiency of evidence

In an action to recover for injuries to the seven-year-old plaintiff when he was struck by defendant's automobile, the evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to keep a proper lookout so as to have avoided striking plaintiff by stopping or taking evasive action where it tended to show that plaintiff, while playing with two friends, pedaled his "Green Machine" tricycle from a driveway into the street; when plaintiff was about three feet into the street, one of his playmates observed defendant's car about 60 feet away from the end of the driveway and approaching plaintiff at a speed of between 15 and 20 miles per hour; both of plaintiff's playmates shouted warnings to plaintiff, by which time he was about eight feet out into the street; plaintiff immediately took evasive action by turning his tricycle but was struck by the right front wheel of defendant's car; the line of vision between defendant and plaintiff was unobstructed and defendant could have seen plaintiff from a distance of 60 feet; defendant never saw plaintiff, his two playmates or anything green prior to the collision; defendant saw "something come out" and when she heard "a bump" she knew that she had hit something, but she did not know exactly what she had hit until she stopped her car and got out; defendant's car stopped about 12 to 18 feet beyond plaintiff's body; and there were no skid marks.

APPEAL by plaintiff from *Brown, Judge*. Judgment entered 1 October 1981 in PITT County Superior Court. Heard in the Court of Appeals 9 November 1982.

Plaintiff, Emmett Bruce Koonce, II, by his guardian *ad litem*, brought this action to recover for injuries allegedly caused by the negligence of defendant, Annie Kite May. Defendant's motion for directed verdict made at the close of plaintiff's evidence was denied. At the close of all the evidence, defendant renewed her motion for directed verdict, which motion the trial court allowed, dismissing plaintiff's action with prejudice. Plaintiff appealed.

James, Hite, Cavendish & Blount, by Charles R. Hardee, for plaintiff-appellant.

Gaylord, Singleton & McNally, P.A., by L. W. Gaylord, Jr., and Vernon G. Snyder, III, for defendant-appellee.

WELLS, Judge.

A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. On such a motion, plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). If, when so viewed, the evidence is such that reasonable minds could differ as to whether the plaintiff is entitled to recover, a directed verdict should not be granted and the case should go to the jury. *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974). On such a motion made at the close of all the evidence, any of defendant's evidence which tends to contradict or refute plaintiff's evidence is not to be considered, but the plaintiff is entitled to the benefit of defendant's evidence which is favorable to plaintiff, *Overman v. Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976), or which tends to clarify plaintiff's case, *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774, *disc. review denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980).

Plaintiff's evidence in this case, when tested by the foregoing rules, tends to show the following events and circumstances. Plaintiff, a seven and one-half year old child, while riding a "Green Machine" tricycle in the street, was injured when he was struck by an automobile operated by defendant. At about three o'clock in the afternoon, plaintiff was playing with Billy Hamilton and Jason Britt in the driveway of a residence located on Kirkland Drive. Plaintiff, trying to elude Billy Hamilton as the two engaged in a game of chase, pedaled his "Green Machine" out into Kirkland Drive. At the point in time when plaintiff was about three feet into the street, Hamilton, running out to the entrance of the driveway, observed defendant's car about sixty feet away from the end of the driveway, approaching plaintiff at a speed of between 15 and 20 miles per hour. Both of plaintiff's playmates,

having seen defendant's car, shouted warnings to plaintiff, by which time he was about eight feet out into the street. The plaintiff immediately took evasive action by turning his tricycle. Plaintiff was struck by the right front wheel of defendant's car, plaintiff's tricycle having come out of a driveway on defendant's right. At the time Hamilton first observed defendant's vehicle 60 feet from plaintiff, the line of vision between defendant and plaintiff was unobstructed and defendant could have seen plaintiff from a distance of 60 feet. After Hamilton first saw defendant's vehicle, approximately three seconds elapsed until the collision.

Defendant's evidence tended to show the following. Defendant's home is approximately one-tenth mile from the scene of the collision. Prior to the collision, defendant was traveling on Kirkland Drive at a speed well below the posted speed limit, on her way to pick up her children from school. She was glimpsing to the left and right, but never saw plaintiff, Britt, Hamilton or anything green. Defendant saw "something come out" and when she heard "a bump" she knew that she had hit something. Defendant was aware that "something darted out in front" of her vehicle and at the time she first observed anything in her path it was between 15 and 30 feet ahead of her vehicle. Defendant did not blow her horn because she was "trying to stop and get out of the way all at the same time." Defendant never knew exactly what she had hit until she stopped her car and got out. At this time, defendant's car was around 12 to 18 feet beyond plaintiff's body. There were no skid marks.

Defendant's motion for directed verdict was based on two grounds, first that plaintiff was contributorily negligent as a matter of law, and second that the evidence failed to show any negligence on the part of defendant. The trial court expressly denied the motion as based on the first asserted ground, and granted defendant's motion, concluding that "all the evidence taken in the light most favorable to plaintiff fails to show negligence on the part of the defendant." Thus, our inquiry is limited to whether the evidence presented would support a jury finding of negligence on the part of defendant.

Well settled rules of law apply to the negligence issues presented by the evidence in this case. There is abundant decisional precedent for the proposition that a driver otherwise exer-

cising reasonable care has no duty to foresee the sudden appearance of a child who darts out into a roadway. Generally, the rule is that the driver is not the insurer of the safety of children in the street, and that under ordinary circumstances he is not bound to anticipate children in his pathway; a driver has to have enough time to stop or to avoid a collision before his failure to do so can be actionable negligence. *See Winters v. Burch*, 284 N.C. 205, 200 S.E. 2d 55 (1973) (seven year old plaintiff on Big Wheelie tricycle did not show that defendant could have seen him in time to avoid collision); *Dixon v. Lilly*, 257 N.C. 228, 125 S.E. 2d 426 (1962) (ten year old boy darted from behind tree at night into side of truck—unavoidable accident); *Brewer v. Green*, 254 N.C. 615, 119 S.E. 2d 610 (1961) (six and one-half year old girl ran out in front of passing car when car was even with where she had been standing); *Brinson v. Mabry*, 251 N.C. 435, 111 S.E. 2d 540 (1959) (defendant had no reason to know seven year old girl might dart out and defendant not negligent with regard to speed, control, lanes or lookout); *Dorsey v. Buchanan*, 52 N.C. App. 597, 279 S.E. 2d 92 (1981) (child on bike came out of driveway and hit truck after it had almost completely passed the drive; no inference that collision could have been avoided with reasonable care); *Daniels v. Johnson*, 25 N.C. App. 68, 212 S.E. 2d 245 (1975) (eight year old plaintiff's proof failed to show that defendant could have seen him in time to avoid collision); *Burns v. Turner*, 21 N.C. App. 61, 203 S.E. 2d 328 (1974) (where defendant would have had to stop from 42 miles per hour in 30 feet, plaintiff had not shown that defendant could have avoided collision).

When a driver knows or should know, however, that there are children on or near a roadway, he has a duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury. *Brinson v. Mabry, supra.* Thus, in *Jones v. Johnson*, 267 N.C. 656, 148 S.E. 2d 583 (1966), where the defendant saw children playing on the roadside and failed to take any cautionary action until a child ran in front of her car, our Supreme Court held that the case was improperly taken from the jury when the trial court granted the defendant's motion for nonsuit. In *Waycaster v. Sparks*, 267 N.C. 87, 147 S.E. 2d 535 (1966), a seven year old child and other children had been playing in a yard which was partially obscured from the road by obstructions. On the other side of the road were children playing in an open field.

The child darted into the road in front of the defendant's vehicle which was traveling at 20 miles per hour. The defendant had no time to either sound his horn or apply his brakes before striking the child. Our Supreme Court held that the evidence was sufficient to require submission of the case to the jury.

The evidence in this case was sufficient to justify an inference that defendant could have seen that children were playing near the street in her direction of travel, both of plaintiff's playmates having seen defendant's car approaching. From such evidence, the jury could have reasonably found that defendant failed to see plaintiff when she was first able to and that had she seen him at that time, she could have avoided the collision by stopping or taking evasive action. From this evidence, the jury could reasonably have found that defendant was not keeping a proper lookout and that she never saw plaintiff until after the collision and that she failed to respond in any manner to plaintiff's presence in the street until after the collision. This case must be distinguished from the typical "darting child" case; there was evidence from which the jury could have concluded that plaintiff was in the street for a sufficient length of time to give defendant an opportunity to exercise due care to avoid colliding with him.

In such a case as this, we feel it appropriate to emphasize the procedural point that where the question of granting a directed verdict is a close one,

> the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial.

Manganello v. Permastone, Inc., supra.

The trial court erred in granting defendant's motion for a directed verdict and there must be a new trial.

Reversed and remanded.

Judges VAUGHN and WHICHARD concur.

JOHN D. LATIMER & ASSOCIATES, INC. v. HOUSING AUTHORITY OF THE CITY OF DURHAM, NORTH CAROLINA

No. 8114SC1327

(Filed 7 December 1982)

1. **Quasi Contracts and Restitution § 1.1— conduct indicating different understanding from express contract—implied contract arising**

In an action which arose from plaintiff's furnishing architectural and engineering services for defendant, even if an express contract may have at one time existed between the parties, plaintiff's evidence clearly showed that as plaintiff's work on the project progressed, plaintiff requested payment and was assured that it would be paid for its work and such conduct clearly indicated a different understanding indicating an implied contract could have arisen between the parties.

2. **Quasi Contracts and Restitution § 2.2— recovery under quantum meruit—sufficiency of showing defendant benefited**

In an action where plaintiff architectural and engineering firm asserted an agreement that it was to be compensated for preparing plans for defendant's use in applying for H.U.D. approval for a housing project, and plaintiff showed that plaintiff's plans were received and used by defendant in defendant's H.U.D. application, there was a sufficient showing of benefit to defendant from plaintiff's work.

3. **Quasi Contracts and Restitution § 2.1— implied contract—reliance on defendant's chief executive officer reasonable**

In an action for recovery of architectural and engineering services, where plaintiff's evidence tended to show that plaintiff dealt extensively with defendant's chief executive officer, not only in the project involved in the case, but also on other similar projects, plaintiff's reliance on the officer's authority to bind defendant was reasonable.

APPEAL by defendant from *Herring, Judge.* Judgment entered 9 June 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 21 September 1982.

In its complaint, plaintiff alleged in Count I that James E. Kerr, defendant's Executive Director, entered into an oral contract with plaintiff wherein plaintiff was to furnish architectural

and engineering services for defendant in connection with a project undertaken for the construction of a housing development for the elderly in Durham; that plaintiff provided defendant with all services requested by defendant until plaintiff was advised by defendant that defendant would be unable to complete the project; that at the time defendant advised plaintiff defendant would be unable to complete the project, there was due and owing plaintiff the sum of $105,879.89; and that defendant refused to pay plaintiff for its services. Under Count II, plaintiff alleged in the alternative that defendant, by obtaining and accepting plaintiff's services, impliedly agreed to pay for plaintiff's services. Defendant answered denying plaintiff's essential allegations. At trial, both at the close of plaintiff's evidence and at the close of all the evidence, defendant moved for a directed verdict. These motions were denied. The jury answered the issues, in pertinent part, as follows:

> 1. Did the plaintiff, John D. Latimer & Associates, Inc., enter into an oral agreement with James Kerr as Executive Director of the defendant, Housing Authority of the City of Durham, whereby plaintiff would provide the defendant with architectural services for a housing project, and that payment for those architectural services would be contingent upon approval of the housing project by the Department of Housing and Urban Development?
>
> ANSWER: NO.
>
> . . .
>
> 5. Did the plaintiff provide architectural services to the defendant, Housing Authority of the City of Durham, under such circumstances that the defendant should be required to pay for them?
>
> ANSWER: YES.
>
> 6. If so, what amount, if any, is the plaintiff entitled to recover of the defendant, Housing Authority of the City of Durham?
>
> ANSWER: $65,000.00.

Following the verdict, defendant moved for judgment notwithstanding the verdict. This motion was denied. From judgment entered on the verdict, defendant appealed.

Mount, White, King, Hutson, Walker & Carden, P.A., by Lillard H. Mount, William O. King and James H. Hughes, for plaintiff-appellee.

Daniel K. Edwards for defendant-appellant.

WELLS, Judge.

By its properly preserved exceptions and assignments of error, defendant raised questions as to the sufficiency of the evidence to withstand defendant's motions, made pursuant to Rule 50 of the Rules of Civil Procedure, for a directed verdict and for judgment notwithstanding the verdict.[1] Defendant's argument raises three aspects of the sufficiency of the evidence to support the submission of the issue as to an implied contract between plaintiff and defendant, so as to entitle plaintiff to recover under principles of *quantum meruit.* First, defendant argues that plaintiff and defendant reached an express contract which included as a condition precedent to plaintiff's entitlement to compensation the approval of the project by the Department of Housing and Urban Development (H.U.D.), that such approval was never obtained, and therefore no implied contract ever arose. Second, defendant argues that defendant received no benefit from plaintiff's services, thus defeating plaintiff's entitlement to a recovery under *quantum meruit.* Third, defendant argues that its director, Kerr, had no authority to obligate defendant to compensate plaintiff absent H.U.D. approval of the project. The evidence, which we will summarize below, was in substantial conflict on the question of whether H.U.D. approval was understood to be a condition precedent to plaintiff's entitlement to compensation. We perceive no such substantial conflicts in the evidence as to defendant's benefit from plaintiff's work on the project or on Kerr's authority to obligate defendant to plaintiff.

1. Although defendant has argued in its brief that the verdict is inconsistent and does not support the judgment, all of defendant's assignments of error relate to the sufficiency of the evidence to support the verdict, none of them relating to the entry of judgment. The question of the sufficiency of the verdict to support the judgment is therefore not before us.

The rules as to the sufficiency of evidence to withstand a motion for directed verdict are well established. On such a motion by defendant at the close of plaintiff's evidence in a jury case, plaintiff's evidence must be taken as true and considered in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom. *See Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774 (1980), *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980), and cases cited therein. On such a motion made at the close of all the evidence, any of the defendant's evidence which tends to contradict or refute the plaintiff's evidence is not considered, but other evidence presented by defendant which tends to clarify plaintiff's case may be considered. *Home Products Corp., supra.* These rules also apply to defendant's motion for judgment N.O.V. *Home Products Corp., supra.*

Briefly summarized, plaintiff's evidence, as tested by the foregoing rules, tended to show the following. Plaintiff is a large firm specializing in industrial and institutional architecture. Plaintiff's firm has been in business in Durham for about 28 years. In August, 1976, Mr. James Kerr, Executive Director of defendant, approached plaintiff's president, Latimer, requesting assistance in determining evaluation of a site in Durham for a housing project. The project initially contemplated the construction of 110 housing units for the elderly. Plaintiff carried out an initial site evaluation, and on 10 September 1976 sent a letter to Kerr giving plaintiff's impressions of the site, favorably recommending the site for the proposed project. At the request of Kerr, plaintiff then further evaluated the site to determine estimated cost of street improvements, water and sewer extensions and site preparation necessary to accommodate 110 housing units. Plaintiff furnished this evaluation, in writing, to Kerr on or about 21 October 1976. Subsequently, at Kerr's request, plaintiff prepared a preliminary proposal for the project, showing a site location plan, floor plans and perspective, and cost estimates on all aspects of constructing the project. This proposal was furnished defendant on or about 19 April 1977. Subsequently, meetings and conferences between defendant and plaintiff resulted in a modified proposal to H.U.D. to construct 85 housing units on the site. On 2 June 1978, defendant wrote to plaintiff, informing plaintiff that H.U.D. had accepted the modified site plan, but had suggested extensive design

changes in the housing units. Defendant requested further discussion with plaintiff regarding the suggested design changes. Negotiations with H.U.D. continued, resulting in a H.U.D. notification on 20 March 1979 that defendant's final proposal, dated 6 December 1978, was approved, subject to appropriate financing. Plaintiff continued to work on the plans for the project, including reviewing construction bids. Defendant did not obtain final H.U.D. approval for the project. The agreement was that plaintiff would be paid for its services subject to H.U.D. approval of *plaintiff's plans.* Plaintiff periodically sent bills to defendant for services. Kerr assured plaintiff that plaintiff would be paid, but defendant had to wait for "H.U.D. approval." In December of 1979 or January of 1980, plaintiff was told for the first time that defendant would not pay for plaintiff's services. Plaintiff's fees were reasonable for the service rendered and totaled at least $105,000.00. The actual expenses incurred by plaintiff in work on the project was in the amount of $58,587.00.

Defendant's evidence tended to confirm plaintiff's evidence as to the initiation and progress of plans for the project, but consistently emphasized defendant's position that plaintiff was plainly told and well understood that plaintiff was engaged on a contingent fee basis and would not be entitled to payment for its work unless *the project* was approved and built.

[1] The heart of defendant's argument is that plaintiff's own evidence showed an express contract, and that where there is an express contract, no implied contract can exist. We recognize the validity of defendant's argument as to this principle of contract law. *See Snyder v. Freeman,* 300 N.C. 204, 266 S.E. 2d 593 (1980); *Supply Co. v. Clark,* 247 N.C. 762, 102 S.E. 2d 257 (1958); *Campbell v. Blount,* 24 N.C. App. 368, 210 S.E. 2d 513 (1975). Whatever the agreement may have been in the early stages of negotiation between plaintiff and defendant in this case, plaintiff's evidence clearly showed that as plaintiff's work on the project progressed, plaintiff requested payment and was assured that it would be paid for its work. Thus, even if an express contract may have at one time existed between these parties, by their conduct clearly indicating a different understanding, an implied contract could arise between them. *See Campbell, supra.*

[2] Defendant argues that even if there was evidence to support an implied contract, plaintiff is not entitled to recover under *quantum meruit* because defendant received no benefit from plaintiff's services, *citing Stout v. Smith*, 4 N.C. App. 81, 165 S.E. 2d 789 (1969) *and Williams and Associates v. Products Corp.*, 19 N.C. App. 1, 198 S.E. 2d 67, 69 A.L.R. 3d 1348, *cert. denied*, 284 N.C. 125, 199 S.E. 2d 664 (1973). Neither of the cases relied upon by defendant involved resolution of a question of whether there was sufficient evidence to support an implied contract. *Stout* involved the appropriate measure of damages under *quantum meruit*. *Williams and Associates* involved the question of the propriety of using parol evidence to vary the terms of a written contract. In the case now before us, plaintiff's version of the agreement was that it would be compensated for preparing plans for defendant's use in applying for H.U.D. approval for the project. Plaintiff's evidence having showed that plaintiff's plans were received and used by defendant in defendant's H.U.D. application, there was a sufficient showing of benefit to defendant from plaintiff's work.

[3] Finally, defendant argues that Kerr had no authority to bind defendant to pay plaintiff unless the project was approved and built. Kerr was defendant's chief executive officer, responsible for conducting its affairs. Plaintiff's evidence showed that plaintiff dealt extensively with Kerr, not only on the project involved in this case, but also on other similar projects. Plaintiff's reliance on Kerr's authority was reasonable. *See Zimmerman v. Hogg and Allen*, 286 N.C. 24, 209 S.E. 2d 795, 76 A.L.R. 3d 1004 (1974).

The trial court properly denied defendant's motions for directed verdict and for judgment notwithstanding the verdict.

No error.

Judges VAUGHN and WEBB concur.

NEW HANOVER COUNTY v. GRAHAM B. PLEASANT AND WIFE, GLENDA B. PLEASANT

No. 815SC1231

(Filed 7 December 1982)

1. **Counties § 5; Municipal Corporations § 30.15— violation of county zoning ordinance—authority to grant injunction and order of abatement**

The trial court had authority under G.S. 153A-324 and G.S. 153A-123 to grant injunctive relief and an order of abatement for violations of a county zoning ordinance although the ordinance itself did not provide specifically for such relief.

2. **Counties § 5; Municipal Corporations § 31— violation of zoning ordinance—failure to appeal decision of board of adjustment**

Where defendants failed to appeal a decision by a county board of adjustment that defendants were violating a county zoning ordinance and that the county was not estopped to assert defendants' violation, they could not thereafter raise such issues by a collateral attack on the decision of the board of adjustment.

APPEAL by defendants from *Strickland, Judge*. Order entered 22 July 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 3 September 1982.

Defendants own a tract of land in New Hanover County, North Carolina, purchased by them in March 1980 for $3,000 with the understanding from prior owners that the land was not zoned. In April 1980, defendants applied to the New Hanover County Health Department for a permit to construct and install a private well. This application, which stated defendants' property was not zoned, was approved approximately 3 May 1980. Also in May 1980, defendants applied for a building permit to construct a building on their property. The New Hanover County Building Inspector subsequently advised defendants that their property was located in an R-15 residential zone and that defendants were, therefore, precluded from building a structure for commercial storage and distribution because that use was not allowed in an R-15 zone. Despite the Building Inspector's refusal to issue a building permit, defendants proceeded with construction of the building on their property. In September 1980, the Building Inspector notified defendants in writing that they were violating the zoning ordinance, informed them of their right to appeal his decision, and instructed them to desist operations immediately.

Defendants appealed the Building Inspector's decision to the New Hanover County Zoning Board of Adjustment. After hearing on 12 August 1980, the Board concluded and informed defendants that they were in fact violating the zoning ordinance, that the Building Inspector's decision was correct, and that they had thirty days in which to appeal the Board's decision to the New Hanover County Superior Court. Defendants did not appeal the Board of Adjustment's decision. On 6 January 1981, New Hanover County filed suit against defendants alleging that they were violating the county zoning ordinance by operating a business in a residentially zoned area and requested that the court grant an injunction enjoining future business operation and issue an order of abatement requiring defendants to remove certain structures from their property. Defendants filed answer on 2 March 1981, alleging first, that they had been assured by certain county officials that their intended use of the land and construction of the building in question would not violate the county zoning ordinance, and second, that the court had no authority to grant injunctive relief or an order of abatement as plaintiff requested because the county zoning ordinance did not provide specifically for such relief. Plaintiff filed a motion for summary judgment and defendants gave notice of hearing on their motion to dismiss, previously set forth in their answer. Judge Strickland heard plaintiff's and defendants' motions and entered an order denying defendants' motion to dismiss and granting plaintiff's summary judgment motion. Defendants appealed.

Murchison, Fox and Newton, by Fred B. Davenport, Jr., and Louis K. Newton, for plaintiff appellee.

Martin, Wessell and Queens, by John C. Wessell, III, for defendant appellants.

MORRIS, Chief Judge.

[1] By their first assignment of error defendants urge that the court erred in denying their motion to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, for failure to state a claim upon which relief could be granted. We disagree with defendants because injunctive relief and an order of abatement are available relief, in accord with plaintiff's complaint.

Article 18 of Chapter 153A authorizes counties to plan and regulate development which includes the power to enact ordinances zoning land. Enforcement of zoning ordinances enacted pursuant to this Article is governed by G.S. 153A-324 which provides that:

> In addition to the enforcement provisions of this Article (Article 18, Planning and Regulation of Development, Part 3 of which governs zoning) and subject to the provisions of the ordinance, any ordinance adopted pursuant to this Article . . . . may be enforced by any remedy provided by G.S. 153A-123.

G.S. 153A-123 is located in Article 6 of Chapter 153A and deals with enforcement of ordinances enacted pursuant to counties' general ordinance-making power. This statute provides in pertinent part:

> § 153A-123. *Enforcement of ordinances.*—(a) A county may provide for fines and penalties for violation of its ordinances and may secure injunctions and abatement orders to further insure compliance with its ordinances, as provided by this section.
>
> . . .
>
> (d) An ordinance may provide that it may be enforced by an appropriate equitable remedy issuing from a court of competent jurisdiction. In such a case, the General Court of Justice has jurisdiction to issue any order that may be appropriate, and it is not a defense to the county's application for equitable relief that there is an adequate remedy at law.
>
> (e) An ordinance that makes unlawful a condition existing upon or use made of real property may provide that it may be enforced by injunction and order of abatement, and the General Court of Justice has jurisdiction to issue such an order. When a violation of such an ordinance occurs, the county may apply to the appropriate division of the General Court of Justice for a mandatory or prohibitory injunction and order of abatement commanding the defendant to correct the unlawful condition upon or cease the unlawful use of the property. The action shall be governed in all respects by the

laws and rules governing civil proceedings, including the Rules of Civil Procedure in general and Rule 65 in particular.

In addition to an injunction, the court may enter an order of abatement as a part of the judgment in the cause. An order of abatement may direct that buildings or other structures on the property be closed, demolished, or removed; that fixtures, furniture, or other movable property be removed from buildings on the property; that grass and weeds be cut; that improvements or repairs be made; or that any other action be taken that is necessary to bring the property into compliance with the ordinance. . . .

(f) Subject to the express terms of the ordinance, a county ordinance may be enforced by any one or more of the remedies authorized by this section.

Plaintiff contends that G.S. 153A-324 makes any remedy of G.S. 153A-123 available for enforcing ordinances regulating development, including zoning ordinances. It is unnecessary for a zoning ordinance itself to contain any specific provision for equitable enforcement because G.S. 153A-324 allows any remedy under G.S. 153A-123 to be used at the county's election as a matter of right and without qualification, unless the county's zoning ordinance provides otherwise. The New Hanover County zoning ordinance contains no such contrary language but states specifically that the county's power to remedy a zoning violation is as broad as the law allows. Before it was amended 2 February 1981, Section 132 of the New Hanover County zoning ordinance read as follows:

Section 132 *Penalties for Violation*

Violation of the provisions of this Ordinance of failure to comply with any of its requirements (including violations of conditions and safeguards established in connection with grants or variances) shall constitute a misdemeanor. Any person who violates this ordinance or fails to comply with any of its requirements shall upon conviction thereof be fined not more than fifty (50) dollars or imprisoned for no more than thirty (30) days, or both, and in addition shall pay all costs and expenses involved in the case. Each day such violation continues shall be considered a separate offense.

> The owner or tenant of any building, structure, premises, or part thereof, and any architect, builder, contractor, agent, or other person who commits, participates in, or maintains such violation may each be found guilty of a separate offense and suffer the penalties herein provided.
>
> Nothing herein contained shall prevent the County of New Hanover from taking such other lawful action as is necessary to prevent or remedy any violation.

The language of this ordinance, authorizing the county to take any lawful action needed to prevent or remedy a violation, is broad enough to encompass G.S. 153A-324 and the equitable remedies of G.S. 153A-123, incorporated by reference. Because an injunction and an order of abatement are appropriate relief as requested by plaintiff, defendants' assignment of error is overruled.

[2] Defendants contend in their second assignment of error that the trial court erred in granting plaintiff's summary judgment motion pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Defendants argue that disputed facts exist as to whether they received sufficient assurances from county officials to raise the defense of estoppel and that plaintiff presented no evidence that the zoning ordinance was violated after the Board's decision.

Defendants' right to appeal is derived from G.S. 153A-345(e) which states in part:

> Each decision of the board [of adjustment] is subject to review by the Superior Court by proceedings in the nature of certiorari.

This right to appeal and obtain review by the superior court is limited by Section 132 of the New Hanover County zoning ordinance which follows:

> An appeal from the decision of the zoning board of adjustment may be made to the New Hanover County Superior Court within thirty (30) days after the decision is made by the board, but not thereafter.

Although defendants were fully advised of their appellate rights, they failed to appeal the Board's decision that defendants were violating the zoning ordinance and that New Hanover Coun-

ty was not estopped in establishing defendants' violation. To allow a collateral attack on this unappealed Board decision would make the decision meaningless.

The facts of this case are similar to the facts in *Durham County v. Addison*, 262 N.C. 280, 136 S.E. 2d 600 (1964), where defendant applied for a building permit from the zoning administrator, was denied a permit and then appealed the zoning administrator's decision to the Board of Adjustment. Although the Board upheld the administrator's decision and denied defendant's request for a variance, defendant began constructing the building in violation of the county zoning ordinance. When defendant refused to stop construction, plaintiff sought and received the relief requested because defendant was permanently enjoined from constructing the building. On defendant's appeal from that judgment, the Court refused to alter the Board of Adjustment's decision stating:

> Moreover, with reference to the adverse decision by the Board of Adjustment, the applicable statutes provide: "Every decision of such board shall be subject to review by the superior court by proceedings in the nature of certiorari." G.S. 153-266.17; Session Laws of 1949, Chapter 1043, Section 8. The decision of the Board of Adjustment is not subject to collateral attack. As stated by Adams, J., in *S. v. Roberson*, 198 N.C. 70, 72, 150 S.E. 674: "When . . . the building inspector's decision was affirmed by the board of adjustment the defendant should have sought a remedy by proceedings in the nature of certiorari for the purpose of having the validity of the ordinances finally determined in the Superior Court, and if necessary by appeal to the Supreme Court. This he failed to do and left effective the adjudication of the board of adjustment." The decisions of the Board of Adjustment are final, subject to the right of courts on certiorari "to review errors in law and to give relief against its orders which are arbitrary, oppressive, or attended with manifest abuse of authority."

Id. at 283-4, 136 S.E. 2d at 603.

Thus, defendants' right to raise the issues they attempt to raise is precluded by their failure to appeal. Because the unappealed Board decision is still effective, evidence that the or-

dinance was violated after the Board's decision is unnecessary. The trial court correctly enforced the Board of Adjustment's decision by granting summary judgment in plaintiff's favor.

Affirmed.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. MICHAEL WAYNE PATTERSON

No. 8215SC184

(Filed 7 December 1982)

1. **Criminal Law § 42.4— armed robbery—guns taken from defendant's car—one having no connection with crime—admission erroneous**

The trial court erred in a prosecution for armed robbery by allowing the assistant district attorney to cross-examine defendant concerning a sawed-off shotgun found in the car in which defendant was driving in addition to the pistol identified by the robbery victim. The shotgun was not connected to the robbery and it was clearly not relevant to any issue in the case, and the admission of the shotgun was potentially confusing and misleading to the jury thereby constituting prejudicial error.

2. **Criminal Law § 163— failure to summarize all evidence defendant found favorable—necessity for calling court's attention to**

Defendant did not properly preserve his exceptions to the trial judge's charge to the jury for appeal where he did not bring his relatively minor contentions concerning the trial judge's failure to summarize certain evidence favorable to the defense to the trial judge's attention.

3. **Criminal Law § 117.6— failure to instruct on inferences that could be drawn from witness's refusal to answer—no entitlement to such instruction**

In a prosecution for armed robbery, the trial judge did not err in failing to instruct the jury with respect to the permissible inferences that could be drawn from defendant's brother's refusal to answer certain questions by using the privilege against self-incrimination since the refusal to answer a question alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant.

APPEAL by defendant from *Battle, Judge.* Judgment entered 24 September 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 20 September 1982.

Defendant, Michael Wayne Patterson, was indicted for armed robbery. He pled not guilty and was tried by a jury.

The jury convicted defendant of armed robbery and he was sentenced to imprisonment. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Alfred N. Salley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

JOHNSON, Judge.

The issues on appeal are (1) whether the trial court erred in admitting evidence that a sawed-off shotgun was found in the defendant's car; (2) whether the trial court gave a biased summary of the evidence in its charge to the jury; and (3) whether the trial court violated G.S. 15A-1232 when instructing the jury regarding a witness' assertion of the privilege not to incriminate himself.

The State's evidence tended to show that Marie Tarver was robbed of her wallet and car keys by a young, slender, light skinned black male wearing a light colored shirt with a dark jacket, in a hospital parking lot in Chapel Hill. Ms. Tarver stated that the man who robbed her was not wearing a hat. She testified that the robber approached her as she was leaving work on the night of 24 October 1980 and that he held a gun on her and struck her below the eye during the robbery. He then ran to another parking lot where two or three other men were waiting at a small car.

Ms. Tarver testified that soon after the robbery, she saw John Russell coming to the parking lot. She ran to him, related what happened, and was taken by him to the hospital security trailer. Ms. Tarver stated that she could still see her assailant's car and pointed the car out to Mr. Russell. Mr. Russell testified that he saw a black man get into the passenger side of the car which then drove out of the lot and past the security trailer. Tarver promptly reported the robbery to a hospital security officer and pointed out the defendant's car. The officer followed the car and got in touch with the local police. A police officer stopped the car. The defendant was driving, and there were three passen-

gers. Police found a pistol in the car. Later, Marie Tarver was shown a series of photographs, and she selected a photograph of the defendant as the robber.

The defendant testified that he, his two brothers, and a fourth man named Mark Sumler, were riding around Chapel Hill on the night in question and that he stopped in a parking lot at the request of his brother, Raymond Patterson and Mark Sumler. Raymond and Sumler got out of the car, returned in a short while, and told defendant to drive off. Sumler told him where to drive and Raymond stated that he had just robbed someone. After they were stopped, the defendant told police that he had not robbed anyone and that Raymond had committed the robbery. The defendant testified that he was wearing a hat on the night of 24 October 1980 and that he never left the car while it was parked in the parking lot.

Defendant presented his brother, Raymond, to testify. Raymond testified that he was riding around with the others and that he got out of the car at the hospital parking lot and saw Marie Tarver. He refused to state whether he robbed Tarver on grounds that the answer might incriminate him.

I

[1] During cross-examination of the defendant the assistant district attorney brought out testimony to the effect that there was a sawed-off shotgun in the car in addition to the pistol identified by the robbery victim. Defendant stated that he knew of the presence of the shotgun. The assistant district attorney produced the shotgun and defendant identified it. The defendant assigns error. He argues that there was no evidence connecting the shotgun to the robbery and that the presence of the shotgun in the car was irrelevant to the robbery charge. We agree.

It is a well settled principle that weapons may be admitted into evidence when there is evidence tending to show that they have been used in the commission of a crime. *State v. Wilson*, 280 N.C. 674, 187 S.E. 2d 22 (1972). The case *sub judice* involves the admission of testimony of a weapon into evidence where there is no evidence the weapon was connected with the crime charged.

This case is very similar to *State v. Milby and State v. Boyd*, 47 N.C. App. 669, 267 S.E. 2d 594 (1980), *disc. rev. allowed*, 302

N.C. 137, 273 S.E. 2d 716 (1981), in which the State was permitted to introduce into evidence two handguns taken from a car in which the defendants were riding. The defendants were being tried for armed robbery. In reversing the convictions and ordering a new trial, this Court stated that the State failed to connect the handguns seized from the defendants with the handguns utilized in the robbery, and failed to produce any testimony to the effect that the handguns were similar to those actually employed by the defendants.

On discretionary review, the Supreme Court reversed, stating that it was unable to determine that there was indeed a discrepancy between the weapons used in the commission of the robbery and the weapons received in evidence because the record was devoid of any stipulation or description of the weapons, and the weapons were not before the Supreme Court for its examination. Due to this deficiency of the record, the Supreme Court applied the well settled principle that a ruling of the trial court on an evidentiary point is presumptively correct. *Id.* at 141, 273 S.E. 2d at 719. The Supreme Court further stated, that assuming *arguendo* that the handguns were admitted erroneously, in view of the overwhelming evidence presented by the State as well as the quality of that evidence, there was no reasonable possibility that the verdicts returned by the jury were affected by the introduction of the handguns in question. *Id.*

In the case *sub judice*, there was no evidence, nor does the State contend otherwise, that the sawed-off shotgun was used in any fashion in the commission of the armed robbery. A small caliber pistol which the State contends was the weapon used in the commission of the robbery was introduced and the victim identified this pistol as being very similar to the one used in the robbery. The shotgun was not connected to the robbery and it was clearly not relevant to any issues in the case. Therefore, the shotgun was erroneously admitted into evidence. *State v. Wilson, supra; Sprinkle v. Ponder*, 233 N.C. 312, 320, 64 S.E. 2d 171, 178 (1951).

We further conclude that there is a reasonable possibility that the erroneous admission of the shotgun evidence contributed to the defendant's conviction, particularly in light of the conflict-

ing evidence regarding the identity of the defendant as the man who robbed Marie Tarver.

The State argues that evidence concerning the shotgun was properly used to impeach defendant's testimony about the reason why he and the others were in Chapel Hill. This cross-examination was improper as it constitutes impeachment on a collateral matter. In addition, permitting the State to present evidence of a shotgun which was not used in the commission of the armed robbery was potentially confusing and misleading to the jury. The effect of such impeachment was to bring out a matter purely prejudicial to the defendant. For this error, defendant is entitled to a new trial. *See generally* 1 Brandis on N.C. Evidence, § 42 (2nd Rev. Ed. 1982). We will briefly address the defendant's other assignments of error as they may recur upon retrial.

II

[2] By his second argument on appeal, the defendant contends that the trial judge failed to mention certain testimony favorable to the defense while summarizing the evidence for the jury. Although defendant did not raise such an objection at trial, he reasons that the judge's failure to mention this testimony amounted to an expression of opinion that the testimony was not credible and, therefore, that he was not required to object at trial. On this point he cites *State v. Covington*, 48 N.C. App. 209, 268 S.E. 2d 231 (1980). In *Covington*, this Court found that the trial judge had expressed an opinion while stating the contentions of the parties since the judge assumed that the defendant admitted certain essential elements of the State's case and because the judge's manner of stating the defendant's contentions had the effect of ridiculing the defendant before the jury. Such is not the case herein. Here, the alleged error consists of the trial judge's failure to summarize certain evidence that the defendant finds favorable. A trial judge is not required to summarize all of the evidence, *State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 893 (1980), and in this case the trial judge specifically instructed the jury that he had not summarized all of the evidence and that it was the jury's duty to remember all of the evidence whether summarized or not. We conclude that this case comes within the following rule of *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976):

> We have held in many cases that any minor misstatement in the trial judge's statement of facts or contentions must be brought to his attention at trial. (Citations omitted.) The reason for this rule is that the trial judge should be given an opportunity to correct any misstatements in order to avoid the expense of a retrial. We have further held that a defendant may not avoid the operation of this rule by contending that the trial judge's misstatements were impermissible expressions of opinion. (Citation omitted.)

Id. at 53, 229 S.E. 2d at 173-74. As the evidence cited by defendant is relatively minor and defendant did not raise the present objection at trial, we hold that he has not properly preserved these exceptions for appeal.

III

[3] By his final argument, the defendant contends that the trial judge erred in omitting from his summary of the evidence the witness, Raymond Patterson's refusal to answer certain questions and by failing to instruct the jury with respect to the permissible inferences that could be drawn from this witness's refusal to answer. As to the first part of this argument, we again note that defendant did not raise this objection at trial, and we conclude that defendant may not present this issue for the first time on appeal. As to the second part of this argument, we note that defendant made no request for jury instructions in the trial court, but we choose to examine the issue further. Defendant argues that the judge should have instructed the jury that it could infer that Raymond Patterson's answers would indeed have incriminated him. We disagree. It has been held in certain cases that the defendant has no right to present a witness who intends to claim the privilege against self-incrimination as to essentially all the questions that will be asked him. *United States v. Johnson*, 488 F. 2d 1206 (1st Cir. 1973); *Bowles v. United States*, 439 F. 2d 536 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 995, 28 L.Ed. 2d 533, 91 S.Ct. 1240 (1971). Calling such a witness would likely have a disproportionate impact on the jury's deliberations and "would only invite the jury to make an improper inference." *Bowles*, 439 F. 2d at 542. The general rule, supported by a number of cases, is

> that when a witness, other than the accused, declines to answer a question on the ground that his answer would tend

to incriminate him, that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the defendant.

Annot., 24 A.L.R. 2d 895-96 (1952). Thus, we conclude that the defendant was not entitled to the instruction now urged by him. The judge might have given an instruction along the lines of the general rule, but his failure to give any instruction at all with respect to Raymond Patterson's assertion of his privilege against self-incrimination did not prejudice the defendant since, in the absence of any instruction, the jury was more likely to view the matter in a manner favorable to the defendant.

The defendant is awarded a

New trial.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. KENDRICK LEVINE STONER

No. 8219SC353

(Filed 7 December 1982)

1. **Criminal Law § 89.6— testimony that defendant was framed by witness—admissibility on question of credibility**

In a prosecution for possession with intent to sell and sale of marijuana, testimony by defendant that he was framed by an SBI agent because of his alleged unwillingness to cooperate in a murder investigation should have been admitted to allow the jury to determine the credibility of the SBI agent.

2. **Criminal Law § 26.5; Narcotics § 1.3— conviction of possession with intent to sell and sale of marijuana—no double jeopardy**

The entry of separate judgments against defendant for possession with intent to sell and sale of marijuana was proper under G.S. 90-95(a) and did not violate defendant's right against double jeopardy.

APPEAL by defendant from *Washington, Judge.* Judgments entered 29 September 1981 in Superior Court, ROWAN County. Heard in the Court of Appeals 19 October 1982.

On 19 November 1979, defendant was indicted for four offenses: two charges of sale and delivery of marijuana and two

charges of possession with intent to sell marijuana. One sale and delivery and possession allegedly took place on 9 August 1979, the other on 25 September 1979.

The State's evidence tended to show the following. On 9 August 1979, Mary Jo Miller and SBI agent Brenda Corbet, drove to defendant's trailer and told him they wanted to buy an ounce of marijuana. He sold them an ounce for thirty dollars. Corbet met with SBI agents Nelson and Stout; she initialed and dated the marijuana and turned it over to Nelson. On 25 September 1979, Corbet and Miller returned to defendant's trailer. Corbet asked defendant if he had any marijuana. He said no, but he could get some at his mother's house. He got in Corbet's car and directed her to a house on Division Avenue. Defendant went inside and returned with a grocery bag and a set of scales. They drove back to defendant's trailer. He weighed two ounces of marijuana into two plastic bags and gave them to Corbet. She gave him eighty dollars.

Agent Stout testified that he and Nelson took Corbet to areas they believed people were trafficking in drugs. They showed Corbet pictures of defendant and where he lived.

Defendant's evidence tended to show the following. In 1979, he was living in a trailer with Betty Barber and her three children. He said that on 9 August 1979, Mary Jo Miller and another person visited him. Miller asked him where she could find some marijuana. He told her that he was not involved in drugs, and asked her to leave. She returned to his trailer two or three times a week with the other person and asked him where she could get marijuana. Each time he told her that he could not help her, and he was not involved in drugs.

Defendant testified that when he was arrested, he saw Agent Stout at the police station. According to defendant, Stout asked him to sit down, showed him the warrants for his arrest, and told him that he could get up to ten years on the conviction of each of the charges. Then Stout said that he did not want to talk about the drug charges, but that defendant knew what he wanted to talk about.

When defendant was asked what Stout wanted to talk to him about, the State objected, and the court sustained the objection.

Defendant testified that he went to Virginia in February 1980 and got a job as a carpenter. He said that he went there because he feared for the health and safety of himself and his family. At this point, the State objected, and the court sustained the objection. After he had been in Virginia a year and a half, he was picked up for extradition back to North Carolina. Stout and Detective Douglas visited defendant in jail in Virginia. Defendant said:

> Well, Mr. Stout said to me, "Kenny, I guess you know why we're here to see you." I said, "Yes, I have a very good idea." And at that point he said, "Do you remember telling us about John Miller?" . . . He said he wanted to talk to me about John Miller, and I said, "All right." . . . He asked me did I remember telling him that I had been to the home of Larry Thompson the day he disappeared.

At this point, the State objected, and the court allowed direct examination on *voir dire* out of the presence of the jury. On *voir dire*, defendant offered evidence which tended to show that he was framed by Stout and Nelson because of his alleged unwillingness to cooperate in a murder investigation in 1979. According to defendant, Larry Thompson was murdered in 1974, and defendant had been at his house the day he disappeared. Defendant said that he told Stout and Nelson that he knew nothing about the murder. Then Stout said to him: "If you do not cooperate with us, how would you feel if we hassled you, followed you, go everywhere you go, and make things difficult for you?" According to defendant, Stout and Nelson followed him on several occasions. After defendant was arrested on the drug charges, he saw Stout at a club, and Stout said to him: "I told you I was going to get you." In the car on the ride back to North Carolina from Virginia, Stout told defendant that he could not understand why he was holding back information about the murder. Detective Johnson said he knew that defendant knew more information about Larry Thompson's murder than he was telling. He also told defendant that if he would cooperate with them, the drug charges would be dropped.

After *voir dire*, the court sustained the State's objection to the admission of the evidence on the ground that it was not relevant.

Betty Barber and Marvin Haggins testified about Mary Jo Miller visiting defendant, asking for marijuana, and defendant telling her to leave because he did not have marijuana and did not want to get involved in drugs.

Defendant was found guilty of one count of possession with intent to sell and one count of sale and delivery of marijuana. A mistrial was declared for the other two charges. He was given a ten-year active sentence, a five-year suspended sentence with five years supervised probation, and a $10,000.00 fine.

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

Assistant Appellate Defenders James H. Gold and Ann B. Peterson, for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first argument is that the trial court erred by excluding evidence that he contends tended to show he was framed by Stout. This evidence should have been admitted to allow the jury to determine Stout's credibility. As Justice Ervin said in *State v. Hart*, 239 N.C. 709, 710, 80 S.E. 2d 901, 902 (1954):

> Truth does not come to all witnesses in naked simplicity. It is likely to come to the biased or interested witness as the image of a rod comes to the beholder through the water, bent and distorted by his bias or interest. . . . [T]he law decrees that "any evidence is competent which tends to show the feeling or bias of a witness in respect to the party or the cause," and that jurors are to consider and weigh evidence of this character in determining the credibility of the witness to whom it relates.

Defendant's testimony that he was framed was his defense, preventing him from testifying about the frame was prejudicial error even though he should have first cross-examined Stout to call the matter to his attention. *See* 1 Brandis on North Carolina Evidence § 48 (1982). The State would have been free to recall Stout to rebut defendant's testimony. The jury would decide whether there was any truth in defendant's testimony.

[2] Defendant argues that the trial court erred in entering judgments against him for both sale and possession with intent to

sell because the offenses arise from the same transaction, and the multiple judgments violate his right against double jeopardy. Defendant admits that this Court has consistently held that possession with intent to sell and sale are separate offenses, but he contends that *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973), which was decided under the former statute, should not be applicable under our present statute. In *Cameron*, defendant was charged with possession and sale of heroin. The State's evidence tended to show that an undercover policeman, Conant, went to defendant's house and asked him if he had any heroin. Defendant left his house, and returned with fifteen small packages of heroin. At trial, defendant argued that possession is a lesser included offense of the sale because it is necessary to possess the drug in order to sell it. He contended that possession and sale constitute a single offense, and permit only a single punishment. In his opinion, Justice Moore discussed several analogous cases. In *State v. Moschoures*, 214 N.C. 321, 199 S.E. 92 (1938), defendant, who was charged with possession with intent to sell and unlawful sale of liquor, claimed that it was only one offense and he could receive only one sentence. The Supreme Court disagreed, and held that the unlawful sale and unlawful possession for the purpose of sale are distinct, separate offenses and support separate sentences. In *Albrecht v. United States*, 273 U.S. 1, 71 L.Ed. 505, 47 S.Ct. 250 (1926), defendants, who were charged with four counts of illegal liquor sales and four counts of illegal possession, contended that they could not be punished for both the sale and possession because the liquor which they sold was the same liquor that they possessed. Justice Brandeis disagreed, and said "[P]ossessing and selling are distinct offenses, one may obviously possess without selling; and one may sell and cause to be delivered a thing of which he has never had possession; or one may have possession and later sell, as appears to have been done in this case."

Justice Moore concluded:

> The North Carolina General Assembly has determined that the unlawful possession of heroin is illegal [and] . . . the unlawful sale of heroin is illegal. While possession may be a part of the sale, the possession may be legal and the sale illegal; therefore, they are separate and distinct offenses. . . . We hold, then, that in the instant case two separate, distinct, and punishable crimes were established. . . .

State v. Cameron, 283 N.C. at 203, 195 S.E. 2d at 489.

Defendant's argument that *Cameron*, which was decided under our old statute, G.S. 90-88, should not be followed because a different result would have been reached under our present statute, G.S. 90-95, has no merit. A comparison of the two statutes shows that the reasoning in *Cameron* would apply to the new statute as well as the old. G.S. 90-88 provided: "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article." Articles 5 and 5A of Chapter 90 of the North Carolina General Statutes were rewritten in 1971 (c. 919 s. 1 effective 1 January 1972). The present version of G.S. 90-95(a) provides: "Except as authorized by this Article, it is unlawful for any person: (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance; . . . (3) To possess a controlled substance."

Defendant contends that since possession and sale are in separate sections of the statute, they are separate and distinct offenses, and since possession with intent to sell and sale are in the same section, they are alternative offenses. Furthermore, the penalties for possession with intent to sell and sale are identical, whereas the penalties for possession and sale are different, which indicates that possession with intent to sell and sale are alternative offenses. Although this argument is reasonable, defendant fails to show how *Cameron* is not controlling, since in *Cameron*, the offenses of possession and sale were also in the same section and had the same punishment. If the legislature intended to overrule *Cameron*, they would have worded the statute to clearly show that they were alternative offenses and not separate offenses.

The errors alleged in defendant's other assignments of error are not likely to recur at the next trial, and, therefore, need not be discussed.

New trial.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. EDDIE GOODWIN

No. 8220SC340

(Filed 7 December 1982)

Criminal Law § 163— jury instructions—failure to object before jury deliberations—inability to assign error to jury charge

Where defendant was given an opportunity by the trial judge specifically to object to the charge and he did not object thereto and state distinctly his objections before the jury began its deliberations, defendant could not, on appeal, assign as error any portion of the jury charge. App. Rule 10(b)(2).

Judge BECTON concurring in the result.

APPEAL by defendant from *Collier, Judge.* Judgment entered 19 November 1981 in Superior Court, UNION County. Heard in Court of Appeals 19 October 1982.

Defendant was charged in a proper bill of indictment with feloniously burning a 1975 Cadillac automobile with the specific intent "to injure or prejudice the insurer of the property, to wit: State Farm Mutual Automobile Insurance Company, a corporation."

Defendant pleaded not guilty but was found guilty as charged. From a judgment imposing a prison sentence of not less than three years nor more than five years, defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr. for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen for the defendant, appellant.

HEDRICK, Judge.

The only assignment of error brought forward and argued in defendant's brief is as follows:

> The Court erred in instructing the jury that the obtaining of insurance proceeds by the burning of a vehicle would be specific intent to injure or prejudice the State Farm Insurance Company, in that the instruction given was erroneous and amounted to a conclusive presumption on an

element of the offense, thereby depriving the defendant of his rights to trial by jury and due process of law.

The portion of Appellate Rule 10(b)(2) pertaining to the defendant's assignment of error is as follows:

> *Jury Instructions; Findings and Conclusions of Judge.* No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

The record of defendant's trial discloses the following at the conclusion of the instruction to the jury:

> COURT: Gentlemen, before sending the verdict form to the jury and allowing them to begin their deliberations, I will now consider any requests for corrections to the charge to the jury or any additional matters if anyone feels is necessary or appropriate to submit a proper and accurate charge to the jury. Are [there] any specific requests for corrections or additions to the charge?
>
> MR. CHURCH [prosecuting attorney]: No.
>
> MR. HARRINGTON [defendant's counsel]: No, sir.
>
> COURT: Hand them the verdict form and let them begin their deliberations without any comment.

In our opinion the defendant may not now assign as error any portion of the jury charge since, having been given an opportunity by the trial judge specifically to object, he did not object thereto and state distinctly his objections before the jury began its deliberations. We hold the defendant had a fair trial free from prejudicial error.

No error.

Judge WEBB concurs.

Judge BECTON concurs in the result.

Judge BECTON, concurring in the result.

Although concluding that "defendant had a fair trial free from prejudicial error," ante, p. 3, the majority has effectively dismissed defendant's appeal because defendant's trial counsel failed to comply with our relatively new contemporaneous objection rule, Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure.[1] Believing that the challenged instruction in this case was not prejudicial and that our contemporaneous objection rule should not be applied mechanically and literally in every case in which trial counsel fails specifically to bring error to the trial court's attention before the jury retires, I write this concurring opinion.

I

In explaining to the jury the elements of the offense, the trial court instructed the jury as follows:

> I charge that for you to find the defendant guilty of setting fire or burning personal property with the intent to injure or prejudice, the State must prove three things beyond a reasonable doubt. First, that the defendant intentionally set fire to or burned a 1975 Cadillac Limousine automobile; second, that the defendant did so wantonly and wilfully; and third, that the defendant did so with the specific intent to injure or prejudice State Farm Insurance Company. *The obtaining of insurance proceeds by the burning of a vehicle would be a specific intent to injure or prejudice the State Farm Insurance Company,* if you find that to be a fact from the evidence and beyond a reasonable doubt. [Emphasis added.]

The challenged instruction is not a model of clarity. The portion italicized, fairly interpreted, tells the jury that the burning of a vehicle in order to obtain insurance proceeds would be a specific intent to injure or prejudice State Farm Insurance Company. Further, when considered in context, the challenged instruction does not direct the jury to find that defendant specifically intended to injure or prejudice State Farm Insurance Company once the jury

1. The amendment to Rule 10 is applicable to trials which began on or after 1 October 1981.

has found that insurance proceeds were obtained. It must be remembered that defendant could not obtain insurance proceeds by burning his brother's car because he had no interest in the insurance policy or proceeds. The instruction, taken as a whole, informed the jury that if it found that the defendant burned his brother's car with the intent that his brother collect insurance proceeds, then the defendant's intent would be an unlawful intent to injure or prejudice the insurance company. In this respect, defendant's trial was free from prejudicial error.

II

Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, as amended, provides:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the ground of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

I do not believe it was intended for this Rule to be an unequivocal bar to appellate review in all cases when there is no objection in the trial court to jury instructions. Experience tells us that trial lawyers are often drained physically after closing arguments and are, thereby, less able to listen attentively to the trial court's instructions. Should we dismiss a defendant's case when the trial counsel, for example, fails to object to a trial judge's instruction that directs the jury to find defendant guilty? I think not.

When erroneous instructions affect the substantial rights of the defendant, they are sufficiently important to be the subject of appellate review even in the absence of an objection. And, there is nothing novel about this position. It is called "plain error" by the federal courts[2] and by courts in other states. The Commentary to Appellate Rule 10 states that the amendment "will make North Carolina's procedure for reviewing alleged errors in the jury charge similar to that of the federal courts and many, if not most, of the other states including Connecticut, Florida, Indiana,

2. *See* Rule 52(b) of the Federal Rules of Criminal Procedure.

Massachusetts, Michigan, New Jersey, New York, Ohio, Texas and South Carolina."

Rule 30 of the Federal Rules of Criminal Procedure is similar to our Rule 10(b)(2). It, too, states, without apparent exception, that there will be no appellate review of instruction errors in the absence of an objection. The federal rule, however, has never been applied mechanically or literally. When the trial court's action affects the defendant's substantial rights resulting in a miscarriage of justice, the "plain error" rule will be invoked. *See*, for example, *United States v. Gambina*, 564 F. 2d 22, 24 (8th Cir. 1977) and *United States v. Musquiz*, 445 F. 2d 963, 966 (5th Cir. 1971). *See also* Fed. R. Crim. P. 52(b).

Equally significant, every state mentioned in the Commentary to the Rule 10 amendment provides for some form of appellate review for unobjected to instruction error in spite of an unequivocally stated contemporaneous objection rule.[3]

Believing that Rule 10 should be interpreted to permit appellate review of plain error in the absence of a contemporaneous objection at trial, I cannot concur in the majority's suggestion that defendant waived his right to have his assignment of error considered. Having considered defendant's assignment of error, I concur in the stated result: No error.

3. *See State v. Evans*, 165 Conn. 61, 327 A. 2d 576 (1973); *Turcio v. Manson*, 186 Conn. 1, 439 A. 2d 437 (1982); *State v. Jones*, 377 So. 2d 1163 (Fla. 1979); *Webb v. State*, 259 Ind. 101, 284 N.E. 2d 812 (1972); *Commonwealth v. Fitzgerald*, 80 Mass. Adv. Sh. 1433, 406 N.E. 2d 389 (1980); *People v. Hall*, 77 Mich. App. 528, 258 N.W. 2d 547 (1977); *State v. Begyn*, 58 N.J. Super. 185, 156 A. 2d 15, *aff'd* 34 N.J. 35, 167 A. 2d 161 (1959); *People v. McLucas*, 15 N.Y. 2d 167, 204 N.E. 2d 846 (1965); *State v. Gideons*, 52 Ohio App. 2d 70, 368 N.E. 2d 67 (1977); and *State v. Griffin*, 129 S.C. 200, 124 S.E. 81 (1924).

STATE OF NORTH CAROLINA v. WAYNE SEAY

No. 8221SC485

(Filed 7 December 1982)

1. **Criminal Law § 143.1— probation revocation—preliminary hearing not required**

A preliminary hearing was not required before defendant's probation could be revoked in a hearing under G.S. 15A-1345(e).

2. **Criminal Law § 143— delay in probation violation order—no waiver of violation**

A probation violation in April was not waived because a violation order was not filed until October.

3. **Criminal Law § 143.5— probation revocation hearing—improper evidence—absence of prejudice**

The impeachment of defendant at his probation revocation hearing by a crime committed in Texas for which he had been pardoned was not reversible error where the court was sitting without a jury, since it is assumed that the court disregarded incompetent evidence in extending defendant's probation.

4. **Criminal Law § 143.9— violations of probation—sufficiency of evidence**

The evidence was sufficient to support a determination by the trial court that defendant violated the conditions of his probation by (1) failing to report to his probation officer at reasonable times and in a reasonable manner, (2) changing his place of residence without obtaining prior approval of his probation officer, and (3) failing to remain within the court's jurisdiction and failing to obtain permission to leave by the court or the probation officer when he went to another state on specified dates.

5. **Criminal Law § 143.13— appeal from extension of probation—oral motion for appearance bond—who may set bond**

A motion for an appearance bond during an appeal of a probation extension order did not have to be in writing where it was made during a hearing. G.S. 15A-951(a)(1). Furthermore, it was not required that the appearance bond be set by the same judge who signed the appeal entry.

APPEAL by defendant from *Helms, Judge* and *Albright, Judge.* Orders entered 15 December 1981 and 8 February 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 November 1982.

Defendant was convicted of two counts of embezzlement, given an active sentence of sixty days and placed on supervised probation for one year and ten months. The 19 April 1979 probation judgment allowed defendant to leave the jurisdiction of the

court with the permission of the court or the probation officer. The judgment required him to obtain prior approval from the probation officer for any change in address or employment.

On 26 February 1981, defendant met with Steve Jacobs, his probation officer. Jacobs told defendant that he could travel to Texas in early March but that the defendant should call Jacobs within 30 days of when he got back. The defendant went to Texas because of a case in federal court there and because his cardiologist was there. Jacobs allowed him to travel to and from Texas without issuing travel permits.

On 23 March, the defendant reported to Jacobs' office. He talked with unit supervisor Robert Harrison, who left Jacobs a note that the defendant had been there.

The defendant and Jacobs talked by telephone on 14 April while the defendant was in Texas. Jacobs told the defendant to contact him when he returned to North Carolina. During this conversation, Jacobs did not tell the defendant that he was in violation of his probation because he was in Texas on 9 and 10 April.

The two talked on 28 April by telephone. On 12 June, the defendant visited Jacobs at his office. On 14 August, the defendant informed Jacobs by telephone that he had been in Winston-Salem on 27 July and 3 August and had gone to Jacobs' office. On 24 September, the defendant received a letter from Jacobs that suggested that the case be transferred to Texas since the defendant spent so much time there. The defendant answered it the next day by stating that he did not want the case transferred.

The defendant returned to Winston-Salem on 12 October. He called Jacobs but could not reach him. When he went to Jacobs' office on 14 October, the defendant discovered that his office was now in Kernersville. Subsequent attempts by the defendant to contact Jacobs were unsuccessful.

Jacobs filed a violation of probation report on 15 October. Defendant was served with an arrest warrant on 12 November.

On 15 December, an order was issued that extended the defendant's probation until 25 December 1983 and required that he report to his probation officer on the second Friday of each month.

On 8 February 1982, a release order was filed requiring the defendant to post an appearance bond during the appeal of this case. The bond amount was $5,000 with $500 of that amount being secured. From the probation extension order and the release order, defendant appeals.

Attorney General Edmisten, by Associate Attorney G. Criston Windham, for the State.

Kennedy, Kennedy, Kennedy and Kennedy, by Harold L. Kennedy, III and Harvey L. Kennedy, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that a preliminary hearing is required before a probation revocation hearing can be held. We disagree.

G.S. 15A-1345(c), which outlines when a preliminary hearing on a probation violation is required, states "Unless the hearing required by subsection (e) is first held or the probationer waives the hearing, a preliminary hearing on probation violation must be held. . . ." Subsection (e) requires that before probation can be revoked or extended, a hearing is required at which the judge "must make findings to support the decision." The record shows that the subsection (e) hearing was held and that all provisions of the statute were satisfied. Thus, no preliminary hearing was required.

Defendant next argues that the terms of probation were altered without written notice to him in violation of G.S. 15A-1343(c) because he was allowed to travel outside North Carolina. But there was no modification here where the original order allowed the court or the probation officer to give the defendant permission to leave the jurisdiction.

[2] Two facts are alleged to be due process violations by the defendant. First, it is asserted that the April violation was waived because the violation order was not filed until October. We find no reversible error on this point because we find no prejudice to the defendant as a result of this delay. Jacobs met and talked with the defendant during this six-month period on a

number of occasions in an attempt to resolve any problems with the probation. If anything, the delay worked to defendant's advantage.

[3] The second alleged due process violation is the impeachment of defendant at the revocation hearing by a crime committed in Texas for which he had been pardoned. Although the general rule in North Carolina is that a defendant's credibility may be impeached on cross-examination, there are exceptions to the rule for convictions that are void for constitutional reasons or that have been expunged from the record. *See* 1 Brandis N.C. Evidence § 112 (1982). We note that the Federal Rules of Evidence would not allow this type of impeachment if the pardon was based on a finding of rehabilitation or innocence. Fed. R. Evid. 609(c).

No reversible error was committed here where the court was sitting without a jury. In such a case, it is assumed that the trial court disregards any incompetent evidence and considers only that which is competent. *See, e.g., State v. Baines*, 40 N.C. App. 545, 253 S.E. 2d 300 (1979).

[4] Defendant also contends that there was insufficient evidence to show that he willfully and without lawful excuse violated the terms of probation. In the 15 December 1981 order extending probation, the court found three violations by defendant. First, he failed to report to Jacobs at reasonable times and in a reasonable manner. Second, he changed his place of residence without obtaining prior approval from Jacobs. Third, he failed to remain within the court's jurisdiction and was not granted permission to leave by the court or the probation officer when he went to Texas on 9 and 10 April 1981.

Probation revocation hearings do not require proof beyond a reasonable doubt since probation is

> an act of grace. . . . 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 violated a valid condition upon which the sentence was suspended.

State v. Duncan, 270 N.C. 241, 245, 154 S.E. 2d 53, 57 (1967); *State v. Hewett*, 270 N.C. 348, 353, 154 S.E. 2d 476, 480 (1967). It is sufficient grounds to revoke the probation if only one condition is

broken. *See State v. Braswell*, 283 N.C. 332, 196 S.E. 2d 185 (1973); *State v. Freeman*, 47 N.C. App. 171, 266 S.E. 2d 723, *disc. rev. denied* 301 N.C. 99, 273 S.E. 2d 304 (1980).

There are at least three areas that the trial judge reasonably could have found a probation violation. First, Jacobs testified that the defendant was in Texas on 9 and 10 April without permission and did not return to see Jacobs until 12 June. This could be seen as a violation of the condition that he come back every 30 days to Winston-Salem.

Second, in his 25 September letter in response to Jacobs' 16 September letter suggesting a transfer of the case to Texas, defendant objected to the transfer and stated that he would accept collect calls from Jacobs and write him a monthly letter. This could be seen as a violation of the condition requiring defendant to report as directed by the probation officer. We note that the fact that Jacobs filed the violation order three weeks after the defendant wrote this letter does not amount to a first amendment freedom of speech violation, as defendant claims.

Finally, the court could have found that the defendant changed his residence without permission. When an attorney for a party to another lawsuit to which the defendant was a party tried to take his deposition, the defendant refused to appear, asserted that he was an out-of-state resident and had not been given sufficient notice under the Rules of Civil Procedure. Any one of these three alleged violations reasonably could be found to be probation violations.

[5] Defendant's final assignment of error attacks the 8 February 1982 order requiring him to post an appearance bond. The court entered this order after an oral motion by the State on 26 January.

We note that a motion for an appearance bond like the one here does not have to be in writing since it was made during a hearing. G.S. 15A-951(a)(1). In addition, any prejudice to the defendant was eliminated when the matter was postponed until 8 February. Finally, we find no authority that the same judge who signed the appeal entry must also set any appearance bond, as defendant contends. This is not a case where one superior court judge is modifying, reversing or setting aside the judgment of

another superior court judge, which is prohibited. *See State v. McClure*, 280 N.C. 288, 185 S.E. 2d 693 (1972); 3 Strong's N.C. Index 3d *Courts* § 9 (1976).

No error.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. FELTON EARL REEKES

No. 8226SC445

(Filed 7 December 1982)

Criminal Law § 91— Speedy Trial Act—dismissal with leave for nonappearance of defendant—clock resumed running when proceedings reinstituted

Once a prosecutor entered a dismissal with leave for nonappearance of the defendant pursuant to G.S. 15A-932, G.S. 15A-701(b)(11) controlled and the speedy trial clock did not resume running against the State until the proceedings were reinstituted against the defendant. G.S. 15A-701(b)(13).

APPEAL by the State from *Grist, Judge.* Order entered 5 January 1982 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 9 November 1982.

Defendant, Felton Earl Reekes, was arrested for the felony of breaking and entering on 23 February 1981 and was subsequently indicted on that same charge. On 15 December 1981, defendant moved the court to dismiss the charge with prejudice for lack of a speedy trial. The trial court made the following pertinent findings of fact:

> That on or about the 23rd day of February, 1981, the defendant was arrested for the offense of breaking or entering with the intent to commit larceny at the Paper Doll Lounge and with the felony of larceny pursuant to the aforesaid breaking or entering. That on the 12th day of March, 1981, the defendant waived a Probable Cause Hearing and was subsequently indicted by the Grand Jury of Mecklenburg County on the 23rd day of March, 1981, at which time the clock began to run on the 120 days as required under the Speedy Trial Act.

That on the 5th of May, 1981, the defendant through his attorney, W. Joseph Dozier, Jr., appeared in Superior Court and filed a motion for a continuance until May 19, 1981, which was granted. That the period from March 23, 1981, through May 5, 1981, constituted 43 days, which time was applied against the 120 days as required under the Speedy Trial Act. That the time from May 5 through May 19 is excluded from the Speedy Trial Act due to the continuance aforesaid.

This matter came on for hearing on motion of the defendant's counsel, W. Joseph Dozier, Jr., for a continuance on the 22nd of May, 1981, requesting that the matter be continued to May 28, which motion was granted on the 22nd of May continuing the matter and excluding the time, according to the Order, through May 27, 1981. That the period from May 19 through May 22, consisting of three days, when added to the 43 days previously included, constitutes a total inclusion to that point of 46 days. That the period from May 22 through May 27 constitutes five days, and these are excluded under the Speedy Trial Act.

That the clock began running again on May 28, and on June 1, 1981, the defendant failed to appear in Court as a result of calendar call on June 1, 1981, again stopping the clock under the Speedy Trial Act, but the time from May 28 until June 1, 1981, is included and, when added to the previous 46 days, made a total of 51 days to be included in counting time relating to the Speedy Trial Act.

That it later was determined that the defendant was in the custody of the Police Department in Forsyth County, North Carolina, and the Order for his Arrest was forwarded to Forsyth County, where he was arrested on August 29, 1981.

That prior to his arrest on August 29, 1981, a Voluntary Dismissal was taken by Calvin E. Murphy, Assistant District Attorney for the State, on June 1, 1981, as a result of the defendant's failure to appear on June 1, 1981 in the Mecklenburg County Superior Court aforesaid, said dismissal having been taken with leave, before the Assistant Clerk of Superior Court for Mecklenburg County, and filed on August 18, 1981, following the defendant's failure to appear again at the call of

the calendar in the Superior Court of Mecklenburg County on August 10, 1981. That the defendant was apprehended in Forsyth County where he was an inmate in the Forsyth County Jail, by service of the Order of Arrest on the defendant on the 29th of August, 1981, by a member of the Forsyth County Sheriff's Department, and the Order for Arrest, together with the officer's Return indicating that the defendant was in custody in Winston-Salem, North Carolina, was returned to the Clerk of Superior Court for Mecklenburg County and filed in Case No. 81-CRS-12959, said Order of Arrest and Return of the Sheriff's Department of Forsyth County having been filed in Mecklenburg County on September 2, 1981. That the period from June 1 until September 2, 1981, was excluded from the Speedy Trial Act because of the defendant's absence from the jurisdiction of the Court.

That, irrespective of the fact that the Order for Arrest had been served on the defendant and the Return indicating the Order of Arrest had been served on the defendant was filed on September 2, 1981, no action was taken by the State to reinstate the matter pursuant to the August 18 Voluntary Dismissal With Leave by the State until it was placed on the calendar on December 14, 1981, before the undersigned and Motion to Dismiss having been filed in this matter on the 15th of December, 1981, after the appearance of the matter on the calendar for December 14, 1981.

Based on these findings, the court made the following conclusion:

That the Court is of the opinion and rules as a matter of law that the time from September 2 until December 14, 1981, should be included in the time to be included under the Speedy Trial Act, since the warrant was served on the defendant and filed in Mecklenburg County subsequent to service on September 2, 1981, and that the State had notice of the situation by the filing of the warrant and its Return on September 2, 1981, in the office of the Clerk of Superior Court for Mecklenburg County. That the inclusion from September 2 through December 14, 1981, when added to the prior inclusion of 51 days through June 1, 1981, constitutes a total of 153 days to be included for counting under the

Speedy Trial Act; and that, since the time exceeds 120 days, this matter is HEREBY ORDERED DISMISSED WITH PREJUDICE.

From the order of the trial court allowing defendant's motion, the State appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney David E. Broome, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant.

WELLS, Judge.

The State contends that the Speedy Trial Act allows the State to take a voluntary dismissal with leave and to reinstitute the proceedings at whatever time it chooses, and that the trial court erred in charging against the State the days between 2 September and 14 December, when the State had notice of defendant's whereabouts but had not yet reinstituted proceedings. The statutes relied upon by the State are as follows:

§ 15A-701. *Time limits and exclusions.*

. . . .

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

. . . .

(11) A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932;

. . . .

§ 15A-932. *Dismissal with leave when defendant fails to appear and cannot be readily found.*

(a) When a defendant fails to appear at any criminal proceeding at which his attendance is required and the prosecutor believes that the defendant cannot be readily found, the prosecutor may enter a dismissal with leave for nonappearance under this section.

. . . .

(d) Upon apprehension of the defendant, or in the discretion of the prosecutor when he believes apprehension is imminent, the prosecutor may reinstitute the proceedings by filing written notice with the clerk.

Defendant contends that it was proper for the court to charge the disputed period against the State because it is implicit in the Speedy Trial Act that the State is required to reinstitute proceedings which have been dismissed with leave once the State has notice that the defendant has been arrested. We disagree. Defendant relies on G.S. 15A-701(b)(13) which provides:

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

. . . .

(13) Any period of delay from the time criminal process is served on a defendant who has previously been called and failed until the time that the district attorney receives notice that the criminal process has been served;

. . . .

Defendant argues that G.S. 15A-701(b)(11) and (13), when read together, create an ambiguity; that in the face of such ambiguity we must look to the manifest intent of the Speedy Trial Act; and that upon doing so, the correctness of the trial court's ruling becomes clear.

G.S. 15A-701(b)(13) has no application to the case before us. Once the prosecutor entered a dismissal with leave for nonappearance of the defendant pursuant to G.S. 15A-932, G.S. 15A-701(b)(11) controlled and the speedy trial clock did not resume running against the State until the proceedings were reinstituted against the defendant on 14 December 1981.

Defendant further contends that the State is required to reinstitute proceedings within a "reasonable" time and that for its failure to do so he is entitled to a dismissal with prejudice to the State under the Speedy Trial Act. Certainly, the State is re-

quired to reinstitute proceedings within some "reasonable" time, especially in a case such as the present one where the defendant is in custody, awaiting trial. But that "reasonable" time is not to be measured under the provisions of the Speedy Trial Act, and a defendant may not rely on the Act to assert legal rights which may arise elsewhere. The Speedy Trial Act creates new rights, supplemental to the speedy trial rights existing under the Sixth Amendment to the Constitution of the United States. G.S. 15A-704. It is clear from the provisions of G.S. 15A-701(b) that the legislature intended to limit the statutory speedy trial rights of defendants who fail to appear in court.

The order of the trial court must be reversed and this case must be remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges VAUGHN and WHICHARD concur.

FIBER INDUSTRIES, INC. v. CORONET INDUSTRIES, INC.

No. 8218SC91

(Filed 7 December 1982)

Constitutional Law § 24.6; Process § 14.3— personal jurisdiction over foreign corporation—substantial activity in this State—minimum contacts with this State

Defendant foreign corporation was "engaged in substantial activity within this State" so as to give the courts of this State personal jurisdiction over it pursuant to G.S. 1-75.4(1)(d) in an action to recover for goods sold to defendant, and defendant had sufficient minimum contacts with this State so that the exercise of jurisdiction over it did not violate due process, where defendant has sold carpet to more than 140 customers in North Carolina during the past five years with total sales of more than $1 million in each of the five years; over the past five years defendant has purchased goods and services from more than 100 persons and companies in North Carolina; defendant has a resident sales representative in North Carolina who has about 50 accounts in this State; the sales representative receives promotional aids from defendant which are provided to North Carolina customers without charge; defendant keeps a WATS telephone number in Georgia for use by its customers in placing orders; defendant has provided cooperative advertising funds to its North Carolina customers; and defendant has bank accounts in North Carolina.

APPEAL by defendant from *Seay, Judge.* Order entered 17 November 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 November 1982.

This is a civil action instituted by plaintiff to collect $268,316.64 from defendant for nylon yarn which the plaintiff delivered to the defendant in 1980. Defendant counterclaimed for $236,420 alleging that plaintiff wrongfully discontinued the manufacture of certain carpet yarn utilized by the defendant in making carpet products. In its answer and counterclaim, the defendant also denied that it had sufficient contacts with North Carolina to allow jurisdiction over it by the North Carolina Courts and moved for dismissal of the action for lack of jurisdiction.

The affidavits, answers to interrogatories and exhibits reveal the following facts. The plaintiff is a Delaware corporation which manufactures and sells nylon staple and maintains its principal place of business in Charlotte, North Carolina. The defendant is a Delaware corporation with its principal place of business in Dalton, Georgia. Since 1975 defendant has purchased from plaintiff over $20 million worth of nylon staple. During the past five years defendant has sold carpet to more than 140 customers in North Carolina with total sales of more than $1,000,000 in each of the five years. Also, over the past five years, defendant has purchased goods and services from more than 100 persons and companies in North Carolina. Defendant has a resident sales representative in North Carolina who has about 50 accounts in North Carolina. The North Carolina sales representative receives promotional aids from the defendant which are provided to North Carolina customers without charge. Defendant's salesman solicits orders but exercises no control over corporate functions, nor does he supply any services to customers such as product installation, maintenance or technical assistance. Rather, the defendant company controls its sales representative in handling customer complaints and establishing customer credit. Defendant keeps a WATS telephone number in Georgia for use by its customers in placing orders, but it has never had a North Carolina telephone number, mailing address or office. Along with price lists and other promotional material, the defendant has provided cooperative advertising funds to its North Carolina customers. Finally, the defendant has bank accounts in North Carolina with Wachovia Bank and Trust Company.

The subject of this action is a contract for the sale of nylon staple by plaintiff to the defendant. Plaintiff offered to sell nylon staple, and defendant agreed to buy the product. The defendant sent an order from its Dalton, Georgia office, and plaintiff then sent an acknowledgment form from its Charlotte, North Carolina office. When the defendant refused to pay for its last order plaintiff brought this action. Upon the trial judge's denial of defendant's motion to dismiss for lack of personal jurisdiction, defendant appealed.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr. and Kathrine A. McLendon for plaintiff, appellee.

Smith Moore Smith Schell & Hunter, by Alan W. Duncan for defendant, appellant.

HEDRICK, Judge.

The defendant argues that the plaintiff must establish the statutory grounds for personal jurisdiction under G.S. § 55-145(a)(1) which reads in pertinent part:

> *Jurisdiction over foreign corporations not transacting business in this State.*—(a) Every foreign corporation shall be subject to suit in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows: (1) Out of any contract made in this State or to be performed in this State;
>
> . . . .

The defendant contends this statute applies because of the provision for "Special Jurisdiction Statutes" in G.S. § 1-75.4(2). Defendant goes on to argue that the jurisdictional standard of G.S. § 55-145(a)(1) has not been established because the defendant has had insufficient contacts with North Carolina, the contract involved was not made or performed in North Carolina and there is no nexus between plaintiff's claim and the defendant's contacts with this state. The defendant also contends that the requirement of constitutional due process has not been met because it does not have the requisite "minimum contacts" with North Carolina "such that the maintenance of the suit does not offend 'traditional no-

tions of fair play and substantial justice.' " (Citations omitted.) *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

A two-part test controls the proper determination of personal jurisdiction. First, a statutory basis must exist for finding personal jurisdiction. Second, the exercise of personal jurisdiction must meet the requirements of constitutional due process. *Dillon v. Funding Corp.*, 291 N.C. 674, 675, 231 S.E. 2d 629, 630 (1977).

The applicable statutory provision of the North Carolina long-arm statute grants a court of this state jurisdiction

> [i]n any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party: . . . [i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

G.S. § 1-75.4(1). The statute which defendant argues controls the instant situation, G.S. § 55-145, is an *alternative* ground for finding jurisdiction. As stated in G.S. § 55-146.1,

> [i]n addition to the provisions set out in this Chapter, foreign corporations may be served with process and subjected to the jurisdiction of the courts of this State pursuant to applicable provisions of Chapter 1 and Chapter 1A of the General Statutes.

Therefore, we find that G.S. § 1-75.4(1)(d) controls the jurisdictional issue in this case, and under that provision the necessary determination is whether the defendant was "engaged in substantial activity within this State." G.S. § 1-75.4(1)(d) does not, by any of its terms, require a finding of a nexus between a plaintiff's claim and a defendant's contacts with the state, but applies to "any action" against a defendant "engaged in substantial activity" in North Carolina.

In our opinion, the facts of this case demonstrate "substantial activity" by the defendant in North Carolina. Over the past several years the defendant has purchased millions of dollars worth of yarn from the plaintiff in North Carolina, solicited orders for carpet through its sales representative who maintains 50 accounts, sold millions of dollars worth of carpet to over 140 customers, purchased goods and services from more than 100 in-

dividuals or companies, provided promotional aids to its salesman, maintained a WATS line for its customers' use in placing orders at its Georgia office and given cooperative advertising funds to some of its North Carolina customers.

We further find that these facts fulfill the requisites of constitutional due process under the second prong of the two-part jurisdictional test. The minimum contacts standard of *International Shoe* was later refined by the United States Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 253 (1958):

> [I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Our own Supreme Court recognized these principles in *Farmer v. Ferris*, 260 N.C. 619, 625, 133 S.E. 2d 492, 497 (1963):

> It seems, according to the most recent decisions of the United States Supreme Court, that the question cannot be answered by applying a mechanical formula or rule of thumb, but by ascertaining what is fair and reasonable and just in the circumstances. In the application of this flexible test, a relevant inquiry is whether defendant engaged in some act or conduct by which it may be said to have invoked the benefits and protections of the law of the forum.

See also, Chadbourn, Inc. v. Katz, 285 N.C. 700, 208 S.E. 2d 676 (1974).

Applying these statutory and constitutional standards, this court recently held the sufficient contacts requirements for due process were met where the defendant, a Saudia Arabian corporation, whose agents solicited job applications through newspaper advertisements, came to North Carolina to interview and hire employees and mailed letters offering employment to twenty-eight North Carolina residents at their homes. *Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 273 S.E. 2d 509 (1981) *appeal dismissed*, 302 N.C. 398, 279 S.E. 2d 352 (1981). Also, in *Parris v. Disposal, Inc.*, 40 N.C. App. 282, 253 S.E. 2d 29 (1979) *appeal dismissed*, 297 N.C. 455, 256 S.E. 2d 808 (1979), one of the facts noted by this court in finding sufficient minimal contacts was the defendant's listing in North Carolina telephone directories a toll

free number to call in Hartford, Connecticut in the event of an accident.

Similarly, in this case, although the defendant does not have any North Carolina telephone listings it does maintain a WATS line for use by its North Carolina customers in placing orders. More than that, however, the defendant has benefited from millions of dollars worth of sales over the past five years to numerous customers and has purchased millions of dollars worth of materials used in making its carpet from North Carolina industries. Despite having no offices, mailing address, or phone number, or owning or leasing real property in North Carolina, its contacts with this state can hardly be called *de minimus.* Therefore, we hold the defendant had sufficient contacts with this state to give our courts personal jurisdiction over it. Under these facts, by denying defendant's motion to dismiss for lack of jurisdiction, the trial judge did not violate any of the requirements of due process, fair play or substantial justice.

Affirmed.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. DALTON PATRICK WELLS

No. 824SC380

(Filed 7 December 1982)

1. **Arrest and Bail § 6.2— instructions—resisting an officer—proper**

The trial judge properly failed to submit self-defense and the right to resist an illegal arrest where defendant denied ever striking the police officer and therefore raised no issue of self-defense.

2. **Arrest and Bail § 6.1— resisting arrest—defective citation—arrest of judgment**

A citation charging defendant with resisting arrest was fatally defective since the citation failed to indicate the specific official duty the officer was discharging or attempting to discharge when arresting defendant. G.S. 14-223.

3. **Automobiles and Other Vehicles § 119.2— reckless driving—insufficient evidence**

The trial judge erred in not dismissing a reckless driving charge against defendant at the close of the evidence where the record lacked evidence tend-

ing to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of the motor vehicle immediately before his arrest. G.S. 20-140(c).

4. **Automobiles and Other Vehicles § 3— driving while license permanently revoked—previous offense lacked element of statutory crime**

Although a previous offense may be indirectly involved, if it in fact contributed to a conviction of driving while license permanently revoked, it is not an element of a violation of the statutory crime proscribed by G.S. 20-28(b); the permanent revocation is an element of the offense.

5. **Automobiles and Other Vehicles § 3.6— sentence for driving while license permanently revoked appropriate**

A prison sentence of "a maximum term of eighteen (18) months and a minimum term of twelve (12) months" did not exceed the statutory maximum for the crime of driving while license permanently revoked. G.S. 20-28(b) and G.S. 14-3.

APPEAL by defendant from *Llewellyn, Judge.* Judgments entered 10 November 1981 in Superior Court, ONSLOW County. Heard in the Court of Appeals 18 October 1982.

Defendant was charged with and convicted of resisting arrest, reckless driving, and driving while license permanently revoked. He appeals from a judgment imposing an active prison term.

Attorney General Edmisten, by Assistant Attorney General David Gordon, for the State.

Jeffrey S. Miller for defendant-appellant.

HILL, Judge.

The State's evidence tends to show that on 16 February 1981 North Carolina State Highway Patrolman W. F. Preast saw defendant driving a car on rural paved road 1511. When the officer tried to stop the car, defendant backed it approximately three hundred feet before he stopped. When Officer Preast asked to see his driver's license, defendant said he did not have one. Defendant got out of his car and walked without difficulty, but the officer noticed the odor of alcohol on his breath. He arrested defendant for driving under the influence of intoxicating liquor and driving without an operator's license. After advising defendant of his rights, the officer told him to accompany him to the police department, but defendant refused. Officer Preast again told defendant

he was arrested and took him by the arm. Defendant jerked away and struck the officer across the face with his right fist. When the officer once more told defendant to come along, defendant hit him a second time. Officer Preast then brought defendant under control with a blackjack. On the date in question, defendant was driving with his license permanently revoked.

Defendant admitted driving the car but said he was arrested despite the fact that he had driven on private property. When defendant tried to walk away from the arresting officer, the officer beat him on the head with a blackjack, knocking him to the ground. Defendant denied having anything to drink or striking Officer Preast. Defendant admitted that his license was permanently revoked on the day he was arrested.

[1] In his first assignment of error, defendant argues the trial judge erred in his instructions to the jury on the charge of resisting an officer (G.S. 14-223). He contends the jury should have been instructed on the defendant's right to resist an illegal arrest and right to self-defense. We do not agree. Defendant denied ever striking the police officer and therefore raised no issue of self-defense. *State v. Pritchard and State v. Carswell*, 11 N.C. App. 166, 180 S.E. 2d 370 (1971). Defendant may not rely on self-defense where the State's evidence is that defendant provoked the incident after his lawful arrest, and the officer used only the amount of force necessary to bring the situation under control. *State v. Gatewood*, 23 N.C. App. 211, 208 S.E. 2d 425, *cert. den.*, 286 N.C. 338, 210 S.E. 2d 59 (1974). The trial judge properly did not submit self-defense and the right to resist an illegal arrest because these issues are not supported by the evidence.

[2] The defendant also argues that the trial judge erred in entering a judgment on the resisting arrest charge because the uniform citation used as a pleading in this case was fatally defective. We agree. The citation charges defendant with "[r]esisting arrest. To wit did resist and delay officer W. E. Preast a state patrolman performing the duties of his office by striking said officer with his hands and fist." To charge a violation of G.S. 14-223, the warrant or bill must indicate the specific official duty the officer was discharging or attempting to discharge. *State v. Smith*, 262 N.C. 472, 137 S.E. 2d 819 (1964). Although defendant made no

motion in the trial court to arrest judgment on this charge, this Court *ex mero motu* has taken notice of the fatally defective citation and now orders that judgment on this charge be arrested. *See State v. Fowler*, 266 N.C. 528, 146 S.E. 2d 418 (1966).

[3] Defendant next contends the trial judge erred in not dismissing the reckless driving charge at the close of the evidence. We agree.

G.S. 20-140(c), as it read at the time of this offense, provides:

> 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.

Officer Preast testified in pertinent part:

> When I first observed him, I noticed nothing unusual except he was coming toward me. . . . He had a strong odor of intoxicating liquor about his person on his breath. . . . He had no trouble getting out of his car, walking or otherwise that I observed. . . . I did not observe anything about him except the odor. Based on that, and, of course, the way in which he drove trying to elude me, I charged him. I stated in direct examination that the only thing unusual I noticed was that he was leaning against the car and his driving.

Although the officer's testimony indicates that the defendant attempted to elude him by driving in reverse, the record lacks evidence tending to show that defendant's consumption of intoxicating liquor directly and visibly affected his operation of the motor vehicle immediately before his arrest. The trial judge should have dismissed this charge at the close of the evidence.

[4] We find no merit in defendant's next argument that the trial judge erred in failing to follow the mandate of G.S. 15A-928. He contends that a special arraignment should have been held since, in order for him to be convicted of driving while license permanently revoked, the State must prove that he had been earlier convicted of an offense that led to the permanent revocation. We do not agree.

G.S. 20-28(b) provides that:

> Any person whose license has been permanently revoked or permanently suspended, as provided in this Article, who shall drive any motor vehicle upon the highways of this State while such license is permanently revoked or permanently suspended shall be guilty of a misdemeanor and shall be imprisoned for not less than one year. . . .

Although a previous offense may be indirectly involved, if it in fact contributed to the permanent revocation, it is not an element of a violation of the statutory crime proscribed by G.S. 20-28(b); the permanent revocation is an element of the offense. G.S. 15A-928 applies solely to those charges in which the defendant's prior conviction raises an offense of lower grade to one of higher grade. *State v. Jeffers*, 48 N.C. App. 663, 269 S.E. 2d 731 (1980), *disc. rev. denied*, 301 N.C. 724, 276 S.E. 2d 285 (1981). This assignment of error is overruled.

[5] In his last assignment of error, defendant contends the prison sentence of "a maximum term of eighteen (18) months and a minimum term of twelve (12) months" exceeds the statutory maximum for the crime of driving while license permanently revoked. We do not agree. Since only the minimum punishment of "not less than one year" is specified in G.S. 20-28(b), this statute must be read together with G.S. 14-3, applicable to motor vehicle misdemeanors contained in sections other than Article 3 of Chapter 20, to find the maximum term of imprisonment. G.S. 14-3 stipulates in subsection (a) that "[e]xcept as provided in subsection (b), every person who shall be convicted of any misdemeanor for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court." The prison sentence imposed on this charge was within the statutory limits.

As to the charge of resisting arrest: Judgment arrested.

As to the charge of reckless driving: Judgment reversed.

As to the charge of driving with license permanently revoked: No error.

Judges ARNOLD and JOHNSON concur.

NORMAN S. ADAMS AND WIFE, JEAN C. ADAMS v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

No. 813SC1426

(Filed 7 December 1982)

Telecommunications § 2— fire damage—negligence of telephone company in transmitting call—sufficiency of evidence

In an action to recover damages for defendant telephone company's alleged negligent delay in connecting plaintiffs with the local fire department when a fire broke out in their home, plaintiffs' evidence was sufficient to support submission of issues to the jury as to (1) whether defendant's operator was negligent in failing promptly to connect plaintiffs with the local fire department, (2) whether earlier contact with the local fire department would have decreased the fire, smoke and water damage sustained by plaintiffs, and (3) whether any portion of the total fire, smoke and water damage could be attributed to defendant's negligence.

APPEAL by plaintiffs from *Rouse, Judge.* Judgment entered 13 August 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 15 October 1982.

Plaintiffs filed suit against defendant, the telephone service to which plaintiffs subscribed, alleging that defendant was negligent in connecting plaintiffs with the local fire department when a fire broke out in their home and that defendant's negligence resulted in extensive fire, smoke and water damage to plaintiffs' home and personal property requiring plaintiffs to live in a motel for approximately three months.

At trial, plaintiffs introduced evidence tending to show that when a grease fire broke out in plaintiffs' kitchen, plaintiffs' son, in a state of panic, dialed defendant's operator on duty to obtain help. Plaintiffs' son testified that he gave the operator his name, address and described the nature of the emergency, and then requested that the operator contact the West of New Bern Fire Department. The operator placed him on hold for fifteen to thirty seconds and then asked him to repeat, two different times, the information he had already given. The operator again placed him on hold and when she returned to the line, she asked for the same identifying information a third time. Plaintiffs' son testified that this repetition lasted for two to four minutes. At that point he handed the phone to his sister and ran across the street to obtain help from a neighbor. The neighbor immediately contacted the West of New Bern Fire Department.

Plaintiffs' daughter testified to essentially the same story as her brother. In addition, she testified that after her brother had been on the phone with the operator for three or four minutes she grabbed the phone and gave the same information once again and was then put on hold. After holding for thirty to forty seconds the operator came back on and after speaking another time with plaintiffs' daughter, connected her with the New Bern Fire Department. Plaintiffs' daughter got the West of New Bern Fire Department's number from someone at the New Bern Fire Department, but then had to abandon the phone and the house because of the smoke. Plaintiffs' daughter also testified as to her observations concerning the fire's growth and the different stages of the fire in relation to her brother's attempts to obtain assistance from the telephone operator.

Plaintiffs also presented the testimony of the first fireman to arrive at their home. He testified that it took him less than two minutes to get from his house to the fire station and then to plaintiffs' home. He also testified that he was at home for about fifteen minutes prior to the time he received notice of the fire and would have been able to reach the plaintiffs' home earlier had he been notified. He stated that it took less than a minute to put out the fire and his testimony indicated that all the equipment was in good working order.

The local fire marshal testified that the critical period for any fire is the first five minutes and that the damage can be reduced if the fire is extinguished within that time period.

A general contractor and the plaintiffs all testified as to the damage and expenses resulting from the fire.

It was stipulated that a dispatcher was on duty before and at the time of the fire.

At the conclusion of plaintiffs' evidence, defendant's motion for a directed verdict pursuant to Rule 50(a) of the North Carolina Rules of Civil Procedure was granted.

Plaintiffs appeal from this judgment.

Dunn and Dunn, by Raymond E. Dunn, for plaintiffs-appellants.

William W. Aycock, Jr., for defendant-appellee.

MARTIN (Robert M.), Judge.

The difficult question presented by plaintiffs' appeal is whether under the law of North Carolina defendant's delay in connecting plaintiffs with the local fire department would constitute actionable negligence in a situation where plaintiffs' home was damaged by fire, smoke, and water allegedly by reason of defendant's delay.

Our courts have considered a similar question on only two other occasions. While the present appeal challenges the appropriateness of a directed verdict and the previous cases dealt with the appropriateness of a demurrer, we believe the prior cases to be instructive, as both cases also deal with proof of proximate cause problems. Because we find the present fact situation more analogous to *Hodges v. R.R.*, 179 N.C. 566, 103 S.E. 145 (1920), the second case discussed herein, in which the North Carolina Supreme Court suggested that proximate cause could have been established, we hold that the trial court improperly granted defendant's directed verdict motion at the close of plaintiffs' evidence.

The facts of *Whitehead v. Telephone Co.*, 190 N.C. 197, 129 S.E. 602 (1925) are strikingly similar to the case now being considered on appeal. The plaintiff in *Whitehead* sued the telephone service for fire damage suffered, alleging that the telephone company negligently failed to connect plaintiff with the fire department, resulting in a delay of the department to reach the fire in time to extinguish it. In sustaining defendant's demurrer the Court stated:

> The complaint proceeds upon the supposition that all the agencies intervening between the negligent act and the destruction of the plaintiff's building would necessarily have worked out with perfect efficiency. This of course is an assumption, or inference, or conclusion which, under the authorities we have cited, the demurrer does not admit.

Id. at 202, 129 S.E. at 605. Defining proximate cause as "the efficient cause, that which is [sic] natural or continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred," the Court

felt that upon the facts alleged plaintiffs could not prove the requisite proximate cause. *Id.* at 199-200, 129 S.E. at 603-04. It refused to engage in presumptions or speculation as to whether the fire would have been extinguished had the plaintiff been able to contact the fire department. *Id.* at 201, 129 S.E. at 604.

Hodges, the other case which we necessarily focus upon, held that the demurrer should have been overruled. In that case the defendant had cut a telephone line which ran from the city in which plaintiff and his deceased wife lived to the offices of the doctors who were to deliver plaintiff's and his deceased wife's baby. Plaintiff alleged that as a result of defendant's action he was unable to contact the doctors by phone to assist during his wife's labor and that the doctors arrived too late to save plaintiff's wife's life. The court pointed out that

> Plaintiff further specifically alleges that these physicians could and would have come at his call but by reason of the unlawful cutting of the wires of the telephone company, they were unable to reach the plaintiff's wife in time to save her life. Plaintiff further alleges that if the line had not been cut, a physician could have been reached in time to have arrived at the home of the plaintiff to save the life of his wife . . .
>
> . . . Upon the allegations of the complaint the defendant is guilty of a tort, and as such is liable for any injuries naturally following and flowing from the wrongful act.
>
> . . . If the jury should find under proper evidence that the failure of the physician to arrive in time was caused by the wrongful act of the defendant in cutting the wires, that would establish the tort. If the jury should further find upon competent and sufficient evidence that the circumstances of the childbirth and the conditions were such that had the physician been present, he could have administered remedies which in all reasonable probability, judging by experience, would have saved the life of the wife, then the unlawful act of defendant would be the proximate cause of her death.

179 N.C. 569-70, 103 S.E. at 146-47.

The jury in the present action should have been allowed to decide 1) whether defendant was negligent in connecting plaintiffs with the local fire department, 2) whether earlier contact

with the local fire department would have decreased the fire, smoke and water damage sustained by plaintiffs and 3) whether any portion of the total fire, smoke and water damage could be attributed to defendant's negligence. Plaintiffs' evidence at trial was much more specific than plaintiff's complaint in *Whitehead.* Not only did plaintiffs present evidence that the fire department could have responded as quickly to an earlier call and that earlier notification of the fire might have limited the amount of damage sustained by plaintiffs, but they also presented testimony as to how the fire progressed during the phone delay, and the total amount of damage sustained. Because of the short time lag between the time when plaintiffs' son first attempted to contact the fire department and the time of the first fireman's arrival at the fire the trial court nor the jury would be required to engage in the presumptions or the speculation which the *Whitehead* court correctly chose to avoid. The plaintiffs in the present case have presented at least as much factual evidence as the plaintiffs in *Hodges,* and as the court suggested in that case, it is within the jury's province to decide the issues of defendant's negligence and any damages arising therefrom.

We believe that based on the evidence produced by plaintiffs at trial a jury could find both defendant's negligence and the necessary element of proximate cause.

For the foregoing reasons we must overrule defendant's motion for a directed verdict and this case is therefore

Reversed and remanded.

Judges ARNOLD and WHICHARD concur.

ROGER D. MESSER v. THE TOWN OF CHAPEL HILL, NORTH CAROLINA, A MUNICIPAL CORPORATION; JOSEPH L. NASSIF, MAYOR OF THE TOWN OF CHAPEL HILL; THE COUNCIL OF THE TOWN OF CHAPEL HILL AND ITS MEMBERS; MARILYN BOULTON, JONATHAN HOWES, BEVERLY KAWALEC, R. D. SMITH, BILL THORPE, JOSEPH STRALEY, JOSEPH A. HERZENBERG, AND JAMES C. WALLACE

No. 8215SC103

(Filed 7 December 1982)

1. **Municipal Corporations § 30.3— validity of subdivision ordinance**

The municipal subdivision ordinance under which defendant failed to accept plaintiff's complete subdivision plan was valid, and defendant's actions in rejecting plaintiff's plan were within the grant of authority of the ordinance.

2. **Municipal Corporations § 30.8— meaning of subdivision ordinance and statute**

Wording in both a municipal ordinance and G.S. 160A-372 that a recreation area will serve "residents of the immediate neighborhood within the subdivision" means that the area is meant primarily to serve residents of the immediate neighborhood.

3. **Eminent Domain § 2; Municipal Corporations § 29— conditioning approval of subdivision plan—no taking requiring compensation**

Merely changing the location of the recreation area as a condition of approval of a subdivision plan does not amount to a taking so as to require compensation.

APPEAL by plaintiff from *Battle, Judge.* Judgment entered on 30 September 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 17 November 1982.

This case arose when the defendant did not accept a written request by plaintiff for approval of a subdivision within the defendant's planning jurisdiction. As the developer of a 29.2 acre, 40-lot area known as Laurel Hill Subdivision, Section IV, plaintiff submitted the request on 1 December 1980 in accordance with Chapel Hill subdivision ordinance § 18-51 which states:

> Under the authority granted by Section 160A-372 of the North Carolina General Statutes, every subdivision for residential purposes shall include a portion of land permanently dedicated for the purpose of providing open space, park or other recreational areas to serve residents of the immediate neighborhood within the subdivision.

G.S. 160A-372 allows subdivision ordinances to provide "for the dedication or reservation of recreation areas serving residents of

the immediate neighborhood within the subdivision. . . ." G.S. 160A-371 allows a city "by ordinance to regulate the subdivision of land within its territorial jurisdiction." There was no dispute that plaintiff's land is within defendant's territorial jurisdiction.

On 27 January 1981, the Planning Board heard a report from a member of its staff that stated that the Recreation Commission wanted the open space in the eastern part of the property while the plaintiff wanted it next to the arboretum in the northwestern section. The plaintiff objected to the proposed relocation and submitted a modified proposal that would place the open space in the western portion of the subdivision.

In a report dated 9 February, the Parks and Recreation Commission stated that the revised plan was an acceptable compromise, but its first preference was lots 17-20 in the northeastern part of the subdivision.

At its 17 February meeting, the Planning Board heard a report from the Planning Director, who concluded that the space proposed by plaintiff did not meet the intent of the city ordinance. He cited four reasons for that conclusion:

> 1) the proposed 2.02 acre open space parcel is long and narrow in shape, which reduces its potential for accommodating various recreational activities; and 2) the proposed open space cannot be enlarged by adding to it open space that is expected to be required for phase 2 of Laurel Hill IV; 3) the open space would not be centrally located within larger context of Laurel Hill IV, Phases 1 and 2; and 4) if the open space were to be dedicated to the Hunt Arboretum it would most likely not be available for development for active recreational uses.

Lots 17-20 were recommended for open space in this report.

The subdivision proposal was approved at the 23 February City Council meeting subject to thirteen conditions. Condition eleven stated:

> That the open space be relocated in the area identified as lots 17, 18, 19 and part of 20. That the open space be dedicated to the public use and be deeded to the Town subject to the acceptance by the developer and approval by the

Council after receiving the recommendation of the Recreation Commission. The applicant may revise the lot layout and alignment of Rhododendron Drive prior to the final plat if necessary to adjust for this change in open space location.

On 8 April, plaintiff filed a petition for a writ of certiorari in Orange County Superior Court alleging that this condition was contrary to the Chapel Hill subdivision ordinance. He alleged injury in that his proposal was more suitable to the use of residents in the subdivision than a park open generally to the public.

After a hearing before Judge Battle based solely on the administrative record, a judgment was filed on 30 September. The judgment affirmed the relocation of the recreation area as being within Chapel Hill's subdivision ordinance and the enabling legislation. But it found that Chapel Hill could not require that the open space be deeded to it. Instead, the judgment substituted the language "That the open space be dedicated to the public use."

From this judgment, plaintiff appealed.

Lyman & Ash, by Cletus P. Lyman, and Moses & Murphy, by Donald L. Murphy, for plaintiff-appellant.

Haywood, Denny & Miller, by Michael W. Patrick, for defendant-appellees.

ARNOLD, Judge.

Plaintiff first argues that the choice of a site for a recreational area by the defendant that he did not agree with is equivalent to a taking of private property for a public purpose without just compensation in violation of the United States and North Carolina Constitutions. We disagree with this contention because the statute and the city ordinance under which the actions in this case were taken are valid.

[1] A municipal ordinance is presumed to be valid with the burden on an attacking party to show its invalidity. 9 Strong's N.C. Index 3d *Municipal Corporations* § 8 (1977). Although it is true that municipal ordinances which restrict the rights of private property owners will be strictly construed, *Heaton v. City of Charlotte*, 277 N.C. 506, 178 S.E. 2d 352 (1971) (construing a zon-

ing ordinance), we find that defendant's actions were within the grant of authority of the Chapel Hill ordinance. Our holding accords with the majority of jurisdictions that have been faced with this question when interpreting similar statutes. *See* Annot., 43 A.L.R. 3d 863 (1972). We also find that defendant's ordinance was within a specific grant of authority by the General Assembly, as it must be to be upheld. *Upchurch v. Funeral Home*, 263 N.C. 560, 140 S.E. 2d 17 (1965).

[2] Plaintiff argues that the language in both the ordinance and the statute that the recreation area will serve "residents of the immediate neighborhood within the subdivision" means that this area can only be used by those residents. We do not believe this was the intent of the General Assembly.

Instead, a more reasonable interpretation is that these areas were meant primarily to serve residents of the immediate neighborhood. Use of defendant's proposed location would meet such a test since the residents of Laurel Hill IV would be the primary users of the park and thus would be served by it.

A careful reading of the statute also reveals that these recreational areas can be used by the public, in addition to the subdivision residents. G.S. 160A-372 allows city ordinances to provide for the "*dedication or reservation* of recreation areas. . . ." (Emphasis added.) This disjunctive phrase is important because dedication of private property contemplates public use. *Spooner's Creek Land Co. v. Styron*, 7 N.C. App. 25, 171 S.E. 2d 215 (1969).

With the increased population that will follow development of the subdivision comes a need for recreational space. As the court in *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 119, 273 A. 2d 880, 885 (1970), stated, "the need for open space for . . . people becomes a public one."

Other jurisdictions have upheld ordinances and statutes like the one in this case on the ground that a subdivision creates a need for a recreation area, and a municipality can act to fill that need. *See Patenaude v. Town of Meredith*, 118 N.H. 616, 392 A. 2d 582 (1978); *Krughoff v. City of Naperville*, 68 Ill. 2d 352, 369 N.E. 2d 892 (1977). We note that the statute and ordinance before us did not set an arbitrary percentage of the subdivision to be used for recreational purposes that other cases have struck down.

See, e.g., Admiral Development Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1972); *Ansuini, Inc. v. City of Cranston*, 107 R.I. 63, 264 A. 2d 910 (1970).

[3] We do not believe that defendant's action amounts to eminent domain. That term is defined as "the power of the sovereign or some agency authorized by it to take private property for public use." *Va. Elec. & Power Co. v. King*, 259 N.C. 219, 220, 130 S.E. 2d 318, 320 (1963). Merely changing the location of a recreation area as a condition of approval of a subdivision plan does not amount to a taking so as to require compensation. This is especially true given the fact that approval by defendant of plaintiff's plan was a privilege and not a right.

In summary, we hold that defendant's selection of a location for a recreation area as a condition of approving plaintiff's subdivision plan was a valid exercise of its police power under G.S. 160A-372.

Affirmed.

Judges HILL and JOHNSON concur.

ROY G. DOWDY, PLAINTIFF EMPLOYEE v. FIELDCREST MILLS, INC., DEFENDANT EMPLOYER

No. 8210IC52

(Filed 7 December 1982)

Master and Servant §§ 68, 91— byssinosis—time of disability—statute of limitations

Plaintiff was disabled within the meaning of G.S. 97-58(c) when he was forced to retire from work because of byssinosis on 1 March 1976, not when he was informed by a doctor in 1974 that he should file a claim for byssinosis, and his claim for disability from byssinosis filed on 24 February 1978 was thus not barred by the two-year statute of limitations of G.S. 97-58(c).

APPEAL by defendant from opinion and award by the North Carolina Industrial Commission filed 29 September 1981. Heard in the Court of Appeals 8 November 1982.

Plaintiff filed a claim with the Industrial Commission on 24 February 1978 for byssinosis. Evidence showed that from 1936 to 1968 he worked for Dan River Mills in Danville, Virginia in the card room and was exposed to cotton dust. From 1968 until March, 1976, plaintiff worked for the defendant as a card grinder and was exposed to cotton dust.

Plaintiff first saw a doctor because of his breathing problems in February, 1973. Examination by Dr. Mario C. Battigelli showed that plaintiff was suffering from an obstructive lung disorder. Plaintiff was told that his breathing problem was related to the dust at his work but no diagnosis of byssinosis was made at that time.

During June, 1974, Dr. Joseph G. Springer, the defendant's medical examiner, recommended to the plaintiff that he file a claim for byssinosis. He did not do so at that time. Springer told plaintiff before 1976 that he had byssinosis and brown lung. Plaintiff could not work a normal shift in 1974 and 1975 and was hospitalized at times because of his breathing problems. He eventually quit his job on 1 March 1976 because of his health problems.

On 30 May 1978, the defendant filed a motion to dismiss based on the two-year statute of limitations to file claims under G.S. 97-58(c). This motion was denied by Chairman William H. Stephenson and the appeal dismissed by the Full Commission.

After two hearings in 1980 before deputy commissioners, Deputy Commissioner Ben A. Roney entered an Opinion and Award on 14 April 1981 awarding the plaintiff $20,000 in benefits on the basis of damage to his lungs. Both parties appealed to the Full Commission.

On 29 September 1981, the Full Commission vacated and set aside the Opinion and Award of Deputy Commissioner Roney. It determined that the plaintiff was entitled to total disability benefits from the date of his retirement for his lifetime because of his byssinosis. Defendants appealed to this Court. Plaintiff filed cross assignments of error.

Michaels and Jernigan, by Leonard T. Jernigan, Jr., for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan and Caroline Hudson, for defendant appellant.

ARNOLD, Judge.

The sole issue on this appeal is whether plaintiff filed his claim within the statute of limitations. G.S. 97-58(c) states in part:

> 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.

Under G.S. 97-55, disability is defined as "the state of being incapacitated as the term is used in defining 'disablement' in G.S. 97-54." G.S. 97-54 defines disablement in cases like this one to be "equivalent to 'disability' as defined in G.S. 97-2(9)." G.S. 97-2(9) then defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." In this context, disability refers "not to physical infirmity but to a diminished capacity to earn money." *Wood v. Stevens & Co.*, 297 N.C. 636, 651, 256 S.E. 2d 692, 701 (1979) and cases cited therein.

In *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), the court dealt with this issue and concluded that

> Time begins running when an employee has suffered: (1) injury from an occupational disease which (2) renders the employee incapable of earning the wages the employee was receiving at the time of the incapacity by injury.

300 N.C. at 98-99, 265 S.E. 2d at 147. We find that plaintiff was disabled within the meaning of *Taylor* and the Workers' Compensation Act when he was forced to retire in 1976. This conclusion is in agreement with finding of fact fourteen in the opinion and award that is the subject of this appeal.

Defendant argues, however, that the claim was not timely because *Taylor* further states "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." 300 N.C. at 102, 265 S.E. 2d at 149. We agree with this statement of the law but believe that it was meant only to apply to fact situations like *Taylor.*

In that case, the claimant quit working in 1963. She did not file a claim, however, until after being told by competent medical authority in 1975 of her disease and its work-related cause. The statement above from *Taylor* was the Court's justification for deciding that plaintiff's claim was timely even though there was a twelve-year lapse between the date she stopped work and the time she received notice of her disease.

In the case *sub judice,* the plaintiff was not disabled until *after* notification of his disease and its cause, unlike *Taylor* where plaintiff's disability occurred twelve years *before* such notification. The rationale of *Taylor* was that

> our Legislature never intended that the statutory scheme of G.S. 97-58 would be construed to render time for notice and claim absurd. It is equally clear that our 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.

300 N.C. at 102, 265 S.E. 2d at 149 (emphasis added). Since the decision in *Taylor* can be distinguished on its facts, we hold that plaintiff's claim was filed within two years following disability and thus not barred by the statute of limitations.

Moreover, it is inconceivable that our statutes and case law would dictate the harsh result of denying an employee's claim for occupational disease when disability is due to his employment, as in the case at bar, and his employer allows him to continue working for over two years after learning of the employee's work-related health problems. The opinion and award of the Industrial Commission is

Affirmed.

Judges HILL and JOHNSON concur.

ELSIE WILKINS WILLIAMS v. EAST COAST SALES, INC.

No. 826SC56

(Filed 7 December 1982)

1. **Appeal and Error § 45— filing stenographic transcript—noncompliance with Rules—appeal subject to dismissal**

Where defendant chose to file a stenographic transcript of the trial proceedings in lieu of a narration of the evidence, pursuant to Rule 9(c)(1), but failed to reproduce and include in the body of the brief itself, or attach as an appendix to its brief, those portions of the transcript essential to an understanding of the questions presented, as required by Rule 28(b)(4), and failed to indicate in its "statement of facts" the transcript page numbers where the fact cited could be located, defendant's appeal was subject to dismissal.

2. **Fraud § 3.3— mobile home purchase—misrepresentation by silence—law of contracts not applicable**

In an action to recover damages based upon defendant mobile home dealer's failure to inform plaintiff purchaser of the necessity for a health permit before the mobile home could be used as a dwelling as required by G.S. 130-166.31, the trial court properly failed to instruct on the law of contracts since the issue of breach of contract was irrelevant to plaintiff's right to relief. Defendant's duty to speak in the case, which rendered its silence actionable fraud, was a *legal duty* imposed by statute and not a duty arising out of the contractual relationship of plaintiff and defendant. G.S. 130-166.31(a) and (b).

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 10 September 1982 in Superior Court, BERTIE County. Heard in the Court of Appeals 8 November 1982.

This is a civil action to recover actual and punitive damages in connection with the plaintiff's purchase of a mobile home from the defendant, East Coast Sales, Inc. Defendant is in the business of selling mobile homes and, as such, is under a statutory duty to provide information to purchasers regarding health permits required before a mobile home may be used as a dwelling. G.S. 130-166.31. Plaintiff owned a lot and intended to purchase a mobile home for use as a dwelling to place upon her lot.

Plaintiff negotiated the sale with defendant's agent, Mack Davis, who arranged financing with Wachovia Bank. Plaintiff made a down payment on a mobile home and signed a note and purchase money security agreement for the balance. Plaintiff was not informed of the health permit requirement. Ultimately, plaintiff was unable to obtain a permit because her lot was too small for the mobile home and unsuitable for a septic tank. Therefore,

the mobile home was unusable as a dwelling as it was never connected to a sewerage disposal system and, as a result, plaintiff was also refused an electrical hook-up. Plaintiff discontinued her monthly payments on the note. The mobile home was repossessed and plaintiff's initial payments were not refunded. Plaintiff sought to set aside the note and purchase money security agreement on the grounds of fraud, to recover expenses incurred in preparing her lot for the trailer, and to recover punitive damages for defendant's failure to comply with G.S. 130-166.31.

The issues of fraudulent misrepresentation by silence, actual damages, and punitive damages were submitted to the jury. From a jury verdict in favor of plaintiff for actual and punitive damages and judgment of the court, defendant appeals.

Thomas L. Jones, for defendant appellant.

Pritchett, Cooke & Burch, by W. L. Cooke, for plaintiff appellee.

JOHNSON, Judge.

[1] Defendant's sole assignment of error relates to the trial court's failure to instruct the jury on the law of contracts. Pursuant to Rule 9(c)(1), Rules of Appellate Procedure, defendant chose to file a stenographic transcript of the trial proceedings in lieu of a narration of the evidence. Defendant correctly reproduced verbatim the entire charge given and included it in the record on appeal. However, defendant did not reproduce verbatim and include in the body of the brief itself, or attach as an appendix to its brief, those portions of the transcript essential to an understanding of the questions presented, as required by Rule 28(b)(4), Rules of Appellate Procedure, when the stenographic transcript alternative is chosen. In addition, defendant failed to indicate in its "Statement of Facts" the transcript page numbers where the facts cited could be located.

"Failure to observe the requirements of Rule 28(b)(4) constitutes a substantial impediment to the capacity of this court to perform its functions." *State v. Greene*, 59 N.C. App. 360, 361, 296 S.E. 2d 802 (1982). "Rules of Appellate Procedure are mandatory and failure to observe them is grounds for dismissal of the appeal." *State v. Wilson*, 58 N.C. App. 818, 819, 294 S.E. 2d 780 (1982).

Rule 28(b)(4) requires an appendix of transcript portions to be attached to the brief "if there are portions of the transcript which must be reproduced verbatim in order to understand a question presented in the brief." However, the rule provides further that, "it is not intended that an appendix be compiled to show the general nature of the evidence."

The trial judge is required to declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a). Therefore, defendant's assignment of error requires a careful examination of the trial record by this Court so that we may determine if the evidence presented at trial gave rise to the issue of defendant's breach of contract. Appellant's counsel could reasonably, although erroneously, have interpreted Rule 28(b)(4) to not require verbatim reproduction of the testimony supporting the error assigned in this case. Therefore, we will review defendant's assignment of error.

[2] Defendant argues that because plaintiff and defendant entered into a contract for the purchase of a mobile home, whether there was a breach of this contract is the main and only issue that is proper in the case. However, defendant nowhere states what the terms of the contract are or the behavior on its part which complied with the contract's terms, thus precluding recovery by the plaintiff.

The plaintiff's complaint states three causes of action arising out of the facts and circumstances of her purchase from defendant of a mobile home for use as a dwelling. The allegations, taken as a whole, state a claim for relief arising from defendant's false and fraudulent misrepresentation by silence that plaintiff could utilize the mobile home she purchased as a dwelling, situated upon the lot she owned near Aulander, N.C.

The following essential elements of actionable fraud are well established: (1) 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. *Bricknell v. Collins*, 44 N.C. App. 707, 262 S.E. 2d 387 (1980). It is well settled that where there is a duty to speak the concealment of a material fact is equivalent to fraudulent misrepresentation. *Griffin v. Wheeler-Leonard & Co.*,

290 N.C. 185, 225 S.E. 2d 557 (1976). The general rule is that "[s]ilence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his *legal duty* to communicate to the other contracting party." (Emphasis added.) 37 Am. Jur. 2d Fraud § 145, p. 199 (1967).

G.S. 130-166.31(a) provides:

> Every mobile home dealer doing business in this State shall be required to furnish each purchaser of a mobile home an easily understandable summary of the provisions of this Article. The Department of Human Resources shall prepare the summary and shall make sufficient copies available to dealers.

Subsection (b) provides:

> Each mobile home dealer shall be required to post conspicuously at the office of each mobile home sale lot the following: 'NOTICE: State law requires that the local health department determine the method and adequacy of sewerage disposal before a mobile home is placed on the premises.'

The foregoing statutory provisions were offered into evidence at trial and read to the jury as part of the trial court's instructions. Judge Allsbrook gave a careful and thorough instruction on the law of fraud.

It is clear that defendant's duty to speak, which rendered its silence actionable fraud, is a *legal duty* imposed by statute and not a duty arising out of the contractual relationship of plaintiff and defendant. Therefore, the issue of breach of contract is irrelevant to plaintiff's right to relief under the facts of this case. Defendant's assignment of error is without merit.

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. GRAYLON (GRAYLAND) MASSEY

No. 8220SC511

(Filed 7 December 1982)

1. **Criminal Law § 138.7— sentencing hearing—prior convictions—U.S. Department of Justice record**

The statute providing that prior convictions "may" be proved at a sentencing hearing by stipulation or by original or certified copy of the court record, G.S. 15A-1340.4(e), did not prohibit proof of defendant's prior conviction by the reading into evidence of his U.S. Department of Justice record, and it was not error to permit the reading of the record into evidence where defendant failed to object or challenge in any way the accuracy of the record as read, did not deny that he was the person named therein, and did not seek to have the record excluded on the ground that he was indigent and unrepresented by counsel when his prior convictions were obtained.

2. **Criminal Law § 138— Fair Sentencing Act—finding that aggravating factor outweighed mitigating factor**

Where the trial court found as a factor in aggravation that defendant had a prior record of convictions and as a factor in mitigation that defendant had aided in the apprehension of other individuals involved, and defendant's record of prior offenses showed four previous convictions of breaking and entering, the trial court did not err in finding that the factor in aggravation outweighed the factor in mitigation and in entering sentences on two counts of breaking and entering in excess of the presumptive sentence. G.S. 14-54(a); G.S. 15A-1340.4(f)(6).

3. **Criminal Law § 138— sentencing hearing—failure to make finding as to mitigating factor—no abuse of discretion**

Defendant failed to show any abuse of discretion by the trial court in failing to make a finding in mitigation that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. G.S. 15A-1340.4(a)(2)(l).

4. **Burglary and Unlawful Breakings § 8— sentence for breaking and entering—offense before Fair Sentencing Act**

The trial court did not err in imposing an eight year sentence for an offense of felonious breaking and entering committed prior to the effective date of the Fair Sentencing Act where the record did not indicate that the sentence was entered under a misapprehension of the applicable law, and the sentence imposed was within the ten year maximum allowed when the offense was committed. G.S. 14-2; G.S. 14-54(a).

APPEAL by defendant from *Mills, Judge.* Judgments entered 26 April 1982 in Superior Court, UNION County. Heard in the Court of Appeals 16 November 1982.

Defendant pled guilty to two counts of felonious breaking and entering. He appeals from judgments of imprisonment, assigning errors to the sentencing process.

Attorney General Edmisten, by Assistant Attorney General Steven F. Bryant, for the State.

L. K. Biedler, Jr., for defendant appellant.

WHICHARD, Judge.

I.

[1] Defendant first contends the court erred in allowing his U.S. Department of Justice record to be read into evidence at the sentencing hearing. He argues, in effect, that G.S. 15A-1340.4(e), which provides that "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction," precludes proof by other methods.

Defendant failed to object when his record was read into evidence. The failure to object to introduction of evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. *State v. Wilkins*, 297 N.C. 237, 241, 254 S.E. 2d 598, 601 (1979); *State v. Lowery*, 286 N.C. 698, 707, 213 S.E. 2d 255, 261 (1975), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1206 (1976); *State v. Gurley*, 283 N.C. 541, 545, 196 S.E. 2d 725, 728 (1973). Absent objection at the sentencing hearing, then, defendant cannot assert the method of admitting his record as a basis for appeal.

Further, the language of G.S. 15A-1340.4(e) is permissive rather than mandatory. It provides that prior convictions "may" be proved by stipulation or by original or certified copy of the court record, not that they must be. The statute thus does not preclude other methods of proof.

Defendant neither objected to this method of admitting his record nor challenged in any way the accuracy of the record as read. He did not deny that he is the person named therein. He did not seek, as G.S. 15A-1340.4(e) permits, to have the record excluded on the ground that he was indigent and unrepresented by counsel when his prior convictions were obtained. Under these

circumstances it was not error to permit the reading of the record into evidence.

II.

[2] The court found, as a factor in aggravation, that defendant had a prior record of convictions; and, as a factor in mitigation, that defendant had aided in the apprehension of other individuals involved. It then found that the factors in aggravation outweighed the factors in mitigation, and it entered sentences in excess of the presumptive. *See* G.S. 14-54(a); G.S. 15A-1340.4(f)(6). Defendant contends the finding that the factors in aggravation outweighed the factors in mitigation was error.

This Court has stated:

> The fair sentencing act did not remove, nor did it intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, *the weighing of which is a matter within their sound discretion.* Thus, upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent, remains within the trial judge's discretion.
>
> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. . . . *The number of factors found is only one consideration in determining which factors outweigh others.* Although the court is required to consider all statutory factors to some degree, *it may very properly emphasize one factor more than another in a particular case.* N.C. Gen. Stat. 15A-1340.4(a). The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Davis, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982) (emphasis supplied).

The fact that the court here found an equal number of aggravating and mitigating factors thus is not determinative. The finding that the sole factor in aggravation outweighed the sole factor in mitigation was in the court's discretion. Defendant's

record of prior offenses, which we have held was properly admitted, showed four previous convictions for breaking and entering. The record thus supports the determination that the factor in aggravation outweighed the factor in mitigation. Under these circumstances "[t]he balance struck by the trial judge will not be disturbed." *Id.*

III.

[3] Defendant further contends the court erred in failing to consider that he voluntarily acknowledged wrongdoing at an early stage of the criminal process. *See* G.S. 15A-1340.4(a)(2)(1).

Here, as in *Davis, supra*, "defendant did not object at the sentencing hearing to any of the findings of fact, nor did he tender any proposed findings of fact to the trial court." *Davis*, 58 N.C. App. at 334, 293 S.E. 2d at 661. The following from *Davis* is thus equally applicable here:

> There is nothing in the record to indicate that the court failed to consider any of the statutory factors. Although the trial judge is required to consider all of the statutory aggravating and mitigating factors, he is only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present. He is not required to list in the judgment statutory factors that he considered and rejected as being unsupported by the preponderance of the evidence.

Davis, 58 N.C. App. at 334, 293 S.E. 2d at 661. We follow *Davis*, then, by holding that on the evidence in the record here defendant has failed to show any abuse of discretion by the trial court in failing to make the finding of which he now complains for the first time.

IV.

[4] Defendant finally contends that because one of the charges related to an offense committed prior to the effective date of the Fair Sentencing Act, the court erred in sentencing him thereon as a Class H felon as provided in that Act. The record does not indicate, however, that the sentence was entered under a misapprehension of the applicable law. The eight year sentence imposed was within the ten year maximum allowed when the of-

fense was committed. *See* G.S. 14-2, -54(a) (1969 Replacement). The then applicable case law provided that the character and extent of the punishment imposed was in the discretion of the trial court, subject to review only in case of manifest and gross abuse, so long as the sentence was within the limits permitted by law. *State v. Stansbury*, 230 N.C. 589, 591, 55 S.E. 2d 185, 187 (1949); *State v. Sudderth*, 184 N.C. 753, 756, 114 S.E. 828, 830 (1922); *State v. Hodge*, 27 N.C. App. 502, 506, 219 S.E. 2d 568, 571 (1975).

Absent record disclosure that the sentence was entered under a misapprehension of applicable law, then, we review only for manifest and gross abuse of discretion. Because the sentence was within the maximum allowed at the time of the offense, and in light of defendant's record of four prior convictions for offenses similar to those here, no manifest and gross abuse of discretion appears.

V.

The record does not disclose prejudicial error in the sentencing hearing. The judgments are therefore

Affirmed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. DUANE EUGENE WEAVIL

No. 8221SC551

(Filed 7 December 1982)

Searches and Seizures § 18— consent to search trunk of car voluntarily given

Where defendant was warned as to his *Miranda* rights, opened the trunk of his car upon a single request from the investigating officers, there was no evidence that defendant was coerced by threats, promises or show of force, and the evidence showed that defendant was not placed under arrest until after the trunk was opened and the officer found contraband, defendant's motion to suppress the evidence seized from the trunk of his car on the grounds that he did not consent was properly denied by the trial court.

State v. Weavil

APPEAL by defendant from *Wood, Judge.* Order entered 3 March 1982 in FORSYTH County Superior Court. Heard in the Court of Appeals 18 November 1982.

Defendant was indicted for possession of marijuana with the intent to sell and deliver. Defendant moved to suppress evidence seized from the trunk of his car at the time of his arrest. At the hearing of defendant's motion, the evidence adduced was substantially as follows.

On 24 October 1981, Deputy J. L. Burton of the Forsyth County Sheriff's Department, while with another employee of the Sheriff's Department, observed defendant in his car parked in a Zayre department store parking lot. Deputy Burton was at the time working for Zayre, patrolling the parking lot in his personal automobile, wearing his Sheriff's deputy's uniform. Burton approached defendant's car, got out of his vehicle and walked up to defendant's car with a flashlight. When he shined the flashlight in defendant's car he observed defendant in the vehicle with a white Frisbee in his lap which contained a substance that appeared to be marijuana. Defendant drove away and Deputy Burton chased him in his vehicle. Burton saw defendant throw something out the window of his car. Defendant stopped his car after traveling one to one and a half miles. Burton asked defendant to get out of his vehicle and advised him of his *Miranda* rights. Deputy Burton observed several marijuana seeds on the seat and floorboard of defendant's car and under the seat he found the white Frisbee which contained a residue of what appeared to be marijuana. Burton asked defendant to open his trunk, which defendant did. In the trunk, Burton found more marijuana, and then he arrested defendant for felony possession.

Defendant's evidence tended to show that Deputy Burton never shined the flashlight in his car in the Zayre parking lot; that, until he stopped his car, defendant did not know that the vehicle following him carried officers; that he was ordered to open the trunk of his car; and that he felt he had no choice but to open the trunk and did not consent to the search, but did open the trunk without protest.

The trial court found as facts that Deputy Burton did see what appeared to be marijuana in defendant's car in the Zayre parking lot; that Burton stopped defendant's car and observed

marijuana seeds and a white Frisbee containing vegetable residue; that Burton asked defendant to open the trunk, which defendant did; and that Burton found packets of marijuana in the trunk. Upon the trial court's conclusion that defendant opened his trunk voluntarily and that he gave his consent to the officer looking inside the trunk, defendant's motion to suppress was denied. Upon the denial of his motion, defendant pled guilty as charged and appealed from the order denying his motion to suppress.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Bruce C. Fraser for defendant-appellant.

WELLS, Judge.

By his assignments of error, defendant contends that the trial court erred in finding that he consented to the search of the trunk of his car and in concluding that the evidence seized should not be suppressed since it was the product of a valid consent search.[1]

Evidence seized during a warrantless search is admissible if the State proves that the defendant freely and voluntarily, without coercion, duress or fraud, consented to the search. *State v. Long*, 293 N.C. 286, 237 S.E. 2d 728 (1977). In determining whether consent is free and voluntary, we must look to the totality of the circumstances which were present at the time of the search. *State v. Powell*, 297 N.C. 419, 255 S.E. 2d 154 (1979); *State v. Long, supra.* If consent is given after a claim of authority, the consent may be invalid. *See Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed. 2d 797 (1968) (consent given after officer said he had a search warrant was held invalid). Yet it is clear that a defendant may give valid consent to a search even after he has been placed under arrest. *State v. Long, supra.* Moreover, there is no requirement that a defendant be given a warning that he has the right to refuse to consent to a search. *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973). Where a defendant has been given his *Miranda* warnings prior to consenting to a search, that fact has been considered as a factor tending

1. Defendant does not contend that Burton had no probable cause to stop defendant's car. That question is therefore not before us.

to validate consent. *See, e.g., State v. Powell, supra; State v. Long, supra; State v. Frank, supra.*

The findings of fact in the present case are supported by competent evidence and, therefore, they are binding on this court. *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974), *cert. denied*, 421 U.S. 987, 95 S.Ct. 1990, 44 L.Ed. 2d 477 (1975); *State v. Pike*, 273 N.C. 102, 159 S.E. 2d 334 (1968). The facts found support the trial court's conclusion that "defendant opened the trunk voluntarily and gave his consent to the officer looking inside the trunk." Defendant had been warned as to his *Miranda* rights. He opened the trunk to his car upon a single request from the investigating officer. There is no evidence that defendant was coerced by threats, promises or show of force. Although defendant had been warned of his *Miranda* rights prior to consenting to the search, he does not dispute the State's evidence which shows that he was not placed under arrest until after the trunk was opened and the officer found the contraband. Defendant's motion to suppress the evidence seized from the trunk of his car on the grounds that he did not consent was properly denied by the trial court.

Affirmed.

Judges VAUGHN and WHICHARD concur.

GWENDOLYN F. SMITH v. CENTRAL CAROLINA BANK AND TRUST COMPANY, AS EXECUTOR OF WILL OF RAYMOND C. FOSTER, DECEASED; MINNIE B. FOSTER; DOROTHY F. McECHIN GREENE; VIRGIL FOSTER AND WIFE, OLIVIA FOSTER; ZARO FOSTER; R. L. FOSTER AND WIFE, POLLY M. FOSTER; PAUL E. FOSTER AND WIFE, DORIS FOSTER; MARTHA E. EDWARDS AND HUSBAND, ROBERT W. EDWARDS; DONALD COLE AND WIFE, BARBARA COLE; JUANITO PUNG AND WIFE, FE A PUNG; ALBERT G. REAVIS AND WIFE, SYLVIA P. REAVIS; DANIEL A. REAVIS AND WIFE, KATHRYN K. REAVIS; JERRY WAYNE ELLER AND WIFE, PRISCILLA W. ELLER; WILLIAM T. NIVENS AND WIFE, FRANCES K. NIVENS; AND HENRY P. VANHOY, II

No. 8222SC70

(Filed 7 December 1982)

Executors and Administrators § 12.1— sale of testator's property—right of first refusal under will

Where testator's will directed his executor to sell all of his real and tangible personal property and provided that the right of first refusal to purchase any of the property should be given to all of testator's surviving children, the right of first refusal given to testator's daughter by the will was not denied by the executor's sale of a parcel of land to testator's son as the highest bidder after having the land appraised and giving all of the children an opportunity to make a bid on the land above a specified price before it was offered for sale to the general public.

APPEAL by plaintiff from *DeRamus, Judge.* Judgment entered 26 August 1981 in Superior Court, DAVIE County. Heard in the Court of Appeals 10 November 1982.

This is a civil action wherein the plaintiff, Gwendolyn F. Smith, seeks to have declared null and void certain conveyances of real property made by the executor of the estate of her father. Plaintiff further asks the court to order defendant, Central Carolina Bank and Trust Company, to give plaintiff the right of first refusal to purchase the real property from her father's estate.

Our review of the record reveals the following facts. On 9 January 1977 Raymond C. Foster died testate in Davie County, North Carolina leaving a substantial estate. The pertinent provision of his will, which is the origin of this lawsuit, reads:

ITEM TWO

I direct that my Executor hereinafter named sell all real and tangible personal property held in my estate at public or

> private sale at such time and price and upon such terms and conditions as it may deem to be advisable and for the best interest of my estate. The Right of First Refusal to purchase any part or all of my real and tangible personal property shall first be given to any or all children of mine who survive me. The net proceeds from the sale of said real and personal property shall become a part of my residuary estate, hereinafter disposed of.

The will named the defendant, Central Carolina Bank & Trust Co., as the Executor and granted to it all the powers under Section 32-27 of the North Carolina General Statutes, including the power to sell real property and convey good title.

In carrying out the instructions of Raymond Foster's will, the bank had the real property appraised and, through a series of letters sent to the four surviving children of Raymond Foster offered to them all the real property in the estate. The children were allowed to make private bids on the property before it was offered to the general public. The letters also set forth the price, terms, conditions, times and method of bidding for the sale of the property. Complying with the terms and instructions of the letters, plaintiff did purchase two parcels of land from the estate under the same method of sale which she now challenges. In a letter of 8 November 1978, the bank offered the children of Raymond Foster the opportunity to bid on eleven pieces of property, including a 383 acre parcel, the sale of which is the subject of plaintiff's complaint. The correspondence set the minimum bid at $274,000 for the 383 acres and stated that the bank would accept the highest bid.

The plaintiff, Gwendolyn Smith, daughter of Raymond Foster and defendant, Virgil Foster, son of Raymond Foster submitted bids on 8 January 1979. Virgil Foster submitted the higher bid and the property was conveyed to him. Plaintiff alleged in her complaint that the bank's method of offering the property for sale to her thwarted her right of first refusal to purchase the 383 acre farm owned by her father's estate. The bank filed an answer and counterclaim alleging the plaintiff had maliciously libeled and slandered the title to the property.

The trial judge entered summary judgment for the plaintiff as to the defendant bank's counterclaim and granted defendant's

motion for summary judgment with respect to plaintiff's complaint. Plaintiff appealed.

Hall and Vogler, by William E. Hall for the plaintiff, appellant.

Lee Zachary and Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by James H. Kelly, Jr. for defendants, appellees.

HILL, Judge.

The plaintiff argues on appeal that the defendant bank's method of selling the property of Raymond Foster's estate denied her the right of first refusal as granted under her father's will. Our examination of the record, including Raymond Foster's will, reveals that the defendant bank was granted all the powers of an executor to arrange for and sell the property of Raymond Foster. Section 32-27 of the North Carolina General Statutes was also incorporated by reference into Raymond Foster's will. The applicable portion of that statute, G.S. § 32-27(2), reads:

> (2) Sell and Exchange Property.—To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary shall deem advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange.

In establishing a bidding process, whereby the surviving children of Raymond Foster could bid for and buy the property of their father's estate before it was offered for public sale, the defendant bank was clearly within the bounds of its power under the will and the North Carolina General Statutes. We find no irregularities in the bidding method or in the sale of the property which in any way indicates the defendant bank exceeded or abused its power as executor.

Furthermore, plaintiff's right of first refusal was fulfilled through the defendant bank's appraising the property, offering the property to the surviving children through numerous letters, and allowing the children to bid privately on the property. When the plaintiff and defendant, Virgil Foster, placed bids on the 383 acre parcel in question they exercised their right of first refusal. By selling the land to the higher bidder, Virgil Foster, the bank did nothing to interfere with that right. It simply carried out its duties under the provisions of the will. Upon the uncontroverted facts disclosed by the record, the trial court correctly entered summary judgment for the defendants.

Affirmed.

Judges WEBB and BECTON concur.

IN THE MATTER OF: BLAIR F. STUART

No. 8110SC1429

(Filed 7 December 1982)

1. **Administrative Law § 4— revocation of hearing aid license—evidence supporting board's decision**

The evidence before the North Carolina State Hearing Aid Dealers and Fitters Board was sufficient to find that petitioner had violated G.S. § 93D-13(a)(6) by falsifying a document which stated petitioner's audiometer had been calibrated during 1978.

2. **Administrative Law § 4— member of fact finding board testifying before hearing**

It was proper for a member of the North Carolina State Hearing Aid Dealers and Fitters Board to testify as to what he found in the petitioner's files, and such testimony did not deny petitioner a fair and impartial hearing.

APPEAL by petitioner from *Cornelius, Judge.* Judgment entered 19 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 19 October 1982.

On 23 April 1981 the North Carolina State Hearing Aid Dealers and Fitters Board heard evidence in the matter of Blair F. Stuart, who is a licensed and registered Hearing Aid Dealer

and Fitter. The board made the following pertinent findings of fact:

. . .

2. That the Respondent is a duly licensed and registered Hearing Aid Dealer and Fitter with the Board and has been at all times pertinent to the matters contained in this Judgment.

3. That the Respondent received adequate legal notice of a hearing to be held before the Board on April 23, 1981, at 11:00 AM in the offices of the Attorney General, Justice Building, Raleigh, N.C.

4. That on or about March 17, 1977, Audiovox, Inc., 55 Chapel Street, Newton, Massachusetts, which had previously leased an audiometer to the Respondent, received from the Respondent said audiometer to have said meter calibrated, pursuant to requirements of the Board. That said audiometer was calibrated by representatives of Audiovox, Inc., and said audiometer was returned to Respondent along with an "audiometer calibration chart" dated March 18, 1977. That a copy of said chart was mailed by the Respondent to the Secretary-Treasurer of the Board, pursuant to regulations of the Board.

5. That at [sic] or about April 1, 1978, the Secretary-Treasurer of the Board received from the Respondent an audiometer calibration chart, purportedly prepared by Audiovox, Inc., dated March 18, 1978. That a copy of said calibration chart dated 3-18-78 was introduced into evidence by the Board.

6. That Audiovox, Inc., did not calibrate any audiometer for the Respondent during calendar year 1978, and said calibration chart dated 3-18-78, mailed by the Respondent to the Board during calendar year 1978, was an altered document, the date "3-18-78" having been changed by the Respondent, or at his direction, by an employee of the Respondent from the date "3-18-77" to "3-18-78".

Based on these findings the board made the legal conclusion that Stuart, by willfully mailing, or causing to be mailed to the board,

a calibration chart which had been altered by him or at his direction, made a false representation to the board and "willfully deceived the board in violation of G.S. 93D-13(a)(6)." As a result, the board revoked Stuart's license.

Stuart petitioned for judicial review pursuant to North Carolina General Statute Chapter 150A, Article 4. The Superior Court affirmed the decision of the board. Petitioner appealed.

Attorney General Rufus L. Edmisten, by Deputy Attorney General Millard R. Rich, Jr. for the North Carolina Hearing Aid Dealers and Fitters Board.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson for the petitioner, appellant.

HEDRICK, Judge.

[1] After giving petitioner adequate legal notice, the North Carolina Hearing Aid Dealers and Fitters Board conducted a hearing on 23 April 1981 to determine if petitioner Stuart had violated G.S. § 93D-13(a)(6) which reads in pertinent part:

> (a) The Board may in its discretion administer the punishment of private reprimand, suspension of license for a fixed period or revocation of license as the case may warrant in their judgment for any violation of the rules and regulations of the Board or for any of the following causes:
>
> . . .
>
> (6) Conduct involving willful deceit
>
> . . . .

The board heard testimony from a representative of Audiovox, Inc. that no one at Audiovox had calibrated Stuart's audiometer during 1978. A documents expert from the State Bureau of Investigation testified that the calibration charts, dated "3-18-77" and "3-18-78", were identical documents except for the date, and the "3-18-78" document was a photocopy of the "3-18-77" document. Mr. Ray Bedsaul, secretary to the board, testified that both documents were part of Stuart's master file with the board. Petitioner Stuart testified that he had not sent the altered calibration chart to the board, but his secretary had.

In his Assignment of Error Nos. 1-3 based on Exception Nos. 2-10, petitioner argues that the evidence presented was not sufficient to support the board's finding of "conduct involving willful deceit," G.S. § 93D-13(a)(6), because there is no showing that Stuart acted purposely, deliberately or intentionally or even that he himself sent the altered chart to the board. We do not agree and hold that evidence showing the pertinent document in Stuart's file, along with evidence that it had been altered was sufficient to raise the inference that Stuart had acted with "willful deceit."

[2] In his Assignment of Error No. 4, based on Exception Nos. 1, 6 and 10, petitioner contends that the court erred in failing to strike the testimony of Ray Bedsaul because he was a member of the fact finding board when he testified, which petitioner argues denied him a fair and impartial hearing. Bedsaul only testified that the two documents in evidence came from Blair Stuart's master file and that it is a requirement of the board that audiometers be calibrated on an annual basis. In his brief, petitioner fails to specify which clause of the Constitution of North Carolina, Article I, § 19 has been violated nor does he cite any directly applicable case law. As a general rule, an administrative officer may be disqualified from a proceeding

> . . . in which he has prejudged the case, or in which he has a personal or pecuniary interest, where he is related to an interested person within the degree prohibited by statute, or where he is biased, prejudiced, or labors under a personal ill-will toward a party. An interest to disqualify an administrative officer acting in a judicial capacity may be small, but it must be an interest direct, definite, capable of demonstration, not remote, uncertain, contingent, unsubstantial, or merely speculative or theoretical.

1 Am. Jur. 2d *Administrative Law* § 64 (1962). As stated in *Withrow v. Larkin*, 421 U.S. 35 (1975), there is a presumption of honesty and integrity in those serving as adjudicators and the petitioner must demonstrate a risk of bias or prejudgment. This, in our opinion, petitioner has failed to do. Mr. Bedsaul testified only as to what he found in the files and there is no evidence presented by the defendant that Mr. Bedsaul was prejudiced against the petitioner or had any other predisposition which

should have disqualified him from sitting as a member of the adjudicating board. Therefore, the decision of the board appealed from should be affirmed.

Affirmed.

Judges WEBB and BECTON concur.

SALLIE S. BROWN v. MARVIN E. BROWN

No. 818SC1295

(Filed 7 December 1982)

Partition § 12— partition by exchange of deeds—conveyance to husband and wife —no estate by the entirety

Where a husband owned land as a tenant in common, the tenants exchanged deeds for the purpose of partitioning the land, and a division deed conveying property to the husband and his wife did not specify that the grantees were to hold the property as tenants by the entirety, the division deed did not create a new estate in the grantees and the wife did not receive any interest in the property under the deed, since G.S. 39-13.5 requires that, in order to create a tenancy by the entirety by division deed, the tenant in common must clearly state such intention in the granting clause, and that statute creates an exception to the rule of G.S. 39-13.3(b) that a deed to a husband and wife vests an estate in them as tenants by the entirety unless a contrary intent is shown.

APPEAL by respondent from *Tillery, Judge.* Order entered 17 August 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 16 September 1982.

This action was commenced as a special proceeding to partition a tract of land which the petitioner alleged she and the respondent owned as tenants in common. The respondent filed an answer in which he denied the petitioner had any title to the property. The matter was transferred to Superior Court.

The facts as shown by both parties' affidavits are not in dispute. The petitioner and respondent were formerly married. The respondent and his brother inherited land from their mother which they owned as tenants in common. In December 1969 the respondent, his brother, and their two wives executed deeds

which severed the interests of the respondent and his brother as tenants in common. The respondent, his brother, and their wives, including the petitioner, executed the deed to the property involved in this case as grantors. The respondent and petitioner were grantees. The deed was in form a warranty deed, and it did not specify that the grantees were to hold the property as tenants by the entirety. The petitioner and respondent were divorced after the deed was recorded.

Both parties filed motions for summary judgment. The court granted summary judgment for the petitioner. Respondent appealed.

Barnes, Braswell and Haithcock, by Henson P. Barnes and Tom Barwick, for petitioner appellee.

Braswell and Taylor, by Roland C. Braswell, for respondent appellant.

WEBB, Judge.

We hold that on the undisputed facts of this case the court should have granted the respondent's motion for summary judgment. Cross-deeds of division among tenants in common in most circumstances assign to the tenants in severalty what they formerly held in common. Unless a deed specifically provides otherwise, it does not create a new estate in the grantee. If a spouse of a tenant in common is named as a grantee in the deed, he or she does not receive any interest in the property under the deed unless the granting clause specifies otherwise. *See Harris v. Ashley*, 38 N.C. App. 494, 248 S.E. 2d 393 (1978) and *Scott v. Moser*, 31 N.C. App. 268, 229 S.E. 2d 222 (1976), *cert. denied*, 291 N.C. 712, 232 S.E. 2d 204 (1977).

The petitioner argues that under the following sections of the General Statutes, the deed in this case created a tenancy by the entirety in the petitioner and the respondent. G.S. 39-13.3(b) provides:

> (b) A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance.

G.S. 39-13.5 provides in part:

> When either a husband or a wife owns an undivided interest in real property as a tenant in common with some person or persons other than his or her spouse and there occurs an actual partition of the property, a tenancy by the entirety may be created in the husband or wife who owned the undivided interest and his or her spouse in the manner hereinafter provided:
>
> (1) In a division by cross-deed or deeds, between or among the tenants in common provided that the intent of the tenant in common to create a tenancy by the entirety with his or her spouse in this exchange of deeds must be clearly stated in the granting clause of the deed or deeds to such tenant and his or her spouse, and further provided that the deed or deeds to such tenant in common and his or her spouse is signed by such tenant in common and is acknowledged before a certifying officer in accordance with G.S. 52-10.

The petitioner argues that reading these sections together, a tenancy by the entirety was created by the deed since G.S. 39-13.5 allows the creation of tenancies by the entirety by division deeds and G.S. 39-13.3(b) provides that a deed to a husband and wife creates a tenancy by the entirety unless a contrary intention is shown. We do not so read these two sections. G.S. 39-13.5 requires that in order to create a tenancy by the entirety by division deed, the tenant in common must clearly state his intention in the granting clause. This was not done in this case and we do not believe the intention can be supplied by G.S. 39-13.3(b). We believe G.S. 39-13.5 creates an exception to the rule of G.S. 39-13.3(b) that unless a contrary intent is shown, a deed to a husband and wife vests an estate in them as tenants by the entirety. Under G.S. 39-13.5, it is necessary to say so in the granting clause in order to create a tenancy by the entirety by a division deed. *Woolard v. Smith*, 244 N.C. 489, 94 S.E. 2d 466 (1956), which is relied on by the petitioner, does not involve a division deed. It is not precedent for this case.

We hold the motion for summary judgment by the respondent should have been granted and the proceeding dismissed.

Reversed and remanded.

Judges VAUGHN and WELLS concur.

DUBOSE STEEL, INC. v. L. W. FAIRCLOTH AND BETTY FAIRCLOTH

No. 8210SC88

(Filed 7 December 1982)

Husband and Wife § 3.1; Principal and Agent § 4— existence of agency relationship between husband and wife—involuntary dismissal of action against wife error

The trial court erred in ordering that the claim against defendant wife be involuntarily dismissed since evidence that the wife used her personal checking account for the funds of the business in that she retained some of the business money channeled through her account for her personal use were facts sufficient to enable a trier of fact to find that an agency relationship existed. G.S. 59-36(a), G.S. 59-46 and G.S. 1A-1, Rule 41(b).

APPEAL by plaintiff from *Cornelius, Judge.* Judgment entered on 20 January 1982 in Superior Court, WAKE County. Heard in the Court of Appeals 15 November 1982.

Plaintiff brought this action to recover $21,769.28 from the defendants for steel that was delivered to L. W. Faircloth Welding for installation and resale to Christian Word Ministries, Inc. Payment was made to plaintiff after redelivery of the steel to Christian Word with all payment checks but one being drawn on the personal checking account of Betty Faircloth.

Plaintiff's representatives received payment checks at the defendants' residence in Fayetteville. If L. W. Faircloth was not at home, wife Betty would pay by check for the amount that plaintiff's representative and L. W. had agreed upon. If L. W. was at home, he would get a check from Betty and pay for the steel.

At the close of plaintiff's evidence, a motion for involuntary dismissal as to Betty Faircloth was granted. On 20 January 1982, a judgment was entered against L. W. Faircloth for the debt due. The judgment concluded that L. W. and Betty were not business partners and ordered that the claim against Betty be involuntari-

ly dismissed. Plaintiff appealed from the dismissal of the claim against Betty.

Kimzey, Smith & McMillan, by Stephen T. Smith, for plaintiff-appellant.

Smith & Dickey, by W. Ritchie Smith, Jr., for defendant-appellee.

ARNOLD, Judge.

Plaintiff makes two arguments on appeal to hold defendant Betty Faircloth liable. It contends that she is liable because she accepted the benefits of the transaction or under a partnership theory.

Plaintiff first argues that because Betty retained some benefit from the transactions in this case that she is liable for the debts of the business. This argument is an apparent attempt to show that L. W. was an agent of the principal Betty.

We first note that a husband is not the agent of the wife solely because they are married. As in other situations, an agency must be shown to exist independent of the marital relationship. *Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964); *General Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954). But because sufficient facts exist here that would enable a trier of fact to find that an agency relationship existed, we find that it was error to dismiss the case against Betty.

Although the marital relationship alone does not establish agency, only slight evidence is necessary when the wife receives and retains the benefits of the contract negotiated by the husband. *Norburn*, 262 N.C. 16, 136 S.E. 2d 279; *Passmore v. Woodard*, 37 N.C. App. 535, 246 S.E. 2d 795 (1978); *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E. 2d 334, *modified* 285 N.C. 418, 206 S.E. 2d 162 (1974). In the case *sub judice*, there is evidence to show that Betty used her personal checking account for the funds of the business and that she retained some of the business money channelled through her account for her personal use. These facts are sufficient to require a reversal of the trial court's action.

Although plaintiff's arguments that the defendants were members of a partnership under G.S. 59-36(a) or that they were

partners by estoppel under G.S. 59-46 are not as strong as the agency argument, the evidence could be interpreted by a trier of fact to be a partnership.

G.S. 1A-1, Rule 41(b) allows a trial judge to involuntarily dismiss the case at the close of plaintiff's evidence because plaintiff has shown no right to relief. But this motion should be used sparingly.

> Except in the clearest cases the judge should probably defer judgment, since it is always possible that a plaintiff may supply a deficiency of proof by cross-examination of defendant's witnesses, or through rebuttal testimony that may be opened to him, or even occasionally by defendant's evidence-in-chief.

1 McIntosh, N.C. Practice and Procedure § 1375 (2d Ed., Phillips Supp. 1970). *See also,* W. Shuford, N.C. Civil Practice and Procedure §§ 41-3, -7 (1981); *Whitaker v. Earnhardt,* 289 N.C. 260, 221 S.E. 2d 316 (1975); *Helms v. Rea,* 282 N.C. 610, 194 S.E. 2d 1 (1973). Although we recognize that involuntary dismissal may be granted even though the plaintiff has made out a prima facie case that would have withstood a directed verdict motion by the defendant in a jury case, *Helms,* 282 N.C. at 619, 194 S.E. 2d at 7; we reverse the judgment below and remand the case for a new trial because we find that the facts before us are not so clear as to warrant use of this device.

Reversed and remanded.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA v. JEFFREY J. KISTLE

No. 821SC332

(Filed 7 December 1982)

1. Criminal Law § 43.2— admissibility of photographs—showing of chain of custody not necessary

Photographs were properly admitted into evidence without a showing of a complete chain of custody of the photographs where the authenticity of the photographs was established.

2. Criminal Law § 43.2— photographs as substantive evidence—testimony as to true representation not required

Where photographs were introduced as evidence of the crime itself, and not as illustrative evidence, there was no need to have a witness testify that they fairly and accurately represented the scenes, objects, people and position of the people they purported to portray.

3. Rape and Allied Offenses § 19— indecent liberties with child—nude photographs

The taking of nude photographs of a child constituted indecent liberties with the child in violation of G.S. 14-202.1.

APPEAL by defendant from *Small, Judge.* Judgment entered 5 November 1981 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 15 October 1982.

Defendant was charged with taking indecent liberties with a child. The State's evidence at trial tended to show that defendant delivered a roll of unprocessed film to the Coast Guard Exchange for processing. The film processor employed by the Exchange discovered upon development of the film that the roll contained, among other things, photographs of a nude female child. The processor promptly reported the contents of the roll of film to the authorities and defendant was subsequently arrested. The mother of the female child in the photographs testified that the defendant had on occasion baby-sat for her children and that the background in all the photographs depicted the inside of defendant's apartment. Over defendant's objections, the trial court allowed the photographs in question to be introduced into evidence. Defendant presented no evidence and his motion to dismiss was denied.

Defendant was convicted of taking indecent liberties with children pursuant to N.C. Gen. Stat. § 14-202.1 and from a judgment entered pursuant to that conviction he appeals.

Attorney General Edmisten by Assistant Attorney General Lucien Capone, III, for the State.

D. Keith Teague for the defendant-appellant.

MARTIN (Robert M.), Judge.

[1] Defendant contends that the State failed to establish a complete chain of custody for the photographs and that the trial court erred when it admitted them into evidence. Since we find that the

State adequately established the authenticity of the photographs, we hold that the trial judge properly admitted them into evidence.

The purpose behind the evidentiary rule requiring that a chain of custody be established is to insure that "the object offered is the object which was involved in the incident and further that the condition of the object is substantially unchanged." McCormick's Handbook of the Law of Evidence § 212 (E. W. Cleary ed. 2d ed. 1972). A detailed chain of custody need only be established when the evidence offered is not readily identifiable or is susceptible to alteration. "If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is the one in question and is in a substantially unchanged condition." *Id.* In *State v. Brooks*, 15 N.C. App. 367, 190 S.E. 2d 338 (1972), this court held that a complete chain of custody need not be established where an investigating officer, who discovered the burglary tools which were offered into evidence at trial, recognized and identified the tools from memory of marks he made on them. In the present case, as in *Brooks*, the State need not establish a complete chain of custody. A witness who had inspected the film immediately after processing testified that the photographs introduced at trial were the same as those he had inspected immediately after processing. That testimony sufficiently established the authenticity of the exhibits in question when taken in conjunction with the testimony of another witness who stated that the undeveloped film had been brought to the Coast Guard Exchange by the defendant.

[2] Defendant also contends that the photographs were erroneously admitted into evidence because the State could not produce evidence indicating that the photographs were a true representation of the scenes, objects, people and position of the people they purported to portray. Since the photographs were introduced as evidence of the crime itself, and not as illustrative evidence, there was no need to have a witness testify that they fairly and accurately represented the scene described by testimony. To the extent that the victim's mother used the photographs to illustrate her testimony concerning defendant's

apartment, she did state that they fairly and accurately portrayed the scene. We therefore conclude that the photographs were properly admitted into evidence by the trial court.

[3] Finally, defendant argues that the taking of a photograph of a child does not constitute the commission of a lewd and lascivious act upon or with the body, or a part or member thereof, in violation of N.C. Gen. Stat. § 14-202.1. First, it must be noted that this case involves more than a mere photograph of a child. At least one of the photographs taken pictured a nude female child in a clearly sexually suggestive position. Secondly, it has already been established that a violation of N.C. Gen. Stat. § 14-202.1 does not require any sexual contact with the child's body. "We reject the argument and hold that it is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of N.C.G.S. 14-202.1. . . . The purpose of the statute is to give broader protection to children than the prior laws provided. . . . The word 'with' is not limited to mean only a physical touching." *State v. Turman*, 52 N.C. App. 376, 377, 278 S.E. 2d 574, 575 (1981). [Citations omitted.] We hold that N.C. Gen. Stat. § 14-202.1 was designed to protect children from precisely the type of activity engaged in by this defendant.

We have carefully considered defendant's other assignments of error and find them to be without merit. In the defendant's trial, we find

No error.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. DEBORAH WALKER HAGGARD

No. 824SC458

(Filed 7 December 1982)

Prostitution § 2— solicitation for prostitution—sufficiency of evidence

Defendant's statements to a witness as they lay side by side, with defendant partially clothed and the witness nude, that "if [he] wanted anything else

. . . it would cost [him] more money" and that he could "just have anything" clearly constituted solicitation for prostitution when, as required, those words are given their ordinary meaning. G.S. 14-204(5).

APPEAL by defendant from *Strickland, Judge.* Judgment entered 6 January 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 9 November 1982.

Defendant appeals from a judgment of imprisonment entered upon her conviction of solicitation for prostitution.

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

Warrick, Johnson & Parsons, P.A., by W. Douglas Parsons, for defendant appellant.

WHICHARD, Judge.

Defendant was convicted of violating G.S. 14-204(5), which provides: "It shall be unlawful . . . [t]o procure, or to solicit, or to offer to procure or solicit for the purpose of prostitution or assignation." She concedes that the evidence established prostitution, but contends that it failed to establish solicitation for prostitution, and that the court thus erred in denying her motion to dismiss. We reject the contention.

In construing statutes, words should be given their ordinary meaning unless it appears, from the context or otherwise, that another and different sense was intended. *Abernethy v. Commissioners*, 169 N.C. 631, 635, 86 S.E. 577, 579 (1915). Nothing appears with regard to G.S. 14-204(5), from the context or otherwise, to indicate an intent to give the word "solicit" anything other than its ordinary meaning.

"Solicit" is a word of common usage and understanding. The gravamen of the common law offense of soliciting "lies in counseling, enticing or inducing another to commit a crime." *State v. Furr*, 292 N.C. 711, 720, 235 S.E. 2d 193, 199, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed. 2d 281 (1977). *Webster's New International Dictionary* 2169 (3d ed. 1971) defines "solicit", *inter alia*, as "to entice . . .: lure on and esp. into evil . . . [; to] attempt to seduce . . . ." *Webster's New Collegiate Dictionary* (7th ed. 1967) defines "solicit", *inter alia*, as "to entice or lure . . . to do

wrong . . . to accost (a man) for immoral purposes." *Black's Law Dictionary* 1248-49 (5th ed. 1979) defines "solicit", *inter alia*, as "[t]o appeal for something; . . . to ask for the purpose of receiving; . . . to try to obtain; . . . [t]o awake or excite to action, or to invite."

The District of Columbia Court of Appeals has stated: "To establish the offense [of solicitation for prostitution] it is not necessary to prove any particular language or conduct. Ordinarily it is a question of fact whether the acts and words of the defendant, viewed in the light of surrounding circumstances, constitute the inviting or enticing prohibited by [statute]. [Citation omitted.]" *United States v. Smith*, 330 A. 2d 759, 761 (D.C. App. 1975). The pertinent "surrounding circumstances" here were as follows:

The state's principal witness saw defendant at an establishment called "Movie Mates." Defendant asked if he "would like to watch a movie with the lady." A sign advised, *inter alia*, of a $20.00 charge to watch a movie accompanied by a girl with "no top on."

The witness told defendant he would "take the $20.00 for topless." He gave her $20.00, and they went into a back room.

There defendant told the witness "to take [his] clothes off and get comfortable and lay down on the bed." The witness complied. Defendant then turned on a television set, "took off her top," and lay down beside him.

After they had talked for a time while watching a movie of "a lady and a man having oral sex," defendant told the witness that "if [he] wanted anything else . . . it would cost [him] more money." The witness asked what she meant; and defendant replied, "[W]ell, you can just have anything." The witness referred to the TV screen where a woman was performing oral sex on a man, and he asked how much more that would cost him. Defendant replied that it would cost $40.00. The witness gave defendant $40.00; and after a brief departure from the room, defendant commenced performing oral sex on him.

This continued for several minutes, after which the witness asked defendant "how much more it would cost [him] to get laid." Defendant indicated it would cost another $20.00. The witness had only $13.75 in his possession. Defendant settled for that, took

$13.75 from the witness, and left the room briefly. When she returned, she and the witness "had sex."

Defendant's statements to the witness as they lay side by side, with defendant partially clothed and the witness nude, that "if [he] wanted anything else . . . it would cost [him] more money," and that he could "just have anything," clearly constituted solicitation for prostitution when, as required, those words are given their ordinary meaning. Defendant's contention that the court erred in denying her motion to dismiss is thus without merit.

Defendant further asserts prejudicial error in portions of the instructions to the jury. We have carefully examined the portions complained of, and we find no merit in the contention.

No error.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. JAMES CHARLES BOONE

No. 824SC276

(Filed 7 December 1982)

Judgments § 2.1; Searches and Seizures § 43— denial of motion to suppress evidence—order entered after session and in another district

An order denying defendant's pretrial motion to suppress seized evidence was a nullity where it was signed after the close of the session at which the motion was heard and was signed outside of the county and district in which defendant was being tried. Therefore, it was error for the trial judge to decline to hear defendant's motion to suppress when it was renewed before him at the trial. G.S. 15A-977.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 2 July 1981 ONSLOW County Superior Court. Heard in the Court of Appeals 12 October 1982.

Defendant was charged with and convicted of felonious possession of more than one ounce of marijuana, in violation of the Controlled Substance Act. From judgment and sentence entered on the verdict, defendant appealed.

The evidence for the State tended to show the following. On 13 February 1981 a number of police officers were engaged in a search of a farm near Jacksonville, in Onslow Co., where they found a large quantity of marijuana. While the search was underway, one of the officers, State Bureau of Investigation Agent Al Stevens, was in the process of leaving the farm when he observed a vehicle being driven by defendant approaching the farm. As Stevens approached defendant's vehicle, defendant put his vehicle in reverse gear and proceeded to go backward toward a main highway at a speed of 30 to 35 miles per hour, when he reached the main highway, defendant drove away. Agent Stevens followed defendant and signaled for defendant to stop. Agent Stevens recognized the passenger in defendant's vehicle as Tommy Johnson, a person Stevens had been reliably informed was engaged in manufacturing the marijuana discovered at the farm. Agent Stevens had previously arrested Tommy Johnson, who had a reputation as a drug dealer. After stopping defendant's vehicle, Stevens identified himself and asked defendant and Johnson to go back to the farm to talk to Detective Cooper of the Onslow Co. Sheriff's Department. Stevens did not tell defendant he was under arrest. Defendant willingly accompanied Stevens back to the farm. At the farm, defendant was engaged in conversation by Deputy Sheriffs Gibson and Taylor, who requested permission to look in the trunk of defendant's car. Defendant opened the trunk where the officers observed marijuana contained in a duffel bag located in the car trunk. The officers seized the duffel bag, found that it contained ten pounds of marijuana, and placed defendant under arrest.

Defendant's pre-trial motion to suppress the evidence found in his car was heard by Judge Elbert S. Peel, Jr. on the 16th and 18th of June 1981 at a Criminal Session of Superior Court in Onslow County, which is in the Fourth Judicial District. The order denying defendant's motion was signed by Judge Peel in Williamston, Martin County, which is in the Second Judicial District, on 25 June 1981. At trial, defendant moved to have his motion to suppress heard by Judge Strickland. That motion was denied.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Dennis P. Myers, for the State.

Jeffrey S. Miller for defendant-appellant.

WELLS, Judge.

By his first assignment of error, defendant contends that Judge Peel's order denying defendant's motion to suppress was a nullity. We agree. The order was signed after the session at which the motion was heard was closed, and it was signed outside of the district and outside of the county in which defendant was being tried. Under these circumstances, Judge Peel was without authority to enter the disputed order. *See State v. Saults*, 299 N.C. 319, 261 S.E. 2d 839 (1980); *State v. Ray*, 97 N.C. 510, 1 S.E. 876 (1887); 8 N.C. Index 3d, Judgments, § 2.1.

Judge Peel's order being a nullity, defendant was entitled to have his motion to suppress heard before trial, G.S. 15A-977, and it was error for Judge Strickland to decline to hear defendant's motion when it was renewed before him.

Since there must be a new trial, we deem it inappropriate to address defendant's other assignments of error.

New trial.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. PATRICK CURTIS SMITH

No. 826SC101

(Filed 7 December 1982)

Criminal Law § 80.1— nonsupport of illegitimate child—motel registration card—no proper foundation

In a prosecution for nonsupport of an illegitimate child, the trial court erred in allowing the State to introduce into evidence a motel guest registration card bearing a signature purportedly defendant's since there was no evidence identifying the handwriting on the card nor was there any evidence identifying defendant as the man who registered or to whom a room was assigned.

APPEAL by defendant from *Strickland, Judge*. Judgment entered 28 August 1981, in the Superior Court, HALIFAX County. Heard in the Court of Appeals 13 September 1982.

Defendant was convicted of nonsupport of an illegitimate child. Judgment was entered on the guilty verdict imposing a sentence of six months, with the sentence suspended for five years upon condition that defendant pay $15 per week for the support of the child. Defendant appealed. Facts necessary for decision are set out in the opinion.

Attorney General Edmisten, by Associate Attorney Thomas J. Ziko, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

MORRIS, Chief Judge.

The prosecuting witness testified that on 24 June 1979, she and defendant went to the Holiday Inn in Roanoke Rapids, that defendant went in and registered, that they went in a room at the motel where they twice had sexual intercourse. She testified that she was not using any type of birth control, that she did not have another menstrual cycle until the birth of a child; and that she did not have sexual intercourse with any other men during May, June, or July of 1979.

Over defendant's objection, state introduced into evidence a Holiday Inn guest registration card dated 24 June 1979 and bearing a signature purportedly defendant's. The clerk who testified and identified the card was not working at the motel in 1979 and had never seen defendant.

Defendant contends that the admission of this card into evidence was error sufficiently prejudicial to require a new trial. We agree, because it appears that the issue is answered in favor of defendant by *State v. Austin*, 285 N.C. 364, 204 S.E. 2d 675 (1974). There defendant was convicted of incest with his daughter. Over his objection, a desk clerk at a Charlotte motel where a later incident of incest allegedly occurred was allowed to testify that she found, among the records of registrants at the motel on 20 April 1973, the registration card which the state introduced in evidence. She further testified that it was customary for a guest to write his name and home address on a registration card before he paid and checked in. She did not know the defendant and did not register him on 20 April 1973. The card bore, in handwriting,

the name of defendant and the prosecuting witness. There, as here, the solicitor, in introducing the card, did not specify the purpose for which it was offered. He offered it, defendant objected, and the court overruled the objection. There, as here, there was no evidence identifying the handwriting on the card nor was there any evidence identifying defendant as the man who registered as Patrick Smith or as the man to whom a room was assigned. Writing for a unanimous Court, Justice Sharp (later Chief Justice) in granting defendant a new trial, said:

> Once admitted the registration card not only corroborated the prosecuting witness and impeached defendant on a vital point in the case, but it also constituted substantive evidence that defendant had had incestuous relations with his daughter in Charlotte on April 20th. Any attempt by the judge to restrict this evidence would have been futile, for no limiting instruction could have overcome its devastatingly prejudicial effect upon defendant's case. See 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 79.

Id. at 367.

See also *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978).

The registration card, which purportedly was signed by defendant, was the only direct evidence, other than the prosecuting witness's testimony, which bore directly on the question of whether defendant had had sexual intercourse with the prosecuting witness. Its weight was sufficient to overcome any discrepancies in the state's evidence, and its admission was sufficiently prejudicial to require a new trial.

New trial.

Judges BECTON and JOHNSON concur.

Settle v. Beasley

JOHN WESLEY SETTLE, MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, MARK E. SULLIVAN, PLAINTIFF v. KENNETH WAYNE BEASLEY, DEFENDANT

No. 8110DC1333

(Filed 7 December 1982)

Bastards § 10; Judgments § 36.2— paternity action—estoppel by prior judgment

The minor plaintiff in an action to establish paternity was estopped by a judgment entered in a prior action instituted by the plaintiff's mother finding that defendant was not the father of the plaintiff in this action since the legal consequences are the same no matter who brings the paternity action, and there is, therefore, an identity of interests between the plaintiffs in the two actions so that the minor plaintiff is in privity with the plaintiff in the prior action.

APPEAL by plaintiff from *Parker (John), Judge.* Order entered 27 July 1981 in District Court, WAKE County. Heard in the Court of Appeals 21 September 1982.

This is an action pursuant to Article 3, Chapter 49 of the General Statutes to establish paternity. The dismissal of a criminal action against the defendant on the ground the statute of limitations had run has been affirmed by this Court. *See State v. Beasley*, 57 N.C. App. 208, 290 S.E. 2d 730 (1982). In this civil action, the defendant filed an answer in which he denied the material allegations of the complaint. The defendant also alleged as an affirmative defense that the plaintiff was estopped by a judgment previously entered in the District Court of Johnston County. The plaintiff and defendant moved for summary judgment on the defendant's affirmative defense.

The papers offered in support of the motions for summary judgment showed that in November 1977 the plaintiff's mother brought an action in Johnston County to establish paternity between the plaintiff in this action and the defendant. The case was tried without a jury in January 1978. The District Court of Johnston County entered a judgment on 30 April 1981 in which it found that the defendant was not the father of the plaintiff in this action. No appeal was taken from the Johnston County judgment. The District Court of Wake County granted the defendant's motion for summary judgment.

The plaintiff appealed.

Huggard, Sullivan, Hensley and Pearson, by Mark E. Sullivan, for plaintiff appellant.

Canaday and Canaday, by Claude C. Canaday, III, for defendant appellee.

WEBB, Judge.

We affirm the judgment of the District Court. When a final judgment has been rendered by a court which necessarily determines a fact, right or issue, that judgment is conclusive in a subsequent action involving the same fact, right or issue and either identical parties or persons in privity with parties to the earlier action. An estoppel by judgment must be mutual and where one party is not estopped, the adverse party cannot be estopped. *See Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976); *King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973); *Stephens v. Worley*, 51 N.C. App. 553, 277 S.E. 2d 81 (1981). The facts and issues contested in the instant case and the Johnston County action are identical. The question on this appeal is whether the plaintiff in this action is in privity with the plaintiff in the Johnston County action.

The interest of the plaintiff in this action is identical with the interest of the plaintiff in the Johnston County action. G.S. 49-16 permits the mother, father, child, personal representative of the mother or the child, or in some cases, the director of Social Services, or the person who performs the duties of such persons in certain counties, to bring an action to establish paternity. Whoever brings the action, the legal consequences are the same. If paternity is established, the illegitimate child has all the rights allowed by Article 3, Chapter 49 of the General Statutes. If the plaintiff in the Johnston County action had been successful, the defendant would have been bound by the judgment as to the plaintiff in this action. We believe this gives the plaintiff in this action an identity of interest with the plaintiff in the Johnston County action so that the parties are in privity. *See Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962).

The plaintiff argues the law has been changed to allow proof of paternity by a blood test since the action was tried in Johnston

County and this change in the law prevents him from being estopped by the Johnston County judgment. He also argues that the impact on him will be devastating if he is estopped by the judgment. We do not believe the fact that evidence may be used which was not available at a former trial or the effect of the judgment on the plaintiff allows us to ignore a final judgment. *See Hospital v. Guilford County*, 221 N.C. 308, 20 S.E. 2d 332 (1942).

Affirmed.

Judges VAUGHN and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 DECEMBER 1982

ANDERSON v. CP&L No. 825DC64	New Hanover (80CVD2333)	No Error
CLEWIS v. CLEWIS No. 8216DC251	Scotland (80CVD241)	Affirmed
EMORY v. DEGE, INC. No. 8214SC43	Durham (81CVS0417)	New Trial
HARLEY-DAVIDSON v. TEW No. 818SC1330	Wayne (76CVS255)	Affirmed
IN RE WARREN No. 8229DC505	Transylvania (78J2) (78J3)	Affirmed
LEDFORD v. LEDFORD No. 8230DC109	Macon (80CVD199)	Affirmed
SPURGEON v. SPURGEON No. 8122DC1314	Davidson (81CVD71)	Affirmed in Part; Vacated in Part, and Remanded
STATE v. BATEMAN No. 8210SC442	Wake (81CRS35775)	No Error
STATE v. BELLAMY No. 8215SC481	Chatham (81CRS3220)	No Error
STATE v. CLAY No. 8226SC486	Mecklenburg (81CRS64937)	No Error
STATE v. CROUCH No. 8217SC435	Rockingham (81CR8399) (81CR8401)	No Error
STATE v. DARDEN No. 824SC329	Sampson (81CRS4021)	No Error
STATE v. EDNEY No. 824SC303	Onslow (81CRS5493)	No Error
STATE v. EVANS No. 8222SC497	Davidson (80CRS14686) (80CRS14687)	No Error
STATE v. FERGUSON No. 8215SC367	Orange (81CRS4751)	No Error
STATE v. GALES No. 828SC162	Wayne (81CRS3248)	New Trial

STATE v. HARPER No. 8212SC263	Cumberland (81CRS5098)	No Error
STATE v. HICKS No. 823SC363	Carteret (81CRS3983)	No Error
STATE v. LUCAS No. 828SC494	Wayne (81CRS12644)	No Error
STATE v. McCANN No. 8223SC289	Yadkin (81CRS3604)	No Error
STATE v. SMALL No. 8219SC238	Randolph (81CRS7400)	No Error
STATE v. SMITH No. 828SC53	Wayne (81CRS5335) (81CRS5336)	No Error
STATE v. THOMAS No. 8224SC341	Mitchell (81CRS694)	No Error
WELLMAN v. THE HIDEAWAY No. 8225SC403	Burke (81CVS981)	Affirmed
WISHON v. WISHON No. 8229DC287	Henderson (80CVD210)	Vacated and Remanded

APPENDIXES

AMENDMENT OF ORDER CONCERNING
ELECTRONIC MEDIA AND STILL PHOTOGRAPHY
COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

AMENDMENTS TO NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

AMENDMENT OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, is hereby amended as follows:

Add the following subsection to paragraph 3:

(f) The Chief Justice of the Supreme Court, and the Chief Judge of the Court of Appeals, may waive the requirements of rule 3(a) and (b) with respect to judicial proceedings in the Supreme Court and in the Court of Appeals, respectively.

Add the words "or courtroom" after the word "area" in 3(d).

Delete the words "trial judge" from 3(e)(iii) and insert in lieu thereof, "presiding justice or judge."

Paragraph 2(a) is amended by deleting the word "judge" and inserting in lieu thereof the words "justice or judge."

This order shall be published in the Advance Sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this 10th day of November, 1982.

MARTIN, J.
For the Court

AMENDMENTS TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 26(g) of the North Carolina Rules of Appellate Procedure, 304 NC 591, is hereby amended to read as follows:

(g) FORM OF PAPERS; COPIES. Papers presented to either appellate court for filing shall be letter size (8½ x 11") with the exception of wills and exhibits. Documents filed in the trial division prior to July 1, 1982 may be included in records on appeal whether they are letter size or legal size (8½ x 14"). Papers shall be prepared on white paper of 16-20 pound substance in pica type so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The format of all papers presented for filing shall follow the instructions found in the Appendixes to these Appellate Rules.

All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 5 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, *i.e.*, cases (alphabetically arranged), constitutional provisions, statutes, and textbooks cited, with references to the pages where they are cited.

The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record.

Rule 28(i) of the North Carolina Rules of Appellate Procedure, 287 NC 671, 743-744, is hereby amended to read as follows:

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties, within ten days after the appeal is docketed. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions.

Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. In all cases where amicus curiae briefs are permitted by a court, the clerk of the court at the direction of the court will notify all parties of the times within which they may file reply briefs. Such reply briefs will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

The Appendix of Tables and Forms to the North Carolina Rules of Appellate Procedure, 287 NC 671, 763-789, is hereby repealed and the following Appendixes A through F are adopted in its stead:

APPENDIXES

Appendix A: Timetables for Appeals

Appendix B: Format and Style

Appendix C: Arrangement of Record on Appeal

Appendix D: Forms

Appendix E: Content of Briefs

Appendix F: Fees and Costs

APPENDIX A

TIMETABLE OF APPEALS FROM TRIAL DIVISION UNDER ARTICLE II OF THESE RULES

Action	Time (Days)	From date of	Rule Reference
Taking Appeal (civil)	10	entry of judgment (unless tolled)	3(c)
Taking Appeal (criminal)	10	entry of judgment (unless tolled)	4(a)(2)
Filing and serving proposed record on appeal	30	Taking appeal	11(b)
Filing and serving objections or proposed alternative record	15	Service of proposed record	11(c)
Requesting judicial settlement of record	10	Last day within which last appellee served could file objections, etc.	11(c)
Settlement of record by judge	15	Receipt by judge of request for settlement	11(c)
Certification of record by clerk	10	Record on appeal settled	11(e)
Filing record on appeal in appellate court	10	Certification by clerk (but not more than 150 days from taking appeal)	12(a)
Filing appellant's brief	20	Clerk's Mailing of Printed Record	12(b), 13(a)
Filing appellee's brief	20	Service of appellant's brief	13(a)
Oral argument	30 (usual minimum)	Filing appellant's brief	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for Rehearing (civil action only)	20	Mandate	31(a)

TIMETABLE OF APPEALS TO THE SUPREME COURT FROM THE COURT OF APPEALS UNDER ARTICLE III OF THESE RULES

Action	Time (Days)	From date of	Rule Reference
Petition for Discretionary Review Prior to Determination	15	Docketing appeal in Court of Appeals	15(a)
Notice of Appeal	15	Mandate (or from order of Court of Appeals denying petition for rehearing)	14(a)
Cross-Notice of Appeal	10	Filing of first Notice	14(a)
Petition for Discretionary Review	15	Mandate (or from order of Court of Appeals denying petition for rehearing)	15(a)
Response to Petition for Discretionary Review	10	Service of Petition	15(d)
Appellant's Brief	20	Docketing Case	14(d), 15(a)
Appellee's Brief	20	Service of Appellant's Brief	14(d), 15(g)
Oral Argument	30 (usual minimum)	Filing Appellant's Brief	29
Certification or Mandate	20	Issuance of Opinion	32
Petition for rehearing (civil action only)	20	Mandate	31(a)

NOTE: All of the critical time intervals here outlined except those for taking an appeal and petitioning for discretionary review may be extended by order of the Court wherein the appeal is docketed at the time. However, the time for filing the record on appeal may be extended past 150 days from the date of taking appeal only by order of the appellate court to which the appeal of right lies.

No time limits are prescribed for petitions for writs of certiorari other than that they be "filed without unreasonable delay." (Rule 21)

APPENDIX B

Format and Style

All documents for filing in either appellate court are prepared on 8½ x 11 inch, white paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format.

Papers shall be prepared using pica (10 pitch) type and spacing, so as to produce a clear, black image. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be 60 spaces wide and 57 lines long. Tabs are located at the following spaces from the left margin: 5, 10, 15, 20, 30 (center), and 40.

Captions of Documents

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)

****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. _____
v	)	
	)	
(Name of Defendant)	)	

****

(TITLE OF DOCUMENT)

****

The caption should reflect the title of the action (all parties named) as it appeared in the trial division. The appellant or petitioner is not automatically given topside billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county and indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, *e.g.*, PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is to be entitled NEW BRIEF.

Indexes

A brief or petition which is long or complex or which treats multiple issues, and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented ten spaces from *each* margin, providing a 40-space line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

Organization of the Court 1
Complaint of Tri-Cities Mfg. Co. 1

* * *

*PLAINTIFF'S EVIDENCE:
John Smith 17
Tom Jones 23

Defendant's Motion for Nonsuit 84

*DEFENDANT'S EVIDENCE:
John Q. Public 86
Mary J. Public 92

* * *

Request for Jury Instructions 101
*Charge to the Jury 102
Jury Verdict 108
Order or Judgment 109
Appeal Entries 110
Order Extending Time 110
Assignments of Error 112
Certificate of Service 113
Stipulation of Counsel 114
Names and Addresses of Counsel 115

Use of the Transcript of Evidence with Record on Appeal

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the complete stenographic transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record. The transcript has been certified by (name), (deputy) (ass't) Clerk of the Superior Court of (name) County."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be reproduced to assure the parties of a reference copy, file one copy in the appellate court, and provide the Clerk of the Superior Court with a copy if required. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

Table of Cases and Authorities

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in

length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to *A Uniform System of Citation* (13th ed.).

Format of Body of Document

The body of the document should be single spaced with double spaces between paragraphs and triple spaces before topical headings.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented 10 spaces from the left margin and about five spaces from the right. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetical entry in the text. (R pp 38-40) References to the transcript, if used, should be made in similar manner. (T p 558)

Topical Headings

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented five spaces from the left margin.

Numbering Pages

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, *e.g.*, i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, *e.g.* —4—.

An appendix to the brief should be separately numbered in the manner of a brief.

Signature and Address

All original papers filed in a case will bear the original signature of at least one counsel participating in the case. The name, address, and telephone number of the person signing, together with the capacity in which he signs the paper will be included. Counsel participating in argument must have signed the brief in the case prior to that argument.

APPENDIX C

ARRANGEMENT OF RECORD ON APPEAL

Only those items listed in the following tables which are required by Rule 9(b) in the particular case should be included in the record. See Rule 9(b)(5) for sanctions against including unnecessary items in the record. The items marked by an asterisk (*) could be omitted from the record proper if the transcript option of Rule 9(c) is used, and there exists a transcript of the items.

Table 1

SUGGESTED ORDER IN APPEAL FROM CIVIL JURY CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(1)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(1)(ii)
4. Statement of record items showing jurisdiction, per Rule 9(b)(1)(iii)
5. Complaint
6. Pre-answer motions of defendant, with rulings thereon
7. Answer
8. Motion for summary judgment, with rulings thereon (* if oral)
9. Pre-trial order

*10. Plaintiff's evidence, with any evidentiary rulings assigned as error

*11. Motion for directed verdict, with ruling thereon

*12. Defendant's evidence, with any evidentiary rulings assigned as error

*13. Plaintiff's rebuttal evidence, with any evidentiary rulings assigned as error

14. Issues tendered by parties
15. Issues submitted by court

*16. Court's instructions to jury, per Rule 9(b)(1)(vi)

17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)

19. Judgment
20. Appeal entries, per Rule 9(b)(1)(ix)
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 2

SUGGESTED ORDER IN APPEAL FROM SUPERIOR COURT REVIEW OF ADMINISTRATIVE AGENCY

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(2)(i)
3. Statement of organization of superior court, per Rule 9(b)(2)(ii)
4. Statement of record items showing jurisdiction of the board or agency, per Rule 9(b)(2)(iii)
5. Copy of petition or other initiating pleading
6. Copy of answer or other responsive pleading
7. Copies of all items from administrative proceeding filed for review in superior court, including evidence

*8. Evidence taken in superior court, in order received

9. Copies of findings of fact, conclusions of law, and judgment of superior court
10. Appeal entries, per Rule 9(b)(2)(viii)
11. Assignments of error, with pertinent exceptions, per Rule 9(b)(2)(ix)
12. Entries showing settlement of record on appeal, extension of time, etc.
13. Clerk's certification of record on appeal
14. Names, office addresses, and telephone numbers of counsel for all parties to appeal

Table 3

SUGGESTED ORDER IN APPEAL OF CRIMINAL CASE

1. Title of action (all parties named) and case number in caption per Appendix B
2. Index, per Rule 9(b)(3)(i)
3. Statement of organization of trial tribunal, per Rule 9(b)(3)(ii)
4. Warrant
5. Judgment in district court (where applicable)
6. Entries showing appeal to superior court (where applicable)
7. Bill of indictment (if not tried on original warrant)
8. Arraignment and plea in superior court
9. Voir dire of Jurors

*10. State's evidence, with any evidentiary rulings assigned as error

11. Motions at close of state's evidence, with rulings thereon (* if oral)

*12. Defendant's evidence, with any evidentiary rulings assigned as error

13. Motions at close of defendant's evidence, with rulings thereon (* if oral)

*14. State's rebuttal evidence, with any evidentiary rulings assigned as error

15. Motions at close of all evidence, with rulings thereon (* if oral)

*16. Court's instructions to jury, per Rules 9(b)(3)(vi), 10(b)(2)

17. Verdict
18. Motions after verdict, with rulings thereon (* if oral)
19. Judgment and order of commitment
20. Appeal entries
21. Assignments of error, with pertinent exceptions, per Rule 10
22. Entries showing settlement of record on appeal, extension of time, etc.
23. Clerk's certification of record on appeal
24. Names, office addresses and telephone numbers of counsel for all parties to appeal

Table 4

EXCEPTIONS SET OUT IN RECORD ON APPEAL

A. Examples related to evidentiary rulings

1. Evidence admitted

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection overruled.

EXCEPTION No. 7.

A. The name of E. F.

2. Evidence excluded

Q. Did you hear D. call a name?

A. Yes.

Q. Whose name did he call?

Objection.

Objection sustained.

(Witness would have testified: "The name of E. F.")

EXCEPTION No. 8.

B. To ruling on motion for directed verdict

At the close of all the evidence the defendant renewed his motion for directed verdict on the stated grounds that the plaintiff's evidence established as a matter of law his contributory negligence.

Motion denied.

EXCEPTION No. 9.

C. To refusal of court to submit issue tendered by defendant

Issues tendered by the defendant:

. . .

2. If so, did the plaintiff by his own negligence contribute to his injuries, as alleged in the answer?

. . .

The court refused to submit issue No. 2.

EXCEPTION No. 10.

D. Examples related to judge's instructions to jury

1. Instruction erroneously given

(Enclose in brackets portion of instructions to which exception is directed, followed by entry:)

EXCEPTION No. 11.

2. Law not explained, as required by N.C.R.Civ.P. 51

(Entry to be made at end of instructions given by court:)

The court failed to instruct the jury on the doctrine of last clear chance.

EXCEPTION No. 12.

3. Law not applied to evidence, as required by N.C.R.Civ.P. 51

(Entry to be made at end of instructions given by court.)

The court failed in instructing the jury to apply the doctrine of last clear chance to plaintiff's evidence, Record pp. 80-90.

EXCEPTION No. 13.

Table 5

ASSIGNMENTS OF ERROR

A. Examples related to pre-trial rulings in civil action

Defendant assigns as error:

1. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(2) to dismiss for lack of jurisdiction over the person of the defendant, on the grounds (that the uncontested affidavits in support of the motion show that no grounds for jurisdiction existed) (or other appropriately stated grounds).

EXCEPTION No. 1, R p. 4.

2. The court's denial of defendant's motion under N.C.R.Civ.P. 12(b)(6) to dismiss for failure of the complaint to state a claim upon which relief can be granted, on the ground that the complaint affirmatively shows that the plaintiff's own negligence contributed to any injuries sustained.

EXCEPTION No. 2, R p. 7.

3. The court's denial of defendant's motion requiring the plaintiff to submit to physical examination under N.C.R.Civ. P. 35, on the ground that on the record before the court, good cause for the examination was shown.

   EXCEPTION No. 3, R p. 10.

4. The court's denial of defendant's motion for summary judgment, on the ground that there was no genuine issue of fact that the statute of limitations had run and defendant was therefore entitled to judgment as a matter of law.

   EXCEPTION No. 4, R p. 15.

B. Examples related to civil jury trial rulings

Defendant assigns as error the following:

1. The court's admission of the testimony of the witness E.F., on the ground that the testimony was hearsay.

   EXCEPTION No. 7, R p. 29.

   EXCEPTION No. 8, R p. 30.

2. The court's denial of the defendant's motion for directed verdict at the conclusion of all the evidence, on the ground that plaintiff's evidence as a matter of law established his contributory negligence.

   EXCEPTION No. 8, R p. 45.

3. The court's instructions to the jury, R pp. 50-51, explaining the doctrine of last clear chance, on the ground that the doctrine was not correctly explained.

   EXCEPTION No. 10, R p. 51.

4. The court's instructions to the jury, R pp. 53-54, applying the doctrine of sudden emergency to the evidence, on the ground that the evidence referred to by the court did not support application of the doctrine.

   EXCEPTION No. 11, R p. 54.

5. The court's denial of defendant's motion for a new trial for newly discovered evidence, on the ground that on the uncontested affidavits in support of the motion the court abused its discretion in denying the motion.

   EXCEPTION No. 9, R p. 80.

C. Examples related to civil non-jury trial

Defendant assigns as error:

1. The court's refusal to enter judgment of dismissal on the merits against plaintiff upon defendant's motion for dismissal made at the conclusion of plaintiff's evidence, on the ground that plaintiff's evidence established as a matter of law that plaintiff's own negligence contributed to the injury.

   EXCEPTION No. 1, R p. 20.

2. The court's Finding of Fact No. 10 on the ground that there was insufficient evidence to support it.

   EXCEPTION No. 2, R p. 25.

3. The court's Conclusion of Law No. 3, on the ground that there are no findings of fact which support the conclusion that defendant had the last clear chance to avoid the collision alleged.

   EXCEPTION No. 3, R p. 27.

APPENDIX D

FORMS

Captions for all documents filed in the Appellate Division should be in the format prescribed by Appendix B, addressed to the Court whose review is sought.

1. **Notices of Appeal**

a. **to Court of Appeals from Trial Division**
Appropriate in all appeals of right from district or superior courts, except appeals from criminal judgments imposing sentences of death or of imprisonment for life.

(Caption)

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

(Plaintiff) (Defendant) (NAME OF PARTY) hereby gives notice of appeal to the Court of Appeals of North Carolina (from the final judgment) (from the order) entered on (date) in the (District) (Superior) Court of (name) County, (describing it).

Respectfully submitted this _____ day of _____ 19____.

s/_____
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

b. **to Supreme Court from a Judgment of the Superior Court Including a Sentence of Life Imprisonment or Death**

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Name of Defendant), Defendant, hereby gives notice of appeal to the Supreme Court of North Carolina from the final judgment, entered by (name of Judge), in the Superior Court of (name) County on (date), which judgment included a sentence of (death) (imprisonment for life).

Respectfully submitted this _____ day of _____ 19 ____.

s/_____
Attorney for Defendant-Appellant
(Address and Telephone)

c. **to the Supreme Court from a Judgment of the Court of Appeals**

Appropriate in all appeals taken as of right from opinions and judgments of the Court of Appeals to the Supreme Court under G.S. 7A-30. The appealing party shall enclose a certified copy of the opinion of the Court of Appeals with the notice. To take account of the possibility that the Supreme Court may determine that the appeal does not lie of right, an alternative petition for discretionary review may be filed with the notice of appeal.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant) (name of party) hereby appeals to the Supreme Court of North Carolina from the judgment of the Court of Appeals (describing it), which judgment . . .

(**Constitutional question** — G.S. 7A-30(1)) . . . directly involves substantial questions arising under the Constitution(s) (of the United States) (and) (or) (of the State of North Carolina) as follows:

(here describe the specific issues, citing Constitutional provisions under which they arise, and showing how such issues were timely raised below and are set out in the record on appeal, *e.g.*:)

"Question 1: Said judgment directly involves a substantial question arising under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article 1, Section 20 of the Constitution of the State of North Carolina, in that it deprives rights secured thereunder to the defendant by overruling defendant's assignment of error to the denial of his Motion to Suppress Evidence Obtained by a Search Warrant, thereby depriving the defendant of his Constitutional right to be secure in his person, house, papers, and effects, against unreasonable searches and seizures and violating constitutional prohibitions against warrants issued without probable cause and warrants not supported by evidence. This constitutional issue was timely raised in the trial tribunal by defendant's Motion to Suppress Evidence Obtained by a Search Warrant made prior to trial of defendant (R pp 7 thru 10). Exception No. 11 (R p 136). This constitutional issue was determined erroneously by the Court of Appeals."

(**dissent** — G.S. 7A-30(2)) . . . was entered with a dissent by Judge (name).

(**rate-making** — G.S. 7A-30(3)) . . . was entered upon review of a decision of the North Carolina Utilities Commission in a general rate-making case.

Respectfully submitted this ____ day of _____ 19____.

s /_____
Attorney for (Plaintiff) (Defendant)-Appellant
(Address and Telephone)

2. **Appeal Entries**

The appeal entries are appropriate as a ready means of providing in composite form for the record on appeal:

1) the entry required by App. Rule 9(b) showing appeal duly taken by oral notice under App. Rule 3(a)(1) or 4(a)(1);

2) judicial approval of the undertaking on appeal required by App. Rule 6; and

3) the entry required by App. Rule 9(b) showing any judicial extension of time for serving proposed record on appeal under App. Rule 27(c).

These entries of record may also be made separately.

Where appeal is taken by filing and serving written notice, a copy of the notice with filing date and proof of service is appropriate as the record entry required.

Per Tables 1, 2, and 3 of Appendix C, such "appeal entries" are appropriately included in the record on appeal following the judgment from which appeal is taken.

The judge's signature, while not technically required, is traditional, and serves as authentication of the substance of the entries.

(Defendant) gave due notice of appeal to the (Court of Appeals) (Supreme Court). Appeal bond in the sum of $_____ adjudged to be sufficient. (Defendant) is allowed _____ days in which to serve proposed record on appeal, and (Plaintiff) is allowed _____ days thereafter within which to serve objections or a proposed alternative record on appeal.

This _____ day of _____ 19____.

s /_____
Judge Presiding

3. **Petition for Discretionary Review Under G.S. 7A-31**

To seek review of the opinion and judgment of the Court of Appeals where appellant contends case involves issues of public interest or jurisprudential significance. May also be filed as a separate paper in conjunction with a notice of appeal to the Supreme Court when the appellant considers that such appeal lies of right due to substantial constitutional questions under G.S. 7A-30, but desires to have the Court consider discretionary review should it determine that appeal does not lie of right in the particular case.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions the Supreme Court of North Carolina that the Court certify for discretionary review the judgment of the Court of Appeals (describing it) on the basis that (here set out the grounds from G.S. 7A-31 which provide the basis for the petition). In support of this petition, (Plaintiff) (Defendant) shows the following:

Facts

(Here state first the procedural history of the case through the trial division and the Court of Appeals.

Then set out factual background necessary for understanding the basis of the petition.)

Reasons Why Certification Should Issue

(Here set out factual and legal argument to justify certification of the case for full review. While some substantive argument will certainly be helpful, the focus of the argument in the petition should be to show how the opinion of the Court of Appeals conflicts with prior decisions of the Supreme Court or how the case is one significant to the jurisprudence of the State or one which offers significant public interest. If the Court is persuaded to take the case, then the appellant may deal thoroughly with the substantive issues in the new brief.)

Respectfully submitted this _____ day of _____ 19____.

s/_____
Attorney for (Plaintiff) (Defendant)
(Address and Telephone)

Attached to the petition shall be a certificate of service upon the opposing parties and a clear copy of the opinion of the Court of Appeals in the case.

4. Petition for Writ of Certiorari

To seek review 1) of the judgments or orders of trial tribunals in the appropriate appellate court when the right to prosecute an appeal has been lost or where no right to appeal exists; 2) by the Supreme Court of the decisions and orders of the Court of Appeals where no right to appeal or to petition for discretionary review exists or where such right has been lost by failure to take timely action.

(Caption)

****

TO THE HONORABLE (SUPREME COURT) (COURT OF APPEALS) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of certiorari pursuant to Rule 21 of the N.C. Rules of Appellate Procedure to review the (judgment) (order) (decree) of the (Honorable (name), Judge Presiding, (name) County (Superior) (District) Court) (North Carolina Court of Appeals), dated (date) (here describe the judgment, order, or decree appealed from); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding the basis of petition: *e.g.* failure to perfect appeal by reason of circumstances constituting excusable neglect; nonappealability of right of an interlocutory order, etc.) (If circumstances are that transcript could not be procured from reporter, statement should include estimate of date of availability, and supporting affidavit from the Court Reporter.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument to justify issuance of writ: *e.g.*, reasons why interlocutory order makes it impractical for petitioner to proceed further in trial court; meritorious basis of petitioner's proposed assignments of error; etc.)

Attachments

Attached to this petition for consideration by the Court are certified copies of the (judgment) (order) (decree) sought to be

reviewed, and (here list any other certified items from the trial court record and any affidavits attached as pertinent to consideration of the petition.)

Wherefore, petitioner respectfully prays that this Court issue its writ of certiorari to the (Superior Court of (name) County) (North Carolina Court of Appeals) to permit review of the (judgment) (order) (decree) above specified, upon errors (to be) assigned in the record on appeal constituted in accordance with the Rules of Appellate Procedure; and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the _____ day of _____, 19____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel)
(Certificate of service upon opposing parties)
(Attach a clear copy of the opinion, order, etc. which is the subject of the petition and other attachments as described in petition.)

5. **Petition for Writ of Supersedeas under Rule 23 and Motion for Temporary Stay**

A writ of supersedeas operates to stay the execution or enforcement of any judgment, order, or other determination of a trial court or of the Court of Appeals in civil cases under Appellate Rule 8 or to stay imprisonment or execution of a sentence of death in criminal cases (other portions of criminal sentences, *e.g.*, fines, are stayed automatically pending an appeal of right).

A motion for temporary stay is appropriate to show good cause for immediate stay of execution on an ex parte basis pending the Court's decision on the Petition for Supersedeas or the substantive petition in the case.

(Caption)

****

TO THE HONORABLE (COURT OF APPEALS) (SUPREME COURT) OF NORTH CAROLINA:

(Plaintiff) (Defendant), (Name of Party), respectfully petitions this Court to issue its writ of supersedeas to stay (execution) (enforcement) of the (judgment) (order) (decree) of the (Honorable

_____, Judge Presiding, (Superior) (District) Court of _____ County) (North Carolina Court of Appeals), dated _____, pending review by this Court of said (judgment) (order) (decree) which (here describe the judgment, order, or decree and its operation if not stayed); and in support of this petition shows the following:

Facts

(Here set out factual background necessary for understanding basis of petition and justifying its filing under Rule 23: *e.g.*, trial judge has vacated the entry upon finding security deposited under G.S. Section _____ inadequate; or that trial judge has refused to stay execution upon motion therefor by petitioner; or that circumstances make it impracticable to apply first to trial judge for stay, etc.; and showing that review of the trial court judgment is being sought by appeal or extraordinary writ.)

Reasons Why Writ Should Issue

(Here set out factual and legal argument for justice of issuing writ: *e.g.*, that security deemed inadequate by trial judge is adequate under the circumstances; that irreparable harm will result to petitioner if he is required to obey decree pending its review; that petitioner has meritorious basis for seeking review, etc.)

Attachments

Attached to this petition for consideration by the court are certified copies of the (judgment) (order) (decree) sought to be stayed and (here list any other certified items from the trial court record and any affidavits deemed necessary to consideration of the petition).

Wherefore, petitioner respectfully prays that this Court issue its writ of supersedeas to the ((Superior) (District) Court of ____ _____ County) (North Carolina Court of Appeals) staying (execution) (enforcement) of its (judgment) (order) (decree) above specified, pending issuance of the mandate to this Court following its review and determination of the (Appeal) (discretionary review) (review by extraordinary writ) (now pending) (the petition for which will be timely filed); and that the petitioner have such other relief as to the Court may seem proper.

Respectfully submitted, this the _____ day of _____, 19____.

s/_____
Attorney for Petitioner
(Address and Telephone)

(Verification by petitioner or counsel.)
(Certificate of Service upon opposing party.)

Rule 23(e) provides that in conjunction with such a petition for supersedeas, either as part of it or separately, the petitioner may move for a temporary stay of execution or enforcement pending the Court's ruling on the petition for supersedeas. The following form is illustrative of such a motion for temporary stay, either included in the main petition as part of it or filed separately.

Motion for Temporary Stay

(Plaintiff) (Defendant) respectfully applies to the Court for an order temporarily staying (execution) (enforcement) of the (judgment) (order) (decree) which is the subject of (this) (the accompanying) petition for writ of supersedeas, such order to be in effect until determination by this Court whether it shall issue its writ. In support of this Application, movant shows that (here set out legal and factual argument for the issuance of such a temporary stay order; *e.g.*, irreparable harm practically threatened if petitioner must obey decree of trial court during interval before decision by Court whether to issue writ of supersedeas).

Motion for Stay of Execution

In death cases, the Supreme Court uses an order for stay of execution of death sentence in lieu of the writ of supersedeas. Counsel should promptly apply for such a stay after the judgment of the Superior Court imposing the death sentence. The stay of execution order will provide that it remains in effect until dissolved. The following form illustrates the contents needed in such a motion.

(Caption)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Now comes the defendant, (name), who respectfully shows the Court:

1. That on (date of judgment), The Honorable _____, Judge Presiding, Superior Court of _____ County, sentenced the defendant to death, execution being set for (date of execution).

2. That pursuant to G.S. 15A-2000(d)(1), there was an automatic appeal of this matter to the Supreme Court of North Carolina, and that defendant's notice of appeal was given (describe the circumstances).

3. That the record on appeal in this case cannot be served and settled, the matter docketed, the briefs prepared, the arguments heard, and a decision rendered before the scheduled date for execution.

WHEREFORE, the defendant prays the Court to enter an Order staying the execution pending judgment and further orders of this Court.

Respectfully submitted, this the _____ day of _____, 19____.

s/_____
Attorney for Defendant
(Address and Telephone)

(Certificate of Service on
Attorney General, District Attorney,
and Warden of Central Prison)

APPENDIX E

CONTENT OF BRIEFS

Caption

Briefs should use the caption as shown in Appendix B. The Title of the Document should reflect the position of the filing party both at the trial level and on the appeal, *e.g.*, DEFENDANT-APPELLANT'S BRIEF, PLAINTIFF-APPELLEE'S BRIEF, or BRIEF FOR THE STATE. A brief filed in the Supreme Court in a case decided by the Court of Appeals is captioned a "New Brief" and the position of the filing party before the Supreme Court should be reflected, *e.g.*, DEFENDANT-APPELLEE'S NEW BRIEF (where the State has appealed from the Court of Appeals in a criminal matter).

The cover page should contain only the caption of the case. Succeeding pages should present the following items, in order.

Index of the Brief

Each brief should contain a topical index beginning at the top margin of the first page following the cover, in substantially the following form:

INDEX

TABLE OF CASES AND AUTHORITIES ii

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

ARGUMENT:

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* * * * *

Questions Presented

The inside caption is on "page 1" of the brief, followed by the questions presented. The phrasing of the questions presented

need not be identical with that set forth in the assignments of error in the Record; however, the brief may not raise additional questions or change the substance of the questions already presented in those documents. The appellee's brief need not restate the questions unless the appellee desires to present additional questions to the Court.

QUESTIONS PRESENTED

I. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION?

* * *

Statement of the Case

If the Questions Presented carry beyond page 1, the Statement of the Case should follow them, separated by the heading. If the Questions Presented do not carry over, the Statement of the Case should begin at the top of page 2 of the brief.

Set forth a concise chronology of the course of the proceedings in the trial court and the route of appeal, including pertinent dates. For example:

STATEMENT OF THE CASE

The defendant, John Q. Public, was convicted of first degree rape at the October 5, 1981, Criminal Session of the Superior Court of Bath County, the Honorable I. M. Wright presiding, and received the mandatory life sentence for the Class B felony. The defendant gave notice of appeal in open court to the Supreme Court of North Carolina at the time of the entry of judgment on October 8, 1981.

A motion to extend the time for serving and filing the record on appeal was allowed by the Supreme Court on January 22, 1982. The record was filed and docketed in the Supreme Court on April 5, 1982.

Statement of the Facts

The facts constitute the basis of the dispute or criminal charges and the procedural mechanics of the case if they are significant to the questions presented. The facts should be stated objectively and concisely and should be limited to those which are relevant to the issue or issues presented.

Do not include verbatim portions of the record or other matters of an evidentiary nature in the statement of the facts. Summaries and record or transcript citations should be used. No appendix should be compiled simply to support the statement of the facts.

The appellee's brief need contain no statement of the case or facts if there is no dispute. The appellee may state additional facts where deemed necessary, or, if there is a dispute of the facts, may restate the facts as they objectively appear from the appellee's viewpoint.

Argument

Each question will be set forth in upper case type as the party's contention, followed by the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages in the printed record on appeal or in the transcript at which they appear, and separate arguments pertaining to and supporting that contention, *e.g.*,

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

ASSIGNMENT OF ERROR NO. 2 (R p 45)

EXCEPTION NOS. 5 (R p 23), 6 (T p 366), and 7 (T pp 367-390)

Parties should feel free to summarize, quote from, or cite to the record or transcript during the presentation of argument. If the transcript option is selected under Appellate Rule 9(c), the Appendix to the Brief becomes a consideration, as described in Appellate Rule 28 and below.

Where statutory or regulatory materials are cited, the relevant portions should be quoted in the body of the argument.

Conclusion

State briefly and clearly the specific objective or relief sought in the appeal. It is not necessary to restate the party's contentions, since they are presented both in the index and as headings to the individual arguments.

Signature and Certificate of Service

Following the conclusion, the brief must be dated and signed, with the attorney's mailing address and telephone number, all indented to the third tab.

The Certificate of Service is then shown with centered, upper case heading, the certificate itself, describing the manner of service upon the opposing party, with the complete mailing address of the party or attorney served blocked on the first tab, followed by the date and the signature of the person certifying the service.

Appendix to the Brief under the Transcript Option

Appellate Rules 9(c) and 28 require additional steps to be taken in the brief to point the Court to appropriate excerpts of the transcript considered essential to the understanding of the arguments presented.

Counsel is encouraged to cite, narrate, and quote freely within the body of the brief. However, if because of length a verbatim quotation is not included in the body of the brief, that portion of the transcript and others like it shall be gathered into an appendix to the brief which is situated at the end of the brief, following all signatures and certificates. Counsel should *not* compile the entire transcript into an appendix to support issues involving a directed verdict, sufficiency of evidence, or the like.

The appendix should be prepared so as to be clear and readable, distinctly showing the transcript page or pages from which each passage is drawn. Counsel may reproduce transcript pages themselves, clearly indicating those portions to which attention is directed.

The Appendix should include a table of contents, showing the issue from the brief, followed by the pertinent contents of the appendix, the transcript or appendix page reference and a reference back to the page of the brief citing the appendix. For example:

CONTENTS OF APPENDIX

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS HIS INCULPATORY STATEMENT BECAUSE THAT STATEMENT WAS THE PRODUCT OF AN ILLEGAL DETENTION.

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* * *

The appendix will be printed with the brief to which it is appended; however, it will not be retyped, but run as is. Therefore, clarity of image is extremely important.

APPENDIX F

Fees and Costs

Fees and costs are provided by order of the Supreme Court and apply to proceedings in either appellate court. There is no fee for filing a motion in a cause; other fees are as follows, and should be submitted with the document to which they pertain, made payable to the Clerk of the appropriate appellate court:

Notice of Appeal, Petition for Discretionary Review, Petition for Writ of Certiorari or other extraordinary writ, Petition for Writ of Supersedeas—docketing fee of $10.00 for each document, *i.e.*, docketing fees for a notice of appeal and petition for discretionary review filed jointly would be $20.00.

Petitions to rehear require a docketing fee of $20.00. (Petitions to rehear are only entertained in civil cases.)

Certification fee of $10.00 (payable to Clerk, Court of Appeals) where review of judgment of Court of Appeals is sought in Supreme Court by notice of appeal or by petition.

An appeal bond of $200.00 is required in civil cases per Appellate Rule 6. The bond should be filed contemporaneously with the record in the Court of Appeals and with the notice of appeal in the Supreme Court. The Bond will not be required in cases brought by petition for discretionary review or certiorari unless and until the Court allows the petition.

Costs for printing documents are $4.00 per printed page where the document is retyped and printed; $1.50 per printed page where the Clerk determines that the document is in proper format and can be printed from the original. The Appendix to a brief under the Transcript option of Appellate Rules 9(c) and 28(b) and (c) will be reproduced as is, but billed at the rate of the printing of the brief.

The Clerk of the Court of Appeals requires that a deposit for estimated printing costs accompany the document at filing. The Clerk of the Supreme Court prefers to bill the party for the costs of printing after the fact.

Court costs on appeal total $9.00 and are imposed when a notice of appeal is withdrawn or dismissed and when the mandate is issued following the opinion in a case.

Adopted by the Court in conference this 7th day of December 1982. Rule 28(i) and the Appendixes shall become effective 1 January 1983. Rule 26(g) shall become effective for all documents filed on or after 1 March 1983. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

Martin, 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.

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UNFAIR COMPETITION
UNIFORM COMMERCIAL CODE
UTILITIES COMMISSION

WILLS
WITNESSES

ACCOUNTANTS

§ 1. Generally

An agreement between a partnership of accountants and a withdrawing partner providing for a division of fees obtained by the withdrawing partner from former clients of the partnership was supported by consideration, did not violate statutes prohibiting the disclosure of information furnished in connection with the preparation of a tax return, and did not violate provisions of the CPA Code of Ethics prohibiting the disclosure of confidential information. *Dixon, Odom & Co. v. Sledge*, 280.

ADMINISTRATIVE LAW

§ 4. Procedure, Hearings and Orders of Administrative Boards and Agencies

The evidence before the North Carolina State Hearing Aid Dealers and Fitters Board was sufficient to find that petitioner had violated G.S. § 93D-13(a)(6) by falsifying a document which stated petitioner's audiometer had been calibrated during 1978. *In re Stuart*, 715.

It was proper for a member of the North Carolina State Hearing Aid Dealers and Fitters Board to testify as to what he found in the petitioner's files. *Ibid.*

AGRICULTURE

§ 7. Breach of Lease or Contract

A provision in a lease of plaintiff's tobacco allotment to defendant as to permitted uses of any unused portion of the tobacco quota was unambiguous, and parol evidence was not admissible to explain such provision. *Lineberry v. Lineberry*, 204.

Parol evidence regarding an alleged oral promise by defendant to grow plaintiff's full tobacco allotment was inadmissible to vary the terms of the parties' written agreement. *Ibid.*

APPEAL AND ERROR

§ 6.1. Form of Decision as Affecting Appealability

An appeal from the denial of defendant's Rule 12(b) motion to dismiss for insufficient service and lack of jurisdiction over the person was interlocutory and not immediately appealable. *Sigman v. R. R. Tydings, Inc.*, 346.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

A temporary order entered pursuant to the provisions of the Domestic Violence Act was not immediately appealable. *Smart v. Smart*, 533.

An order of the trial judge which refused to allow the defendants to amend their answer was an interlocutory order and was not immediately appealable. *Buchanan v. Rose*, 351.

§ 24. Necessity for Objections, Exceptions, and Assignments of Error

Plaintiff's ex-wife could have prevented plaintiff from testifying about a private conversation under G.S. 8-56; however, defendant waived his privilege when he failed to object to the testimony. *Scott v. Kiker*, 458.

§ 26. Exceptions and Assignments of Error to Judgment or to Signing of Judgment

Although defendant failed to refer to an exception or assignment of error when arguing that the trial court erred in entering judgment for the plaintiff, the Court

APPEAL AND ERROR — Continued

could consider the argument because the defendant did except to the judgment. *Crump v. Coffey*, 553.

§ 41.1. Form of Transcript for Case on Appeal

Appeal is dismissed for failure of appellants to comply with the Rules of Appellate Procedure. *Duke Power Co. v. Flinchem*, 349.

Where defendant chose to file a stenographic transcript of the trial proceedings in lieu of a narration of the evidence but failed to follow the rules concerning that alternative, defendant's appeal was subject to dismissal. *Williams v. East Coast Sales*, 700.

Where defendant failed to follow either Rule 9(c)(1), Rule 9(b)(3) or Rule 28(b)(4) when he filed a record on appeal which contained a verbatim reproduction of the trial transcript, and where one of the defendant's assignments of error did not appear to be based on any exceptions as provided by Rules 10(b)(1) and 10(a), his appeal was subject to dismissal. *S. v. Briley*, 335.

Because of defendant's failure to observe the requirements of G.S. 1A-1, Rule 9(c)(1) and G.S. 1A-1, Rule 28(b)(4) which deal with filing a stenographic transcript of the trial proceedings in lieu of a narration of the evidence, defendant's appeal was subject to dismissal. *S. v. Edmonds*, 359.

§ 45. Form and Contents of Brief

Defendant's appeal is subject to dismissal where defendant filed the stenographic transcript of the evidence at trial but failed to reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions raised. *S. v. Pearson*, 87, and *S. v. Nickerson*, 236.

§ 45.1. Effect of Failure to Discuss Exceptions and Assignments of Error in Brief

Where defendant noted in the record several exceptions to the admission of evidence, and made these exceptions on the basis of an assignment of error in the record, but did not bring forward and argue this assignment of error in his brief, it was deemed abandoned. *Crump v. Coffey*, 553.

ARREST AND BAIL

§ 6. Resisting Arrest

Testimony concerning defendant's abusive behavior and language while he was handcuffed was relevant to his resisting arrest charge. *S. v. Baldwin*, 430.

§ 6.1. Resisting Arrest; Validity and Sufficiency of Warrant

A citation charging defendant with resisting arrest was fatally defective since the citation failed to indicate the specific official duty the officer was discharging or attempting to discharge when arresting defendant. *S. v. Wells*, 682.

It was not error to instruct the jury that defendant threatened the officers when he was charged with resisting arrest. *S. v. Baldwin*, 430.

§ 6.2. Resisting Arrest; Jury Instructions and Sufficiency of Evidence

An instruction on resisting arrest was proper where the judge gave the jury the duty of determining if the evidence proved all the elements of the crime. *S. v. Baldwin*, 430.

The trial judge properly failed to submit self-defense and the right to resist an illegal arrest where defendant denied ever striking the police officer and therefore raised no issue of self-defense. *S. v. Wells*, 682.

ARSON

§ 4.1. Cases Where Evidence Was Sufficient

Evidence that defendant set two fires in his jail cell of strips torn from the mattress was sufficient to support his conviction of felonious burning of personal property. *S. v. Jordan*, 527.

ASSAULT AND BATTERY

§ 3. Actions for Civil Assault

The trial court in a civil assault case properly excluded testimony by a character witness that he had not ever known defendant to be involved in any type of assault. *Nash v. Mayfield*, 521.

§ 3.1. Actions for Civil Assault; Trial

The evidence in a civil assault case did not require an instruction that the jury could consider any provocation by plaintiff in mitigation of damages or an instruction on voluntarily engaging in a mutual combat. *Nash v. Mayfield*, 521.

§ 14.1. Assault With a Deadly Weapon; Sufficiency of Evidence

In a prosecution for assault with a deadly weapon, the evidence was sufficient to be presented to the jury. *S. v. McMillian*, 396.

In a prosecution for assault with a deadly weapon, the evidence was sufficient to withstand defendant's motion to dismiss where defendant swung a knife at a detective and the knife missed the detective's stomach by approximately a foot. *S. v. Musselwhite*, 477.

§ 14.5. Assault With a Deadly Weapon With Intent to Kill, Inflicting Serious Bodily Injury; Evidence

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, the evidence was sufficient on both the elements of "intent to kill" and "inflicting serious injury." *S. v. Musselwhite*, 477.

§ 15.2. Assault With a Deadly Weapon With Intent to Kill, Inflicting Serious Bodily Injury; Instructions

In a prosecution for assault with a deadly weapon with intent to kill, inflicting serious injury, the trial court properly failed to instruct on the lesser offense of assault with a deadly weapon. *S. v. Musselwhite*, 477.

The trial judge committed prejudicial error by attempting to paraphrase a portion of defendant's indictment in pre-trial remarks to the jury by stating that defendant was charged with the "North Carolina equivalent of attempted murder," since defendant was charged with the statutory offense of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Hall*, 567.

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death, the trial judge committed prejudicial error in his charge to the jury by summarizing the evidence as showing that defendant told the victim "that he was going home and get his gun and kill him" since there was no evidence that defendant had said "and kill him" at that point in time. *Ibid.*

§ 15.3. Assault With a Deadly Weapon With Intent to Kill or Inflicting Serious Bodily Injury; Definition of "Intent to Kill" and "Serious Injury" in Instructions

The trial court erred in instructing the jury that if it believed the evidence in the case which tended to show that the victim was twice shot in the upper part of

ASSAULT AND BATTERY — Continued

his body with a .32 caliber pistol, it will have found that a serious injury was inflicted, but such error was not prejudicial. *S. v. Daniels*, 63.

§ 15.6. Defense of Self, Property, or Others: Form of Instruction

The trial court in a prosecution for felonious assault did not err in including the issue of whether defendant was the aggressor in the charge on self-defense. *S. v. Daniels*, 63.

ATTORNEYS AT LAW

§ 4. Testimony by Attorney

The trial court did not err in denying defendant's request to allow one of his attorneys to withdraw and testify as to a prior inconsistent statement of a State's witness in order to contradict testimony by the witness on cross-examination relating to a collateral matter. *S. v. Howell*, 184.

§ 7.5. Allowance of Fees as Part of Costs

The trial court properly denied defendant's oral motion in open court that the trial court conduct an evidentiary hearing to determine whether the defendant's conduct amounted to an unwarranted refusal to pay plaintiff's insurance claim since plaintiff's supporting papers demonstrated his entitlement to attorney's fees, and since defendant failed to file any affidavits pertaining to additional factual matters other than those addressed in his pleadings. *Hillman v. United States Liability Ins. Co.*, 145.

AUTOMOBILES AND OTHER VEHICLES

§ 3. Offense of Driving Without Valid License

Although a previous offense may be indirectly involved, if it in fact contributed to a conviction of driving while license permanently revoked, it is not an element of a violation of the statutory crime proscribed by G.S. 20-28(b); the permanent revocation is an element of the offense. *S. v. Wells*, 682.

§ 3.6. Punishment for Driving Without Valid License

A prison sentence of "a maximum term of eighteen (18) months and a minimum term of twelve (12) months" did not exceed the statutory maximum for the crime of driving while license permanently revoked. *S. v. Wells*, 682.

§ 63.2. Striking Children; Children on or About Roads

In an action to recover for injuries to the seven-year-old plaintiff when he was struck by defendant's automobile, the evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to keep a proper lookout so as to have avoided striking plaintiff by stopping or taking evasive action. *Koonce v. May*, 633.

§ 87.5. Intervening Negligence of Other Drivers

In an action to recover for injuries to a nine-year-old student who was struck by a car while crossing the highway to return to defendants' disabled bus after accompanying another student whom defendant driver had asked to telephone the corporate defendant for assistance, the trial court erred in entering summary judgment for defendants on the ground of intervening negligence based on plaintiff's stipulation that the owner of the car which struck the minor plaintiff had paid her $20,000.00 for her injuries. *Sharpe v. Quality Education, Inc.*, 304.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 90.5. Failure to Instruct on Excessive Speed

Where the issue of speeding was tried by the implied consent of the parties, the trial court erred in failing to instruct the jury that speeding in excess of 55 miles per hour is a violation of G.S. 20-141(b) and is negligence per se. *Harris v. Bridges*, 195.

§ 92.3. Liability of Driver to Passenger; Circumstances of Accident; Evidence of Negligence Sufficient

A material issue of fact as to the negligence of defendants was presented in an action to recover for injuries to a nine-year-old student who was struck by a car while crossing the highway to return to defendants' disabled bus after accompanying another student whom defendant driver had asked to telephone the corporate defendant for assistance. *Sharpe v. Quality Education, Inc.*, 304.

§ 119.2. Insufficient Evidence of Reckless Driving

The trial judge erred in not dismissing a reckless driving charge against defendant at the close of the evidence. *S. v. Wells*, 682.

BANKS AND BANKING

§ 4. Joint Accounts

A signature card signed by plaintiff and by the intestate created a joint account with right of survivorship in a money market savings certificate and controlled disposition of the proceeds of a renewal certificate issued solely in the name of the intestate. *Threatte v. Threatte*, 292.

BASTARDS

§ 10. Civil Action by Illegitimate Child to Compel Father to Furnish Support

The minor plaintiff in an action to establish paternity was estopped by a judgment entered in a prior action instituted by the plaintiff's mother finding that defendant was not the father of the plaintiff in this action. *Settle v. Beasley*, 735.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The State is not required to disclose the names of its prospective witnesses or their expected testimony. *S. v. Ginn*, 363.

Defendant was not prejudiced by failure of the State to give defense counsel advance written notice of a plea arrangement with an accomplice who testified for the State. *Ibid.*

BROKERS AND FACTORS

§ 6. Right to Commissions Generally

Plaintiff real estate brokers were not entitled to a commission pursuant to their nonexclusive listing agreement where the court found that plaintiffs were not the procuring cause of the sale. *Beckham v. Klein*, 52.

A real estate broker who has not procured a sale under an express agreement is not entitled to compensation for services rendered to the seller under principles of quantum meruit. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.3. Aiding and Abetting, Attempts, and Offenses Related to Burglary

The evidence was insufficient to submit to the jury on the charges of attempted burglary and preparation to commit burglary. *S. v. McAlister*, 58.

§ 5.8. Breaking and Entering and Larceny of Residential Premises

A jury question was presented as to whether breaking and entering victims had consented to their daughter's entry into their house in their absence. *S. v. Thompson*, 425.

The State's evidence was sufficient to support defendant's conviction of breaking and entering and larceny under the principle of concerted action where defendant drove the two perpetrators to and from the crime scene. *S. v. Deyton*, 326.

§ 7. Instructions on Lesser Included Offenses

The trial judge was correct not to charge the jury on trespass or forcible trespass because they are not lesser included offenses of attempted first-degree burglary. *S. v. McAlister*, 58.

§ 8. Sentence and Punishment

An eight year sentence was properly imposed for an offense of felonious breaking and entering committed prior to the effective date of the Fair Sentencing Act. *S. v. Massey*, 704.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 3. Cancellation for Mental Incapacity

Plaintiff's evidence was sufficient to support rescission of a deed from plaintiff's ward on the ground of mental incapacity. *Ashley v. Delp*, 608.

§ 9.1. Competency of Evidence

An unexecuted trust agreement was relevant to show defendant's state of mind concerning the mental capacity of plaintiff's ward on the date the ward executed a deed to defendant. *Ashley v. Delp*, 608.

§ 10.2. Duress, Undue Influence, and Mental Incapacity; Sufficiency of Evidence

A note and deed of trust were not procured by fraud, duress or undue influence where plaintiffs executed them in consideration of defendant's agreement not to press legal claims for the male plaintiff's alleged mismanagement of defendant's stock account. *Howell v. Butler*, 72.

CONSTITUTIONAL LAW

§ 18. Right of Free Press, Speech, and Assemblage; Limitations

The statute making it unlawful to telephone another repeatedly "for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number" is not unconstitutionally overbroad or vague and does not prohibit constitutionally protected speech. *S. v. Camp*, 38.

§ 24.6. Service of Process and Jurisdiction

Defendant foreign corporation was engaged in substantial activity within this State so as to give the courts of this State personal jurisdiction over it under G.S. 1-75.4(1)(d) in an action to recover for goods sold to defendant, and defendant had sufficient minimum contacts with this State so that the exercise of jurisdiction over it did not violate due process. *Fiber Industries v. Coronet Industries*, 677.

CONSTITUTIONAL LAW — Continued

§ 26.1. Foreign Judgments Obtained without Jurisdiction

Plaintiff's 1971 judgment for alimony arrearages was not entitled to full faith and credit where her "Exhibit of Service" was an envelope which indicated that two notices were left at the address on the envelope and that the letter was returned to the sender, marked "unclaimed." *Boyles v. Boyles*, 389.

§ 28. Due Process and Equal Protection Generally in Criminal Proceedings

There was no merit to defendant's contention that he was denied due process on the ground that the State used the perjured testimony of an accomplice. *S. v. Ginn*, 363.

§ 30. Discovery; Access to Evidence and Other Fruits of Investigation

The trial court did not err in the denial of defendant's motion that the district attorney be required to disclose whether a prosecuting witness had been granted immunity or concessions by prosecutors in other counties. *S. v. Howell*, 184.

Where the record on appeal contained no indication that defendant complied with the discovery procedures outlined in Article 48 of N.C. Gen. Stat. Chapter 15A, the State was under no duty to tender the names of two officers to defendant as potential witnesses. *S. v. McMillian*, 396.

Failure of defense counsel to receive notice of the return of a true bill of indictment did not prejudice defendant's discovery rights, and the arraignment of defendant was unrelated to the exercise of his discovery rights. *S. v. Ginn*, 363.

The State is not required to disclose the names of its prospective witnesses or their expected testimony. *Ibid.*

Defendant was not prejudiced by failure of the State to give defense counsel advance written notice of a plea arrangement with an accomplice who testified for the State. *Ibid.*

§ 31. Affording the Accused the Basic Essentials for Defense

The trial court properly denied an indigent defendant's request for the appointment of a statistician at State expense. *S. v. Brown*, 411.

§ 48. Effective Assistance of Counsel

Defendant was not denied the effective assistance of counsel because counsel failed to conduct pretrial discovery. *S. v. Ginn*, 363.

§ 51. Delays In and Between Arrest, Issuing Warrant, Securing Indictment, and Arraignment

Defendant's right to a speedy trial was not violated by pre-indictment delay where the indictment was delayed so that an undercover narcotics investigation could be completed. *S. v. Holmes*, 79.

Where the State took a voluntary dismissal of charges against defendant in one county and several months later indicted defendant in another county on similar charges, the State failed to comply with the Speedy Trial Act since the crimes charged in both counties were part of the same scheme or plan. *S. v. Freeman*, 84.

CONTRACTS

§ 6.1. Contracts by Unlicensed Contractors or Businesses

The unpleaded affirmative defense that plaintiff was not licensed as a general contractor was deemed to be part of the pleadings where such defense was raised

CONTRACTS — Continued

in a hearing on a motion for summary judgment. *Barrett, Robert & Woods v. Armi*, 134.

Plaintiff general contractor substantially complied with the licensing requirements of G.S. 87-10 so as to entitle plaintiff to recover under a contract to construct a house for defendant at a price exceeding $30,000. *Ibid.*

The trial court did not err in directing a verdict for plaintiff against defendant's counterclaim for an alleged breach of contract where the court found defendant was not a licensed general contractor under G.S. 87-1. *Phillips v. Parton*, 179.

§ 7.2. Contracts Restricting Business Competition Between Partners

An agreement between a partnership of accountants and a withdrawing partner which included a provision for the division of fees which the withdrawing partner obtained from former clients of the partnership did not constitute a covenant not to compete and thus was not governed by the rules applicable to such covenants. *Dixon, Odom & Co. v. Sledge*, 280.

§ 14.1. Contracts for Benefit of Third Person Where Third Person Can Recover

Plaintiff was a third party beneficiary of a contract for the sale of real property which provided that the seller would deed the property to plaintiff in case of the death of the buyer before execution of the deed. *Marosites v. Proctor*, 353.

§ 18.1. Enforceability of Modification, Waiver or Abandonment

In an action to recover tuition paid by plaintiff for the enrollment and teaching of plaintiff's child in defendant's school, an enforceable modification of the provision of the contract prohibiting a tuition refund was created when defendant's headmistress promised to refund to plaintiff the full tuition payment. *Brenner v. School House, Ltd.*, 68.

§ 21.2. Breach of Building or Construction Contracts

Plaintiff general contractor substantially complied with a provision of a cost plus construction contract requiring it to provide defendant with regular monthly statements detailing expenditures to date. *Barrett, Robert & Woods v. Armi*, 134.

Five months of unusually severe weather, defendant's numerous change orders and defendant's detailed involvement in a construction project constituted "unforeseen circumstances beyond the builder's control" within the purview of a contract provision absolving the builder from liability for failure to complete construction within the 180-day period required by the contract. *Ibid.*

In an action to recover under a cost plus contract for construction of a house, the court did not err in failing to allow defendant an offset for certain incomplete items on the ground that they were normal "callback" items which plaintiff was not required to perform because defendant had breached the contract by refusing to pay plaintiff for its work. *Ibid.*

§ 29.5. Measure of Damages; Interest

The trial court properly allowed interest on plaintiff's recovery against defendant insurer for computer equipment destroyed in a fire from the date defendant breached its obligation to pay plaintiff's claim within 60 days after the filing of a proof of loss. *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 26.

COSTS

§ 4. Items of Costs and Amount of Allowances

Deposition expenses may be taxed as part of the costs in the discretion of the court. *Dixon, Odom & Co. v. Sledge*, 280.

COUNTIES

§ 5. County Zoning; Power to Zone

The trial court had statutory authority to grant injunctive relief and an order of abatement for violations of a county zoning ordinance although the ordinance itself did not provide specifically for such relief. *New Hanover County v. Pleasant*, 644.

COURTS

§ 21.5. Conflict of Laws Between States; Tort Actions

The law of Virginia was to be applied with regard to whether a third party could defeat a negligent employer's subrogation rights when the injured party sued the third party at common law after recovering worker's compensation benefits from his employer in Virginia. *Leonard v. Johns-Manville Sales Corp.*, 454.

CRIME AGAINST NATURE

§ 4. Instructions; Lesser Included Offenses

An indictment which stated that defendant "feloniously commit[ted] a sexual offense . . . by forcing the victim to perform fellatio, in violation of G.S. 14-27.4," supported submission of crime against nature as a lesser included offense of second-degree sexual offense to the jury. *S. v. Warren*, 264.

In a prosecution for a first degree sexual offense, the trial court did not err in submitting as a lesser included offense the charge of crime against nature. *S. v. Hill*, 216.

CRIMINAL LAW

§ 5.2. Mental Capacity as Affected by Unconsciousness

The trial court in an armed robbery prosecution erred in failing to instruct the jury on the defense of unconsciousness where defendant's evidence tended to show that she had no recollection of the events of the day in question because of her consumption of drugs and alcohol. *S. v. Smith*, 227.

§ 9.3. Determination of Guilt as Principal in Second Degree; Competency, Relevancy and Sufficiency of Evidence

The State's evidence was sufficient to support defendant's conviction of breaking and entering and larceny under the principle of concerted action where defendant drove the two perpetrators to and from the crime scene. *S. v. Deyton*, 326.

§ 15.1. Prejudice, Pretrial Publicity or Inability to Receive Fair Trial as Ground for Change of Venue

The trial court did not err in denying defendant's motion for a change of venue or a special venire under G.S. 15A-957. *S. v. Wilhelm*, 298.

Trial court did not abuse its discretion in the denial of defendant's motion for a change of venue on the ground of pretrial publicity. *S. v. Richardson*, 558.

CRIMINAL LAW — Continued

§ 22. Arraignment and Pleas Generally

Failure of the record to show a formal arraignment prior to trial does not entitle defendant to a new trial. *S. v. Ginn*, 363.

The trial court did not err in arraigning defendant when his case had not appeared on the arraignment calendar for that week. *S. v. Richardson*, 558.

§ 26.5. Plea of Former Jeopardy; Same Acts or Transaction Violating Different Statutes

The entry of separate judgments against defendant for possession with intent to sell and sale of marijuana was proper. *S. v. Stoner*, 656.

§ 33.2. Evidence as to Motive, Knowledge, or Intent

Cross-examination of defendant about threats made to her by her marijuana supplier after marijuana was allegedly replaced by one robbery victim with moldy marijuana was proper to rebut defendant's testimony that she did not intend to participate in the robbery and to show defendant's motive for the robbery. *S. v. Horne*, 576.

§ 34. Evidence of Defendant's Guilt of Other Offenses; Inadmissibility

Where there was not a scintilla of evidence linking defendant to a prior break-in in the victim's home, admission of evidence concerning the prior break-in was prejudicial error entitling defendant to a new trial. *S. v. Parker*, 600.

§ 34.4. Admissibility of Evidence of Other Offenses

In a prosecution for assault with a deadly weapon, it was not error for a witness to relate incidents in which the defendant acted abusively toward her. *S. v. McMillian*, 396.

§ 34.7. Admissibility of Evidence of Other Offenses to Show Animus, Motive, Malice, Premeditation or Deliberation

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in allowing the prosecuting witness to testify that defendant had threatened her with a knife and struck her with his hand on prior occasions. *S. v. Musselwhite*, 477.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Modus Operandi or Common Plan, Scheme or Design

In a prosecution of defendant for attempted rape of his 10-year-old stepdaughter, testimony by the victim's two older sisters concerning sexual abuse of them by defendant was competent to establish a common plan or scheme embracing the crime charged. *S. v. Goforth*, 504.

§ 42.1. Articles Used in Commission of Crime or at Scene

A proper foundation was laid for the introduction of a towel and gun. *S. v. McMillian*, 396.

§ 42.4. Identification of Object and Connection with Crime; Weapons

The trial court erred in a prosecution for armed robbery by allowing the assistant district attorney to cross-examine defendant concerning a sawed-off shotgun found in the car in which defendant was driving in addition to the pistol identified by the robbery victim. *S. v. Patterson*, 650.

CRIMINAL LAW — Continued

§ 43.2. Photographs; Authentication and Verification

Authenticated photographs were properly admitted into evidence without a showing of a complete chain of custody. *S. v. Kistle*, 724.

Where photographs were introduced as evidence of the crime itself and not as illustrative evidence, there was no need to have a witness testify that they fairly and accurately represented what they purported to portray. *Ibid.*

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Photographic Identifications

Even though a pretrial photographic showing was unnecessarily suggestive, the in-court identification was of independent origin and still admissible. *S. v. Baldwin*, 430.

§ 73.1. Admission of Hearsay Statement as Harmless or Prejudicial Error

The admission of certain hearsay statements was harmless error where either similar evidence was later admitted without objection or the jury was told to consider the evidence for corroborative purposes only. *S. v. McMillian*, 396.

Without deciding whether the rule expressed in G.S. 15A-1446(d)(10), concerning general objections, may be stretched to cover a specified line of questioning for 47 pages of testimony by the State's principal witness, the Court examined defendant's exceptions and found either that they were not covered by the general objection or that they resulted in no prejudicial error. *S. v. Jackson*, 615.

§ 73.4. Statements as Part of Res Gestae

Statements made by one of defendant's companions during a robbery were admissible as part of the res gestae and were relevant to establish the intent of defendant and her companions. *S. v. Horne*, 576.

§ 75.9. Volunteered and Spontaneous Statements

The trial court properly denied defendant's motion to suppress certain statements made to a police officer. *S. v. Parker*, 600.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights; Insanity or Retardation

In a prosecution for murder where defendant was 57 years old, mildly to moderately mentally retarded, suffering from permanent brain damage, diabetes, high blood pressure, and heart disease, the trial court erred in denying defendant's motion to suppress incriminating custodial statements made by defendant on the night of her arrest. *S. v. Williams*, 15.

§ 75.15. Defendant's Mental Capacity to Confess or Waive Rights; Intoxication

The evidence did not show that defendant was so intoxicated as to render his in-custody statements inadmissible. *S. v. Morris*, 157.

§ 80. Books, Records, and Other Writings

In a prosecution for driving while his operator's license was revoked in violation of G.S. 20-28, the district attorney erred in showing his I.D. card to a defense witness and using it to illustrate or clarify testimony without admitting the I.D. into evidence. *S. v. Burbank*, 543.

§ 80.1. Books, Records, and Other Writings; Foundation and Authentication

In a prosecution for nonsupport of an illegitimate child, the trial court erred in allowing the State to introduce into evidence a motel guest registration card bear-

CRIMINAL LAW — Continued

ing a signature purportedly defendant's since a proper foundation was not laid. *S. v. Smith*, 732.

§ 81. Best and Secondary Evidence

The "best evidence rule" did not apply to the admission of photostatic copies of the money allegedly taken in a robbery. *S. v. Daniels*, 442.

§ 86.8. Credibility of State's Witnesses

The court did not err in refusing to permit defense counsel to ask a defense witness questions which attempted to contradict a State's witness on collateral matters. *S. v. Pearson*, 87.

§ 87.1. Leading Questions

The trial court did not err in allowing leading questions which related to the type of car defendant was driving when he came to the prosecuting witness's apartment. *S. v. McMillian*, 396.

§ 87.4. Redirect Examination

The trial court did not abuse its discretion in refusing to permit defendant to expand the scope of redirect examination to include matters not brought out on either direct or cross-examination. *S. v. Pearson*, 87.

§ 88.2. Questions and Conduct Impermissible on Cross-examination

The trial court did not err in refusing to permit defendant to play before the jury for impeachment purposes a tape recording of the testimony of two witnesses at the preliminary hearing. *S. v. Stuckey*, 355.

§ 88.3. Cross-examination as to Collateral Matters

The trial court did not err in denying defendant's request to allow one of his attorneys to withdraw and testify as to a prior inconsistent statement of a State's witness in order to contradict testimony by the witness on cross-examination relating to a collateral matter. *S. v. Howell*, 184.

§ 88.4. Cross-examination of Defendant

The trial court did not err in allowing the State to question defendant on cross-examination about a stocking cap and paper bag found in his car and to ask him if he had been in the area of a First Citizens Bank prior to his arrest. *S. v. Rouse*, 500.

§ 89.3. Prior Statements of Witness: Consistent Statements

The trial court properly permitted an officer to testify as to prior consistent statements made by two State's witnesses. *S. v. Daniels*, 63.

§ 89.6. Impeachment

Testimony by defendant in a narcotics case that he was framed by an SBI agent because of his alleged unwillingness to cooperate in a murder investigation should have been admitted to allow the jury to determine the credibility of the SBI agent. *S. v. Stoner*, 656.

§ 89.8. Promise or Hope of Payment, Leniency or Other Reward

Defendant failed to show prejudice in the State's failure to give written notice of a plea concession to a witness in exchange for his testimony against defendant. *S. v. Daniels*, 442.

CRIMINAL LAW — Continued

The trial court did not err in the denial of defendant's motion that the district attorney be required to disclose whether a prosecuting witness had been granted immunity or concessions by prosecutors in other counties. *S. v. Howell*, 184.

§ 89.10. Witness' Prior Degrading and Criminal Conduct and Convictions

The trial court did not err, under existing law, in denying defendant's motion to require disclosure to the jury of the fact that a State's witness was untruthful about his prior criminal record. *S. v. Daniels*, 442.

§ 91. Nature and Time of Trial; Speedy Trial

Once a prosecutor entered a dismissal with leave for nonappearance of the defendant pursuant to G.S. 15A-932, G.S. 15A-701(b)(11) controlled and the speedy trial clock did not resume running against the State until the proceedings were reinstituted against the defendant. *S. v. Reekes*, 672.

The 42-day period between a commitment order and the transportation of defendant to a hospital for a mental examination was properly excluded from the statutory speedy trial period. *S. v. Brown*, 411.

The trial court did not abuse its discretion in ordering the dismissal of a robbery charge without prejudice for the State's failure to comply with the Speedy Trial Act although the court failed to make findings as to the factors set forth in G.S. 15A-703(a). *S. v. Washington*, 490.

§ 91.6. Continuance on Ground that Certain Evidence Has Not Been Provided by the State

The trial court erred in not allowing defendants' motion for a continuance prior to their third trial on charges of breaking and entering where they were not provided with a transcript of the second trial until shortly before the third trial began. *S. v. Jackson*, 615.

§ 92.1. Consolidation Held Proper; Same Offense

Joinder of defendant's case with another was proper under G.S. 15A-926(b)(2) b.1 and 3 in that the offenses charged were part of a common plan or scheme and were so closely connected in time, place, and occasion that it was difficult to separate proof of one charge from another. *S. v. Thobourne*, 584.

§ 96. Withdrawal of Evidence

Any prejudicial effect of a witness's remarks during cross-examination by the district attorney was removed by the trial judge's curative instructions. *S. v. Howell*, 184.

§ 98. Presence and Conduct of Defendant and Witnesses

Defendant did not waive his right to be present for selection of the jury where his absence was caused by misinformation he received from his attorney and from the prosecutor's office as to when his case was to be called. *S. v. Shackleford*, 357.

§ 99.6. Questions, Remarks, and Other Conduct by Court in Connection with Examination of Witnesses

The trial judge did not express an opinion as to the credibility of the evidence after several questions asked on cross-examination of a witness. *S. v. Wilhelm*, 298.

§ 99.9. Examination of Witnesses by Court; Particular Questions Held Proper or Not Prejudicial

The trial judge did not express an opinion in asking a State's witness questions relating to defendant's whereabouts before and on the date of the crimes charged. *S. v. Brown*, 411.

CRIMINAL LAW — Continued

§ 101. Conduct or Misconduct Affecting Jurors

The trial court did not err in failing to give the jury the complete instructions required by G.S. 15A-1236 prior to each recess. *S. v. Richardson*, 558.

§ 101.1. Statements or Misconduct of Prospective Jurors

There is no abuse of discretion in the denial of defendant's motion for a mistrial after a prospective juror stated before the entire panel that a codefendant, tried jointly with defendant, "used to go with [her] daughter and also . . . took [her] car at one time." *S. v. Daniels*, 442.

§ 101.2. Exposure of Jurors to Publicity or to Evidence Not Formally Introduced

Defendant's motion for appropriate relief was properly denied where the motion was accompanied by affidavits of four of the jurors which stated that during deliberation they used information related to them by a juror concerning the degree of lighting which he observed on a visit to the scene of the crime. *S. v. Hawkins*, 190.

§ 102.4. Conduct of Prosecutor During Trial

The trial court did not err in denying a mistrial after the prosecutor spilled some marijuana on the witness stand and said, "A little bit of marijuana won't hurt anything, will it?" *S. v. Pearson*, 87.

§ 111.1. Particular Miscellaneous Instructions

The trial judge committed prejudicial error by attempting to paraphrase a portion of defendant's indictment in pre-trial remarks to the jury by stating that defendant was charged with the "North Carolina equivalent of attempted murder," since defendant was charged with the statutory offense of assault with a deadly weapon with intent to kill inflicting serious injury. *S. v. Hall*, 567.

§ 112. Instructions on Burden of Proof and Presumptions

The trial judge's failure to instruct the jury on the presumption of innocence was not prejudicial error. *S. v. Rouse*, 500.

§ 112.1. Instructions on Reasonable Doubt

Defendant was not prejudiced by the trial court's instruction on reasonable doubt that "that does mean reasonable doubt." *S. v. Joseph and S. v. Whitt*, 436.

§ 113.1. Recapitulation or Summary of Evidence

Trial court erred in summarizing the evidence presented by the State but failing to make any reference to evidence brought out on cross-examination which tended to exculpate the defendant or to evidence of the State which tended to raise inferences favorable to the defendant. *S. v. Pryor*, 1.

§ 113.8. Error in Charge Concerning Summary of Evidence

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious bodily injury not resulting in death, the trial judge committed prejudicial error in his charge to the jury by summarizing the evidence as showing that defendant told the victim "that he was going home and get his gun and kill him" since there was no evidence that defendant had said "and kill him" at that point in time. *S. v. Hall*, 567.

§ 114. Expression in Charge of Opinion by Court on the Evidence

Neither former G.S. 1-180 nor its successor, G.S. 15A-1232, has ever been construed to impose a duty on the trial court to tell the jury that it has no opinion in the case. *S. v. Burbank*, 543.

CRIMINAL LAW — Continued

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

The trial judge did not express an opinion by instructing the jury that there was evidence "which tends to show" that defendant confessed that he committed the crime charged. *S. v. Morris*, 157.

There was no error in the trial judge's summary of the evidence where he did not label any of his summary as defendant's evidence. *S. v. Baldwin*, 430.

§ 116.1. Charge on Failure of Defendant to Testify

The trial court's instruction that the jury should consider "any other contentions that occur to you that arise from the evidence or lack of evidence" did not imply that the jury should consider defendant's failure to testify as evidence. *S. v. Joseph and S. v. Whitt*, 436.

§ 117. Charge on Character Evidence and Credibility of Witnesses

In a rape case in which defendant testified and in which the evidence was conflicting, the trial court erred in failing to instruct the jury that defendant's character evidence could be considered as bearing on his credibility. *S. v. Williams*, 549.

§ 117.2. Charge on Interested Witnesses

The trial court erred in its instruction on the duty of the jury to scrutinize the testimony of accomplices by failing to further instruct that if the jury believed such testimony, it should be given the same weight as any other credible evidence. *S. v. Pryor*, 1.

§ 117.4. Charge on Credibility of State's Witnesses, Accomplices

An instruction with regard to the testimony of an accomplice in the robbery with which defendant was charged was essentially in accord with the instructions approved in other cases. *S. v. Daniels*, 442.

§ 117.6. Charge on Credibility of Defense Witnesses; Relatives and Other Interested Persons

In a prosecution for armed robbery, the trial judge did not err in failing to instruct the jury with respect to the permissible inferences that could be drawn from defendant's brother's refusal to answer certain questions by using the privilege against self-incrimination. *S. v. Patterson*, 650.

§ 119. Requests for Instructions

The jury instruction conference required by Rule 21 of the General Rules of Practice for the Superior and District Courts need not be on the record. *S. v. Thompson*, 425.

§ 138. Severity of Sentence and Determination Thereof

The trial court did not abuse its discretion in refusing to grant a continuance of defendant's resentencing hearing to permit defendant to obtain the testimony of the warden of Central Prison. *In re Gallimore*, 338.

The trial court acted properly in increasing defendant's sentence during the term after discovering that the crime for which defendant was convicted was committed prior to the change in a parole law which the court had erroneously taken into consideration when imposing the original sentence. *S. v. Brown*, 411.

Although the trial court erred in basing the two aggravating factors it found on the same evidence that defendant abused a position of trust by attempting to rape his stepdaughter, such error was not prejudicial, and the trial court properly

CRIMINAL LAW – Continued

imposed a sentence exceeding the presumptive term for attempted first degree rape. *S. v. Goforth*, 504.

In imposing a sentence for attempting to burn a dwelling, the trial court improperly relied upon the same evidence to establish an element of the crime and an aggravating factor, and the court erred in finding as an aggravating factor that the owners were not at home when the crime was committed since that was a mitigating factor. *S. v. Jones*, 472.

Where the court imposed the presumptive sentence, it was not required to make any findings regarding aggravating and mitigating factors. *S. v. Horne*, 576.

The trial court did not err in finding that the factor in aggravation that defendant had a prior record of convictions outweighed the factor in mitigation that defendant had aided in the apprehension of other individuals. *S. v. Massey*, 704.

In a prosecution for possession with intent to sell and deliver marijuana, the trial court did not err in the sentencing phase of defendant's trial by considering as aggravating factors that the offense was committed for pecuniary gain and that the offense involved an unusually large quantity of contraband. *S. v. Thobourne*, 584.

In a prosecution for possession with intent to sell and deliver marijuana, the trial judge erred in considering as aggravating factors that the defendant did not at any time render assistance to the arresting officer or the district attorney and that the defendant did not offer aid in the apprehension of other felons. *Ibid.*

Where defendant pled guilty to voluntary manslaughter and felonious child abuse, the trial court did not err in considering the aggravating aspect of defendant's inability to control himself as well as the mitigating aspect. *S. v. Ahearn*, 44.

In a felonious child abuse case, the court erred in considering the "heinous offense" factor in aggravation and in considering the "very young or infirmed victim" factor in aggravation, and it further erred in a voluntary manslaughter case by considering the "heinous offense" factor in aggravation. *Ibid.*

The possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in an armed robbery case, and if the pecuniary gain at issue in a case is inherent in the offense, then that pecuniary gain should not be considered an aggravating factor. *S. v. Morris*, 157.

Fourteen years is not only the minimum sentence but is also the presumptive sentence for robbery with a firearm. *Ibid.*

§ 138.7. Particular Matters Considered in Determining Severity of Sentence

The trial court did not err in permitting defendant's prior convictions to be shown at his sentencing hearing by the reading into evidence of his U.S. Department of Justice record. *S. v. Massey*, 704.

§ 138.11. Different Punishment on New or Second Trial

The fact that defendant's resentence was similar to his original sentence was not error. *In re Gallimore*, 338.

There was no merit to defendant's argument that his sentence imposed by the superior court on his *de novo* appeal had a chilling effect on his right to appeal and right to a trial by jury. *S. v. Burbank*, 543.

§ 139. Sentence to Maximum and Minimum Terms

Sentences of "ten years nor more than ten years" and "forty to forty years" were proper under G.S. 15A-1351(b). *In re Gallimore*, 338.

CRIMINAL LAW — Continued

§ 143. Revocation of Probation

A probation violation in April was not waived because a violation order was not filed until October. *S. v. Seay*, 667.

§ 143.1. Manner of Revocation Proceeding

A preliminary hearing was not required before defendant's probation could be revoked. *S. v. Seay*, 667.

§ 143.5. Competency of Evidence at Revocation of Probation Hearing

The impeachment of defendant at his probation revocation hearing by a crime for which he had been pardoned was not reversible error where the court was sitting without a jury. *S. v. Seay*, 667.

§ 143.6. What Constitutes Violation of Probation Conditions

Where the evidence showed that defendant violated a condition of his suspended sentence that he not communicate with a sheriff's department by telephone without justifiable reason, the court could revoke defendant's suspended sentence regardless of whether his conduct violated a criminal statute. *S. v. Camp*, 38.

§ 143.8. Subsequent Prosecution for Conviction of Crime

The court could properly revoke defendant's probation based on evidence presented in a trial in which defendant was convicted and appealed. *S. v. Ginn*, 363.

Where defendant was placed on supervised probation for one year and his prison sentence was suspended for three years, his probation could not be revoked because of his convictions of misdemeanor breaking and entering and larceny which occurred after the probation period had expired, but the court could revoke the suspension of defendant's sentence on the basis of such convictions. *S. v. Cannady*, 212.

§ 143.9. Probation; Failure to Report to Probation Officer; Change of Residence

The evidence was sufficient to support findings that defendant violated the conditions of his probation by failing to report to his probation officer, changing his place of residence without approval, and failing to remain within the court's jurisdiction. *S. v. Seay*, 667.

§ 143.13. Appeal from Order of Probation Revocation

A motion for an appearance bond during an appeal of a probation extension order did not have to be in writing, and it was not required that the bond be set by the same judge who signed the appeal entry. *S. v. Seay*, 667.

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

A defendant is not entitled to appellate review, as a matter of right, of the court's acceptance of his guilty plea. *S. v. Ahearn*, 44.

§ 158. Conclusiveness and Effect of Record and Presumptions as to Matters Omitted

Where there was nothing in the record to indicate that the superior court had jurisdiction to rule on a defendant's motion to quash a count of his bill of indictment, a misdemeanor, the Court of Appeals had no jurisdiction to hear the appeal. *S. v. Hickerson*, 356.

§ 159.1. Form and Requisites of Record; Transcript of Evidence

Where defendant failed to follow either Rule 9(c)(1), Rule 9(b)(3) or Rule 28(b)(4) when he filed a record on appeal which contained a verbatim reproduction of the

CRIMINAL LAW — Continued

trial transcript, and where one of the defendant's assignments of error did not appear to be based on any exceptions as provided by Rules 10(b)(1) and 10(a), his appeal was subject to dismissal. *S. v. Briley*, 335.

Because of defendant's failure to observe the requirements of G.S. 1A-1, Rule 9(c)(1) and G.S. 1A-1, Rule 28(b)(4) which deal with filing a stenographic transcript of the trial proceedings in lieu of a narration of the evidence, defendant's appeal was subject to dismissal. *S. v. Edmonds*, 359.

§ 163. Exceptions and Assignments of Error to Charge; Necessity of

The jury instruction conference required by Rule 21 of the General Rules of Practice for the Superior and District Courts need not be on the record. *S. v. Thompson*, 425.

Where defendant failed to object to a disputed portion of a jury charge, he did not properly preserve his assignment of error under App. Rule 10(b)(2). *S. v. Bennett*, 418.

Where G.S. 15A-1231(b) and (d) clearly contemplate that defendant was required to request an instruction conference as a prerequisite to assigning error to the trial court's failure to conduct one, pursuant to the provisions of G.S. 7A-34, Rule 21 of the Rules of Practice of the Superior and District Courts, which is inconsistent with the statute, must give way to the provisions of the statute. *Ibid.*

Defendant was given a sufficient opportunity to object to the jury instructions outside the hearing of the jury. *Ibid.*

Appellate Rule 10(b)(2) barred appellate review of jury instructions to which no objection was made before the jury retired where the alleged errors did not relate to matters affecting fundamental or substantial rights. *S. v. Thompson*, 425.

Where defendant was given an opportunity by the trial judge specifically to object to the charge and he did not object thereto and state distinctly his objections before the jury began its deliberations, defendant could not, on appeal, assign as error any portion of the jury charge. *S. v. Goodwin*, 662.

Defendant did not properly preserve his exceptions to the trial judge's charge to the jury for appeal. *S. v. Patterson*, 650.

§ 166. The Brief

Defendant's appeal is subject to dismissal where defendant filed a stenographic transcript of the evidence at trial but failed to attach as an appendix to his brief those portions of the transcript essential to an understanding of the questions presented. *S. v. Greene*, 360.

Defendant's appeal is subject to dismissal where defendant filed the stenographic transcript of the evidence at trial but failed to reproduce verbatim and attach as an appendix to his brief those portions of the transcript necessary to understand the questions raised. *S. v. Pearson*, 87, and *S. v. Nickerson*, 236.

§ 175.2. Review of Findings and Discretionary Orders During Trial

There was no merit to defendant's contention that the trial court erred in refusing to grant a recess to enable unidentified defense witnesses additional time in which to appear to testify. *S. v. Thobourne*, 584.

§ 178. Law of the Case

A Court of Appeals decision finding that a motion to suppress was properly denied as to a confession used in the prior case became the law of the case as to the confession used in the present case. *S. v. Washington*, 490.

DEEDS

§ 16.2. Conditions Subsequent

The grantees of property did not breach a fee on condition subsequent requiring them to support, maintain, clothe, feed and provide shelter to the grantors for the remainder of their lives. *Hooper v. Hooper*, 309.

DIVORCE AND ALIMONY

§ 16.9. Amount and Manner of Payment

An award of alimony of $30.00 per week for a six month period constituted a proper award of lump sum alimony. *Whitesell v. Whitesell*, 552.

§ 19.5. Effect of Separation Agreements and Consent Decrees

Where defendant moved for an increase in support payments alleging a change of circumstances, the court erred in denying defendant's motion by ruling "as a matter of law" that a prior order was "not an order that may be modified so as to permit an increase in the amount of alimony." *Cecil v. Cecil*, 208.

§ 24.1. Determining Amount of Support

Plaintiff presented sufficient evidence to support the trial court's determination of defendant's ability to pay child support as required by G.S. 50-13.4(c) and to support the court's temporary award of $500.00 per month and its later permanent award of $1,100.00 per month. *Peters v. Elmore*, 404.

The trial court erred in awarding monthly child support in an amount greater than that contained in plaintiff's prayer for relief in the complaint. *Ibid.*

There is no error in requiring defendant to pay one sum in child support for all children rather than having the support payments allotted among the children. *Christie v. Christie*, 230.

§ 24.4. Enforcement of Support Orders

The trial court erred in finding defendant in contempt of court for filing a petition for partition or sale of real property, which the plaintiff occupied under a 13 March 1981 order giving her possession of the real estate for support of the child born of plaintiff and defendant, since G.S. 50-13.4(e) did not empower the courts with authority to award the possession of real property as a part of the support for a minor child until after 18 June 1981. *Hardee v. Hardee*, 465.

Temporary resumption of a marital relationship did not require the trial court to grant a motion, pursuant to G.S. 1A-1, Rule 60(b)(4), to have a previous judgment ordering payment of child support declared void. *Walker v. Walker*, 485.

The trial court erred in ordering the defendant to pay one-half of the expenses of orthodontic care of his children pursuant to a separation agreement without finding that the plaintiff had an inadequate remedy at law. *Christie v. Christie*, 230.

§ 24.5. Modification of Support Order

Child support payments of $500.00 per month required by a temporary order could properly be increased by the trial court to $1,100.00 per month in its permanent order without a finding of changed circumstances. *Peters v. Elmore*, 404.

§ 27. Attorney's Fees and Costs

In an action to modify the child support provisions of a separation agreement, the court erred in awarding counsel fees to plaintiff. *Christie v. Christie*, 230.

Since the trial judge erred in holding the defendant in contempt for violation of an invalid order, the trial court also erred in awarding attorney's fees to plaintiff's attorney. *Hardee v. Hardee*, 465.

DURESS

§ 1. Generally

A note and deed of trust were not procured by fraud, duress or undue influence where plaintiffs executed them in consideration of defendant's agreement not to press legal claims for the male plaintiff's alleged mismanagement of defendant's stock account. *Howell v. Butler*, 72.

EMINENT DOMAIN

§ 2. Acts Constituting a "Taking"

Merely changing the location of the recreation area as a condition of approval of a subdivision plan does not amount to a taking so as to require compensation. *Messer v. Town of Chapel Hill*, 692.

§ 2.2. "Taking" Through Closing of Road or Construction of Highway or Street

In a proceeding to condemn land for highway purposes, defendant landowners were not entitled to compensation for interference with access to their remaining property because some impairment of access occurred during construction of the highway. *Board of Transportation v. Bryant*, 256.

§ 2.5. Right-of-Way Agreement

A right-of-way agreement did not create a right of direct access to a ramp leading to an interstate highway but required only an indirect access to the ramp. *Board of Transportation v. Bryant*, 256.

§ 5.1. Amount of Compensation Where Only Part of Land is Taken

A condemned parcel of land was a separate tract and not just a portion of an entire tract of three parcels purchased by the owners, and the amount of damages was the fair market value of the condemned property at the time of the taking. *City of Winston-Salem v. Davis*, 172.

§ 6.1. Evidence of Value at Prior Date

Evidence of the purchase price of an entire tract of land was relevant to the value of a condemned parcel of that land. *City of Winston-Salem v. Davis*, 172.

§ 6.2. Evidence of Value of Property in Vicinity

An expert witness was properly permitted to state his opinion of the value of condemned land based on comparable sales of other vacant lots. *City of Winston-Salem v. Davis*, 172.

§ 6.4. Evidence of Value

In an action to condemn land for a highway right-of-way, evidence of damages resulting from water seepage caused by construction of the highway was inadmissible to establish severance damages to the remaining portions of the landowners' property. *Department of Transportation v. Bragg*, 344.

EMINENT DOMAIN — Continued

§ 6.7. Testimony as to Uses of Land

The cost of improvements on a tract of land was not relevant where the improvements were not on the condemned parcel but were exclusively on a larger parcel. *City of Winston-Salem v. Davis*, 172.

The trial court properly excluded evidence concerning the owners' use of the condemned property for billboard advertising. *Ibid.*

§ 11. Report of Appraisers, Confirmation, and Exceptions

In a condemnation action defendants waived their right to raise an issue based on inadequate notice of the commissioners' report on appeal. *City of Raleigh v. Martin*, 627.

In a condemnation action, absent insufficient notice of proceedings before the clerk, an appealing party must file timely exceptions to the commissioners' report to preserve their right to appeal. *Ibid.*

G.S. 40-20, which guarantees the right to have a jury determine the amount of damages in a condemnation proceeding, does not override the requirement of G.S. 40-19 that exceptions be filed within 20 days of the commissioners' report. *Ibid.*

In an action concerning a condemnation proceeding, the trial court did not err in refusing to allow a defendant to testify or to have his proffered testimony which explained defendants' reason for not giving notice of hearing on appeal summarized for the record. *Ibid.*

ESTOPPEL

§ 4.7. Sufficiency of Evidence of Equitable Estoppel

The trial court erred in directing a verdict on the issue of equitable estoppel for defendant at the close of plaintiff teacher's evidence. *Meacham v. Board of Education*, 381.

EVIDENCE

§ 12. Communications Between Husband and Wife

Testimony by defendant's estranged wife concerning the relationship and transactions between the witness and plaintiff's ward and between defendant and the ward did not violate the husband-wife privilege. *Ashley v. Delp*, 608.

§ 14. Communications Between Physician and Patient

Decedent waived the physician-patient privilege by his execution of an application for life insurance containing an authorization for any licensed physician to give information concerning his health to defendant insurer. *Wright v. American General Life Ins. Co.*, 591.

§ 24. Depositions

The trial court properly admitted the deposition of a psychiatrist who had treated decedent in a hospital in Virginia. *Wright v. American General Life Ins. Co.*, 591.

§ 29.1. Letters

The trial court properly excluded a letter which had not been authenticated. *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 26.

EVIDENCE – Continued

§ 29.3. Hospital Records

Admission and discharge summaries relating to decedent's treatment at a Virginia hospital were properly admitted under the business records exception to the hearsay rule. *Wright v. American General Life Ins. Co.*, 591.

§ 32.2. Application of Parol Evidence Rule

Parol evidence regarding an alleged oral promise by defendant to grow plaintiff's full tobacco allotment was inadmissible to vary the terms of the parties' written agreement. *Lineberry v. Lineberry*, 204.

§ 32.7. Ambiguities in Writings

A provision in a lease of plaintiff's tobacco allotment to defendant as to permitted uses of any unused portion of the tobacco quota was unambiguous, and parol evidence was not admissible to explain such provision. *Lineberry v. Lineberry*, 204.

§ 33.1. Writings as Hearsay

Even if a letter quoting prices for the replacement of computer equipment destroyed in a fire was hearsay, admission of the letter was not prejudicial error in this nonjury trial. *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 26.

§ 34.1. Admissions Against Interest

Statements in hospital records attributed to plaintiff relating to decedent's drinking habits were admissible as admissions of a party. *Wright v. American General Life Ins. Co.*, 591.

§ 43. Evidence as to Sanity

The admission of opinion testimony as to the competency of plaintiff's ward on the date she executed a deed by witnesses who had not had contact with the ward in close proximity to execution of the deed was not prejudicial error where such testimony was merely cumulative. *Ashley v. Delp*, 608.

§ 50. Testimony by Medical Experts

Statements in hospital records attributed to plaintiff's father were admissible for the purpose of showing the basis of a medical witness's diagnosis. *Wright v. American General Life Ins. Co.*, 591.

EXECUTORS AND ADMINISTRATORS

§ 12.1. Sales Under Power in Will

The right of first refusal to purchase testator's property given to his children by his will was not denied by the executor's method of sale of testator's property. *Smith v. Central Carolina Bank*, 712.

FALSE PRETENSE

§ 1. Nature and Elements of the Crime

Where defendant could have been convicted of obtaining property in return for worthless checks, worthless checks, or false pretense, it was not error for the State to elect to prosecute defendant under the false pretense statute since a single act or transaction may violate different statutes. *S. v. Freeman*, 84.

FRAUD

§ 3.3. Concealment

In an action to recover damages based upon defendant mobile home dealer's failure to inform plaintiff purchaser of the necessity for a health permit before the mobile home could be used as a dwelling, the trial court properly failed to instruct on the law of contracts. *Williams v. East Coast Sales*, 700.

GAMBLING

§ 3. Lotteries

Evidence was sufficient to be submitted to the jury on whether possession of a piece of cardboard with numbers on it came within the prohibition of G.S. 14-290 dealing with lotteries. *S. v. Simmons*, 287.

GUARANTY

§ 1. Generally

Where an agreement established an absolute promise by defendant as guarantor, independent of the obligation of the principal debtor, reliance by plaintiff upon the guaranty in selling to the principal debtor was immaterial to defendant's obligation to pay the account upon the failure of the principal debtor to pay the debt. *Exxon Chemical Americas v. Kennedy*, 90.

Where a guaranty agreement by its express terms created a "primary obligation" from defendant to plaintiff, the fact that the principal debtor had been discharged in bankruptcy from the obligation which the guaranty "stood behind" did not terminate any liability he might have had as guarantor. *Ibid.*

§ 2. Actions to Enforce

An allegation that a bankruptcy court ordered the principal debtor, as a condition of discharge, to pay plaintiff 15% of its claim did not entitle defendant guarantor to a set-off of that amount. *Exxon Chemical Americas v. Kennedy*, 90.

HIGHWAYS AND CARTWAYS

§ 5.1. Abutting Owner's Right of Access

In a proceeding to condemn land for highway purposes, defendant landowners were not entitled to compensation for interference with access to their remaining property because some impairment of access occurred during construction of the highway. *Board of Transportation v. Bryant*, 256.

§ 5.2. Actions to Enforce Right-of-Way Agreements

A right-of-way agreement did not create a right of direct access to a ramp leading to an interstate highway but required only an indirect access to the ramp. *Board of Transportation v. Bryant*, 256.

HOMICIDE

§ 16. Dying Declarations

Statements made by deceased were properly admitted as dying declarations. *S. v. Richardson*, 558.

HOMICIDE — Continued

§ 19.1. Evidence of Character or Reputation

Evidence that deceased had a reputation for violence was properly excluded where there was no evidence that defendant acted in self-defense. *S. v. Matthis*, 233.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

Evidence showing that defendant pointed a gun at deceased which she did not know would fire but that the gun did in fact fire and cause the death of the deceased was evidence from which the jury could find defendant guilty of involuntary manslaughter. *S. v. Matthis*, 233.

§ 28.3. Aggression or Provocation by Defendant; Use of Excessive Force

The trial court did not err in instructing that defendant must not have used "more force than reasonably appeared to be necessary to the defendant at the time" without the additional phrase "to protect himself from death or great bodily harm." *S. v. Vaughan*, 318.

The trial court's instruction on the imperfect right of self-defense was sufficient. *Ibid.*

§ 30.3. Guilt of Manslaughter

The trial court erred in failing to instruct on involuntary manslaughter where there was evidence from which the jury could find that defendant had no intent to kill or inflict serious bodily injury. *S. v. Best*, 96.

HUSBAND AND WIFE

§ 3.1. Agency of One Spouse for the Other

The trial court erred in ordering that the claim against defendant wife be involuntarily dismissed since there was evidence sufficient to enable a trier of fact to find that an agency relationship existed. *Dubose Steel v. Faircloth*, 722.

§ 24.1. Alienation; Defenses

In neither alienation of affections nor criminal conversation is the consent of the wife a defense to recovery by the plaintiff of the damages which he had sustained as the result of the wrongful conduct of the defendant. *Scott v. Kiker*, 458.

§ 25. Alienation; Competency of Evidence

In an action for alienation of affections and criminal conversation, the evidence was sufficient to withstand the motion for a directed verdict. *Scott v. Kiker*, 458.

§ 26. Alienation; Damages and Instructions

Where a jury found both actual and punitive damages in an action for alienation of affections and criminal conversation, the trial judge's failure to instruct the jury that they must find actual damages before awarding punitive damages was not prejudicial error. *Scott v. Kiker*, 458.

In actions for criminal conversation and alienation of affections, compensatory damages may not be based on pecuniary loss. *Ibid.*

In an action for alienation of affections, the trial judge's instructions concerning the need to find circumstances of aggravation in addition to the malice implied by law in order to award punitive damages were correct. *Ibid.*

HUSBAND AND WIFE — Continued

§ 28. Competency and Sufficiency of Evidence

Since plaintiff's ex-wife was not a party to an action for criminal conversation and alienation of affections, nothing prohibited plaintiff from testifying about her adultery. *Scott v. Kiker*, 458.

Plaintiff's ex-wife could have prevented plaintiff from testifying about a private conversation under G.S. 8-56; however, defendant waived his privilege when he failed to object to the testimony. *Ibid.*

In neither alienation of affections nor criminal conversation is the consent of the wife a defense to recovery by the plaintiff of the damages which he had sustained as the result of the wrongful conduct of the defendant. *Ibid.*

§ 29. Criminal Conversation; Damages and Instructions

Infidelity, *per se*, does not prevent plaintiff from collecting damages for defendant's criminal conversation but is a factor to reduce plaintiff's damages. *Scott v. Kiker*, 458.

INDEMNITY

§ 1. Nature and Requisites of Agreement

In an action in which a negligent driver was driving a tractor-trailer leased to his employer (Metler) by defendant (Coyote), plaintiff was not subrogated to Metler's contractual right of indemnity when it paid a claim under its insurance contract, and a contract of indemnity could not be implied in law between plaintiff and Coyote. *Reliance Ins. Co. v. Morrison*, 524.

INDICTMENT AND WARRANT

§ 5. Validity of Proceedings Before Grand Jury as Affected by Return of Bill of Indictment

G.S. 15A-630 did not require that a defendant represented by counsel or his counsel be served with notice of the return of a true bill of indictment. *S. v. Ginn*, 363.

§ 8.4. Election Between Offenses or Counts

Where defendant could have been convicted of obtaining property in return for worthless checks, worthless checks, or false pretense, it was not error for the State to elect to prosecute defendant under the false pretense statute since a single act or transaction may violate different statutes. *S. v. Freeman*, 84.

INFANTS

§ 18. Sufficiency of Evidence in Juvenile Hearings

Noncriminal acts which constitute a willful violation of the terms of a court order by an undisciplined juvenile cannot be grounds for an adjudication that the juvenile is delinquent. *In re Jones*, 547.

INSANE PERSONS

§ 1.2. Findings Required by Involuntary Commitment Statutes; Sufficiency of Evidence to Support Findings

In an involuntary commitment proceeding, there was competent evidence to support a finding that respondent was "dangerous to herself." *In re Medlin*, 33.

INSURANCE

§ 18.1. Avoidance of Policy for Misrepresentations as to Health and Physical Condition

The evidence was sufficient to support the jury's finding that decedent had misrepresented to defendant insurer in his life insurance application that he was not an excessive user of alcohol. *Wright v. American General Life Ins. Co.*, 591.

Defendant insurer did not waive a misrepresentation in decedent's life insurance application as to his excessive use of alcohol by its failure to make inquiries of decedent's doctors concerning his alcohol use. *Ibid.*

§ 74. Actions on Collision and Upset Policies

In an action by an insured against his insurance company for damages sustained in a chain collision, it was error for the insurance company to subtract from defendant's damages two deductibles, one for the collision between plaintiff and the car in front of him and one for the collision between plaintiff and the car behind him. *Hillman v. United States Liability Ins. Co.*, 145.

Summary judgment was properly entered for defendant insurer on the issue of punitive damages for defendant's failure to pay a collision loss claim under plaintiff's automobile insurance policy where plaintiff failed to present competent evidence to support his allegation of fraudulent conduct. *Seay v. Allstate Insurance Co.*, 220.

§ 79. Liability Insurance; Inception and Termination of Coverage

Where defendant purchased a motor vehicle for his own exclusive possession and use but registered legal title in the name of his son without the son's knowledge, defendant had an equitable interest in the vehicle which sufficed to make him an "owner" within the coverage intent of an owner's liability policy issued to defendant by plaintiff insurer. *Ohio Casualty Ins. Co. v. Anderson*, 621.

§ 112. Subrogation of Insurer

In an action in which a negligent driver was driving a tractor-trailer leased to his employer (Metler) by defendant (Coyote), plaintiff was not subrogated to Metler's contractual right of indemnity when it paid a claim under its insurance contract, and a contract of indemnity could not be implied in law between plaintiff and Coyote. *Reliance Ins. Co. v. Morrison*, 524.

§ 136. Actions on Fire Policies

Even if a letter quoting prices for the replacement of computer equiment destroyed in a fire was hearsay, admission of the letter was not prejudicial error in this nonjury trial. *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 26.

A tax listing of plaintiff's personal property over six months after a fire loss was not relevant to the value of plaintiff's property at the time of the fire. *Ibid.*

The evidence in plaintiff's action against defendant insurer to recover the value of computer equipment destroyed in a fire was sufficient to overcome defendant's motions to dismiss. *Ibid.*

§ 147. Aircraft Insurance

A genuine issue of material fact was presented as to whether plaintiff "had charge of" an airplane which was damaged by plaintiff's agent so as to come within an exclusion of coverage by an aircraft liability policy for damaged property which the insured "has charge of." *Godwin Sprayers v. Utica Mutual Insurance Co.*, 497.

INTEREST

§ 2. Time and Computation

The trial court properly allowed interest on plaintiff's recovery against defendant insurer for computer equipment destroyed in a fire from the date defendant breached its obligation to pay plaintiff's claim within 60 days after the filing of a proof of loss. *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 26.

JUDGES

§ 5. Disqualification of Judges

The trial judge did not err in failing to recuse himself before signing an order denying defendant's motions to set aside an entry of default, denying defendant relief from child custody and support orders, finding defendant in contempt for failure to comply with a support order, and removing himself from presiding over hearings on defendant's motions to reduce child support because of changed circumstances and to seek clarification of visitation rights. *Peters v. Elmore*, 404.

JUDGMENTS

§ 2.1. Consent to Judgment Rendered Out of Term and Out of County

An order denying defendant's pretrial motion to suppress seized evidence was a nullity where it was signed after the close of the session at which the motion was heard and was signed outside of the county and district in which defendant was being tried. *S. v. Boone*, 730.

§ 36.2. Persons Regarded as Privies Generally

The minor plaintiff in an action to establish paternity was estopped by a judgment entered in a prior action instituted by the plaintiff's mother finding that defendant was not the father of the plaintiff in this action. *Settle v. Beasley*, 735.

§ 51.1. Lack of Jurisdiction as Defense to Judgment

Plaintiff's 1971 judgment for alimony arrearages was not entitled to full faith and credit where her "Exhibit of Service" was an envelope which indicated that two notices were left at the address on the envelope and that the letter was returned to the sender, marked "unclaimed." *Boyles v. Boyles*, 389.

JURY

§ 5. Excusing of Jurors

The female defendant failed to show that she was prejudiced by the court's release of twelve women and ten men from the jury panel prior to trial where the jury which was impaneled contained only two women. *S. v. Matthis*, 233.

§ 7.9. Prejudice and Bias; Preconceived Opinions

Trial court did not err in denying defendant's challenge for cause of a prospective juror who testified to having avidly followed the case in the media. *S. v. Richardson*, 558.

LARCENY

§ 1. Definition; Elements of Crime

Where defendant was charged with felonious breaking or entering, felonious larceny, felonious receipt of stolen property and felonious possession of stolen prop-

LARCENY — Continued

erty, and the trial judge consolidated the breaking and entering case with the larceny case for sentencing and imposed a separate sentence in the possession case, the case must be remanded for the judge to enter sentence on the breaking and entering and either the larceny or possession case. *S. v. Rouse*, 500.

§ 7.4. Possession of Stolen Property

An inference of defendant's guilt of larceny under the doctrine of possession of recently stolen property was not based upon an inference that defendant possessed the property and was proper. *S. v. Joseph and S. v. Whitt*, 436.

§ 8. Instructions Generally

Where the trial court had just fully instructed the jury on all the elements of larceny, there was no prejudicial error in the court's failure to repeat some of the elements in its further instructions. *S. v. Joseph and S. v. Whitt*, 436.

§ 8.1. Instructions as to Felonious Intent

In a prosecution for felonious breaking or entering and felonious larceny among other crimes, the trial judge's instruction to the jury that to convict defendant, they must find that defendant took the pistol without the prosecuting witness's consent and that at the time of the taking, defendant knew he was not entitled to take it, were complete and correct. *S. v. Rouse*, 500.

MASTER AND SERVANT

§ 48. Employers Subject to Act

The evidence supported the Commission's finding that defendant had four or more employees regularly employed at the same business or station when defendant was injured. *Durham v. McLamb*, 165.

§ 49. "Employees" Within the Meaning of the Act

In a workers' compensation case, the evidence supported the Commission's holding that an employer-employee, not an independent contractor, relationship existed between plaintiff and defendant. *Durham v. McLamb*, 165.

§ 67.1. Other Injuries or Disabilities

Under G.S. 97-53(28), 90 decibels, A scale, is a noise level that plaintiff has the burden of showing in order to recover for an "occupational loss of hearing." *McCuiston v. Addressograph-Multigraph Corp.*, 76.

§ 68. Occupational Diseases

Plaintiff was disabled when he was forced to retire from work because of byssinosis on 1 March 1976, not when he was informed by a doctor in 1974 that he should file a claim for byssinosis, and his claim filed on 24 February 1978 was thus not barred by the two-year statute of limitations. *Dowdy v. Fieldcrest Mills*, 696.

The evidence supported findings by the hearing commissioner that plaintiff has not suffered a compensable occupational disease in that plaintiff's work environment did not cause or exacerbate her bronchial condition and that plaintiff is not disabled. *Fann v. Burlington Industries*, 512.

The medical evidence supported a determination by the Industrial Commission that plaintiff suffers from asthma which was exacerbated by exposure to conditions of her employment but that she has no compensable occupational disease since she did not retain any permanent functional pulmonary impairment after she quit her job. *Thompson v. Burlington Industries*, 539.

MASTER AND SERVANT — Continued

§ 74. Disfigurement

The Industrial Commission erred in awarding plaintiff compensation for permanent scars on plaintiff's leg. *Liles v. Charles Lee Byrd Logging Co.*, 330.

§ 85. Jurisdiction, Powers and Functions of Industrial Commission

The Industrial Commission did not err in dismissing plaintiff's claim due to lack of jurisdiction under G.S. 97-24(a) where plaintiff filed a claim for compensation more than two years after he experienced an accident. *Perdue v. Daniel International*, 517.

§ 89.3. Joinder of Employer or Insurer

The law of Virginia was to be applied with regard to whether a third party could defeat a negligent employer's subrogation rights when the injured party sued the third party at common law after recovering worker's compensation benefits from his employer in Virginia. *Leonard v. Johns-Manville Sales Corp.*, 454.

§ 91.1. What Constitutes Filing of Claim

Under G.S. 97-24(a) an employee is required to file a claim with the Industrial Commission within two years after his accident regardless of whether he has become aware of his disorder. *Perdue v. Daniel International*, 517.

§ 94.4. New or Additional Evidence

The Industrial Commission did not err in denying plaintiff's motion to present newly discovered evidence. *Thompson v. Burlington Industries*, 539.

§ 108.1. Effect of Misconduct on Right to Unemployment Compensation

Claimant was properly denied unemployment compensation where he was discharged for misconduct connected with his work in that he had more than seven unexcused absences from work within a 180 day period in violation of an employer's work rule. *In re Collins v. B&G Pie Co.*, 341.

MUNICIPAL CORPORATIONS

§ 29. Nature and Extent of Municipal Police Power

Merely changing the location of the recreation area as a condition of approval of a subdivision plan does not amount to a taking so as to require compensation. *Messer v. Town of Chapel Hill*, 692.

§ 30.3. Validity of Ordinances

The municipal subdivision ordinance under which defendant failed to accept plaintiff's complete subdivision plan was valid, and defendant's actions in rejecting plaintiff's plan were within the grant of authority of the ordinance. *Messer v. Town of Chapel Hill*, 692.

§ 30.8. Construction and Interpretation of Zoning Regulations

Wording in both a municipal ordinance and G.S. 160A-372 that a recreation area will serve "residents of the immediate neighborhood within the subdivision" means that the area is meant primarily to serve residents of the immediate neighborhood. *Messer v. Town of Chapel Hill*, 692.

§ 30.15. Nonconforming Uses Generally

The trial court had statutory authority to grant injunctive relief and an order of abatement for violations of a county zoning ordinance although the ordinance itself did not provide specifically for such relief. *New Hanover County v. Pleasant*, 644.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics

The entry of separate judgments against defendant for possession with intent to sell and sale of marijuana was proper. *S. v. Stoner*, 656.

§ 4. Sufficiency of Evidence and Nonsuit

The evidence was sufficient to go to the jury on the charge of possession with intent to sell and deliver marijuana. *S. v. Thobourne*, 584.

The evidence was sufficient to withstand defendant's motion to dismiss on the charge of possession of a controlled substance with intent to sell or deliver in violation of G.S. 90-95. *S. v. Casey*, 99.

The trial court did not err in allowing exhibits to be introduced into evidence as units of methaqualone where only three tablets of 5,000 tablets were analyzed. *S. v. Wilhelm*, 298.

§ 4.2. Sufficiency of Evidence in Cases Involving Sale to Undercover Narcotics Agent; Defense of Entrapment

The State's evidence was sufficient to support conviction of defendant for possession of marijuana with intent to sell and the sale and delivery of marijuana. *S. v. Ginn*, 363.

NEGLIGENCE

§ 18. Contributory Negligence of Minors

Trial court erred in entering summary judgment for defendants on the ground of contributory negligence by the nine-year-old plaintiff. *Sharpe v. Quality Education, Inc.*, 304.

§ 57.7. Water, Ice or Snow on Floor

In a negligence action where plaintiff fell on ice outside defendant's shop, defendant committed no breach of duty of care owed to plaintiff since the fact that the steps and patio were icy was obvious to plaintiff. *Southerland v. Kapp*, 94.

PARENT AND CHILD

§ 1. Creation and Termination of Relationship

Respondent's willful failure to support his child or to visit him during an eleven year period was sufficient to support the judge's finding of neglect. *In re Apa*, 322.

PARTITION

§ 12. Partition by Exchange of Deeds

A partition deed conveying property to a tenant in common and his wife did not create a tenancy by the entirety or convey any interest in the property to the wife. *Brown v. Brown*, 719.

PARTNERSHIP

§ 9. Dissolution of Partnership

An agreement between a partnership of accountants and a withdrawing partner providing for a division of fees obtained by the withdrawing partner from former clients of the partnership was supported by consideration, did not violate

PARTNERSHIP — Continued

statutes prohibiting the disclosure of information furnished in connection with the preparation of a tax return, and did not violate provisions of the CPA Code of Ethics prohibiting the disclosure of confidential information. *Dixon, Odom & Co. v. Sledge*, 280.

PRINCIPAL AND AGENT

§ 4. Proof of Agency Generally

The trial court erred in ordering that the claim against defendant wife be involuntarily dismissed since there was evidence sufficient to enable a trier of fact to find that an agency relationship existed. *Dubose Steel v. Faircloth*, 722.

PROCESS

§ 3. Time of Service

The trial judge erred in dismissing plaintiff's claims against defendant as being commenced after the running of the three year statute of limitations since the amended complaint related back to the issuance of the summons and the filing of the original complaint. *Jones v. Whitaker*, 223.

§ 14.3. Service of Process; Contacts Within this State; Sufficiency of Evidence

Defendant foreign corporation was engaged in substantial activity within this State so as to give the courts of this State personal jurisdiction over it under G.S. 1-75.4(1)(d) in an action to recover for goods sold to defendant, and defendant had sufficient minimum contacts with this State so that the exercise of jurisdiction over it did not violate due process. *Fiber Industries v. Coronet Industries*, 677.

PROPERTY

§ 4.2. Criminal Prosecutions for Wilful or Malicious Destruction of Property; Sufficiency of Evidence

Evidence that defendant set two fires in his jail cell of strips torn from the mattress was sufficient to support his conviction of felonious burning of personal property. *S. v. Jordan*, 527.

PROSTITUTION

§ 2. Prosecutions for Prostitution

Defendant's statements to a witness clearly constituted solicitation for prostitution when those words are given their ordinary meaning. *S. v. Haggard*, 727.

QUASI CONTRACTS AND RESTITUTION

§ 1.1. Effect of Express Contract

In an action which arose from plaintiff's furnishing architectural and engineering services for defendant, plaintiff's evidence clearly showed that an implied contract could have arisen between the parties. *John D. Latimer & Assoc. v. Housing Authority of Durham*, 638.

§ 2.1. Actions to Recover on Implied Contracts; Sufficiency of Evidence

In an action for recovery of architectural and engineering services, plaintiff's reliance on defendant's chief executive officer's authority to bind defendant was reasonable. *John D. Latimer & Assoc. v. Housing Authority of Durham*, 638.

QUASI CONTRACTS AND RESTITUTION — Continued

§ 2.2. Measure and Items of Recovery

In an action which arose from plaintiff's furnishing architectural and engineering services for defendant, there was a sufficient showing of benefit to defendant from plaintiff's work. *John D. Latimer & Assoc. v. Housing Authority of Durham*, 638.

§ 5. Particular Situations and Applications

The trial court erred in granting defendant's motion to dismiss since plaintiff's complaint set forth a cause of action for unjust enrichment. *Richardson v. Carolina Bank*, 494.

RAPE AND ALLIED OFFENSES

§ 19. Taking Indecent Liberties with Child

The taking of nude photographs of a child constituted indecent liberties with the child in violation of G.S. 14-202.1. *S. v. Kistle*, 724.

RECEIVING STOLEN GOODS

§ 1. Nature and Elements of Offense

Where defendant was charged with felonious breaking or entering, felonious larceny, felonious receipt of stolen property and felonious possession of stolen property, and the trial judge consolidated the breaking and entering case with the larceny case for sentencing and imposed a separate sentence in the possession case, the case must be remanded for the judge to enter sentence on the breaking and entering and either the larceny or possession case. *S. v. Rouse*, 500.

§ 4. Relevancy and Competency of Evidence

In a prosecution for felonious possession of stolen firearms, testimony by a witness that he had visited defendant's store to deliver a television set and to accompany a friend who wanted to pawn his sister's watch, and testimony by an undercover agent that defendant had sold a gun to him was relevant to prove defendant's motive for the crime, to establish a link between the witnesses and the defendant, and to show defendant's reason to believe that the firearms he possessed had been stolen. *S. v. Howell*, 184.

REFORMATION OF INSTRUMENTS

§ 7. Sufficiency of Evidence, Nonsuit and Directed Verdict

The trial court properly refused to rescind plaintiff's conveyance of a tract of land from herself as grantor to herself and defendant as grantees following a disputed marriage. *Presnell v. Presnell*, 314.

ROBBERY

§ 4.2. Common Law Robbery Cases Where Evidence Held Sufficient

The evidence in a prosecution for common law robbery was sufficient to withstand defendant's motion to dismiss. *S. v. Daniels*, 442.

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The State's evidence was sufficient for the jury in a prosecution of defendant for armed robbery of a victim who threw his duffle bag containing money at defendant in the course of an assault on him by defendant. *S. v. Richardson*, 558.

ROBBERY — Continued

§ 4.5. Cases Involving Aiders and Abettors Where Evidence Sufficient

The evidence was sufficient to support defendant's conviction of armed robbery as an aider and abettor. *S. v. Morris*, 157.

The State's evidence was sufficient for the jury to find that defendant aided and abetted an armed robbery by driving the getaway car. *S. v. Pryor*, 1.

§ 5.4. Instructions on Lesser Included Offenses and Degrees

The evidence in an armed robbery case concerning the use of a firearm was not conflicting so as to require instructions on the lesser included offenses of common law robbery and larceny. *S. v. Horne*, 576.

§ 6. Verdict and Judgment

Where defendant was charged in separate armed robbery indictments with taking guns and money belonging to the husband and jewelry belonging to the wife, the property was not taken from only one entity so as to constitute only a single offense of armed robbery. *S. v. Horne*, 576.

§ 6.1. Sentence

Where a defendant was charged with armed robbery, and upon a plea of guilty, the court conducted a sentencing hearing and entered a judgment containing a finding of four factors in mitigation and no factors in aggravation of punishment, the trial court did not err in ruling that a fourteen year term was required by G.S. 14-87(d) and could not be reduced by the mitigating factors recognized under the Fair Sentencing Act. *S. v. Leeper*, 199.

The possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in an armed robbery case, and if the pecuniary gain at issue in a case is inherent in the offense, then that pecuniary gain should not be considered an aggravating factor. *S. v. Morris*, 157.

Fourteen years is not only the minimum sentence but is also the presumptive sentence for robbery with a firearm. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 4. Process

The trial court erred in allowing one defendant's motion to dismiss for insufficient service of process in that the summons served on her stated her name as "Sherrie" instead of "Shirley." *Jones v. Whitaker*, 223.

§ 12. Defenses and Objections

The denial of defendant's Rule 12(b) motion to dismiss for insufficient service and lack of jurisdiction over the person was interlocutory and not immediately appealable. *Sigman v. R. R. Tydings, Inc.*, 346.

§ 15.2. Amendments to Conform to the Evidence or Proof

Where evidence of defendant's speeding in excess of 65 miles per hour was admitted at trial over defendant's general objection, and no objection was made on the ground that it was outside the issues raised by the pleadings, the issue of speeding was tried by the implied consent of the parties. *Harris v. Bridges*, 195.

§ 32. Use of Depositions in Court Proceedings

The trial court properly admitted the deposition of a psychiatrist who had treated decedent in a hospital in Virginia. *Wright v. American General Life Ins. Co.*, 591.

RULES OF CIVIL PROCEDURE — Continued

§ 41. Dismissal of Actions

The defendant erred in arguing that the trial judge erred in denying his "motion to dismiss pursuant to Rule 50," since in actions tried before a judge without a jury, a motion to dismiss is made pursuant to Rule 41(b). *Crump v. Coffey*, 553.

§ 42. Consolidation; Separate Trials

The severance of issues for separate trials is in the trial court's discretion. *Ashley v. Delp*, 608.

§ 54. Judgments

The trial court erred in awarding monthly child support in an amount greater than that contained in plaintiff's prayer for relief in the complaint. *Peters v. Elmore*, 404.

§ 56. Summary Judgment

The unpleaded affirmative defense that plaintiff was not licensed as a general contractor was deemed to be part of the pleadings where such defense was raised in a hearing on a motion for summary judgment. *Barrett, Robert & Woods v. Armi*, 134.

§ 56.3. Necessity for and Sufficiency of Supporting Material; Moving Party

In an action in which plaintiff challenged the assessment of inheritance taxes at an administrative hearing before the Secretary of Revenue, the trial court properly granted summary judgment for defendants on the issue of whether an order entitled "Administrative Hearing and Final Decision Entered by the Secretary of Revenue" was signed by Howard Coble before he resigned as Secretary of Revenue. *Ballinger v. Secretary of Revenue*, 508.

§ 56.4. Necessity for and Sufficiency of Supporting Material; Opposing Party

The trial court properly denied defendant's oral motion in open court that the trial court conduct an evidentiary hearing to determine whether the defendant's conduct amounted to an unwarranted refusal to pay plaintiff's insurance claim since plaintiff's supporting papers demonstrated his entitlement to attorney's fees, and since defendant failed to file any affidavits pertaining to additional factual matters other than those addressed in his pleadings. *Hillman v. United States Liability Ins. Co.*, 145.

Where the sole ground for recovery alleged in plaintiffs' complaint was that the final decision of the Secretary of Revenue concerning an inheritance tax assessment was not validly issued, and where defendant's verified answer and affidavit established that the decision was validly issued, no genuine issue as to any material fact existed since plaintiffs asserted no other grounds for recovery. *Ballinger v. Secretary of Revenue*, 508.

§ 60.2. Grounds for Relief from Judgment or Order

Defendant was guilty of inexcusable neglect in a child custody and support action and was therefore not entitled to have an entry of default entered against him set aside under Rule 60(b)(1). *Peters v. Elmore*, 404.

§ 60.4. Appeal from Judgment or Order

Defendants' appeal from an order setting aside a judgment and granting a new trial under Rule 60(b) was interlocutory and the appeal was premature. *Deal Construction Co. v. Spainhour*, 537.

SCHOOLS

§ 13. Principals and Teachers

The trial court erred in directing a verdict on the issue of equitable estoppel for defendant at the close of plaintiff teacher's evidence. *Meacham v. Board of Education*, 381.

SEARCHES AND SEIZURES

§ 1. Scope of Protection

Even if the judge had believed the testimony of defendant's witnesses that a nonconsensual search of defendant's cars and refrigerator had been made after SBI agents left to obtain a warrant, no evidence was found in the cars or refrigerator which could have been suppressed. *S. v. Wilhelm*, 298.

§ 4. Particular Methods of Search

Chemical tests performed on a car while it was impounded at a local garage after a search pursuant to a valid warrant, and after the search warrant had been returned, were admissible. *S. v. Warren*, 264.

§ 10. Search and Seizure on Probable Cause

Although defendant's behavior fit within the "drug courier profile," two agents could not have reasonably suspected the defendant of criminal activity based on the observed circumstances since the conduct was "too slender a reed" to support a seizure. *S. v. Casey*, 99.

§ 13. Search and Seizure by Consent

The evidence supported the trial court's finding that defendant voluntarily consented to the search of bags which he was carrying. *S. v. Casey*, 99.

The trial court did not err in denying defendant's motion to suppress evidence of a yellow towel and a shotgun found in the search of a silver-blue station wagon. *S. v. McMillian*, 396.

§ 15. Standing to Challenge Lawfulness of Search

Defendant had the requisite expectation of privacy so as to challenge the search of a car which was owned by defendant's sister and which was parked in front of defendant's apartment when he was arrested. *S. v. Warren*, 264.

§ 18. Consent Given by Owner of Vehicle

Defendant's motion to suppress the evidence seized from the trunk of his car on the grounds that he did not consent was properly denied by the trial court. *S. v. Weavil*, 708.

Where defendant assented to a series of requests by the officers, was not coerced, threatened or arrested, agreed to accompany the officers to an office, and was specifically informed that he was not under arrest, the evidence obtained during a subsequent search was not tainted by an unlawful seizure, despite the lack of reasonable suspicion on the part of the officers. *S. v. Casey*, 99.

§ 19. Validity of Warrant

Where defendant denied any interest, possessive or otherwise, in two motel rooms, he had no standing to challenge the validity of a search warrant or of the search itself. *S. v. Thobourne*, 584.

§ 20. Application for Warrant

A search warrant which was used to search a vehicle was sufficient. *S. v. Warren*, 264.

SEARCHES AND SEIZURES — Continued

§ 23. Cases Where Evidence of Probable Cause Sufficient

An officer's affidavit based upon information reported to him by other officers and by two robbery victims was sufficient to support a finding of probable cause for a warrant to search defendant's residence for items taken in the robbery. *S. v. Horne*, 576.

§ 43. Motions to Suppress Evidence

An order denying defendant's pretrial motion to suppress seized evidence was a nullity where it was signed after the close of the session at which the motion was heard and was signed outside of the county and district in which defendant was being tried. *S. v. Boone*, 730.

G.S. 15A-975 requires that a motion to suppress evidence on constitutional grounds be made prior to trial unless certain specified exceptions apply. *S. v. Simmons*, 287.

SPECIFIC PERFORMANCE

§ 3. Inadequacy of Remedy at Law

Plaintiff partnership was entitled to specific performance of an agreement with defendant withdrawing partner providing for the division of fees obtained by defendant from former clients of the partnership. *Dixon, Odom & Co. v. Sledge*, 280.

TAXATION

§ 25. Assessment and Levy of Ad Valorem Taxes Generally

A clerical error by a tax supervisor's office was an immaterial irregularity which did not invalidate the additional taxes levied on the property for past years to correct the error. *In re Nuzum-Cross Chevrolet*, 332.

§ 25.7. Factors Determining Market Value of Property Generally

In appraising the property of two railroads for ad valorem tax purposes by capitalizing income, the Property Tax Commission could properly (1) establish the income base to be capitalized by adding back to income the deferred income taxes which had been charged off as expenses; (2) use the last year's income as a starting point rather than an average of income for the past five years; (3) use the interest rate expressed on the face of a credit instrument in determining income rather than adjusting income to reflect the current market interest rates on such indebtedness; and (4) use a rate of return on equity capital calculated from the railroads' past earnings rather than an average rate of return for all railroads. *In re Southern Railway*, 119.

§ 25.8. Factors Determining Market Value of Property; Book Value

In determining the true value of two railroads' system properties for ad valorem tax purposes, the Property Tax Commission sufficiently considered the original cost and book value of the property in accordance with statutory provisions, although it gave little weight to such factors in its determination of true value. *In re Southern Railway*, 119.

§ 25.10. State Board of Equalization and Review

The Property Tax Commission did not merely review appraisals of the system properties of two railroads by the Department of Revenue for errors of law but properly complied with G.S. 105-342(d) by hearing evidence from both sides and making extensive findings of fact and conclusions. *In re Southern Railway*, 119.

TELECOMMUNICATIONS

§ 2. Liability for Failure or Delay in Delivering Messages

Plaintiffs' evidence was sufficient for the jury in an action to recover damages for defendant telephone company's alleged negligent delay in connecting plaintiffs with the local fire department when a fire broke out in their home. *Adams v. Carolina Telephone*, 687.

§ 5. Prosecution for Obscene or Threatening Calls

The statute making it unlawful to telephone another repeatedly "for the purpose of abusing, annoying, threatening, terrifying, harassing or embarrassing any person at the called number" is not unconstitutionally overbroad or vague and does not prohibit constitutionally protected speech. *S. v. Camp*, 38.

A warrant was sufficient to charge defendant with making repeated harassing telephone calls to another, and evidence that defendant made over 500 calls to a sheriff's department during a two-month period in which he used abusive language and made threats was sufficient to support his conviction of that crime. *Ibid.*

TRESPASS

§ 12. Nature and Elements of Criminal Trespass

Evidence was sufficient to charge the defendant with forcible trespass or trespass after being forbidden to do so. *S. v. McAlister*, 58.

The trial judge was correct not to charge the jury on trespass or forcible trespass because they are not lesser included offenses of attempted first-degree burglary. *Ibid.*

TRIAL

§ 3.1. Motions for Continuance; Discretion of Judge

In an action relating to the transfer of a deed where plaintiffs presented no evidence of the presence of fraud, mistake or undue influence at the execution of the deed, plaintiffs failed to show that the trial court abused its discretion in failing to continue the hearing of the case when one of their witnesses was unable to attend the trial. *Gibbs v. Gibbs*, 530.

§ 5. Course and Conduct of Trial Generally

Although some of the trial judge's actions and statements were ill-advised in the conduct of a trial involving a contract, there was no evidence that they were outcome determinative so as to constitute error. *Brenner v. School House, Ltd.*, 68.

§ 33. Statement of Evidence and Application of Law Thereto

It was not error for the trial judge to charge the jury that they must take the law as he gave it to them and to add that "what [both counsel] have told you is the law is not the law." *Brenner v. School House, Ltd.*, 68.

§ 58.3. Appellate Review; Conclusiveness of Findings

In an action in which plaintiff sought to have a constructive trust imposed on a piece of property or, alternatively, to have a deed from plaintiff to defendant declared void for lack of capacity in the grantor, the trial court's findings of fact and conclusions of law were supported by evidence in the record. *Gibbs v. Gibbs*, 530.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

Refusal by defendant manufacturer and defendant distributor to provide plaintiff with a list of the names, identification, manufacturer, and fair market value of parts for logging machines purchased by plaintiff did not constitute an illegal restraint of trade. *Angola Farm Supply v. FMC Corp.*, 272.

UNIFORM COMMERCIAL CODE

§ 13. Warranties; Particular Cases

There was no implied warranty of fitness of logging equipment by either the manufacturer or by a non-selling distributor. *Angola Farm Supply v. FMC Corp.*, 272.

§ 15. Exclusion or Modification of Warranties

The requirements for the exclusion of an implied warranty of merchantability were met by the manufacturer's written warranty in this case. *Angola Farm Supply v. FMC Corp.*, 272.

Plaintiff's unauthorized repairs of logging equipment voided the manufacturer's written warranty. *Ibid.*

§ 46. Public Sale of Collateral; Requirement of Commercial Reasonableness

Plaintiff creditor's sale of a repossessed car was commercially reasonable although plaintiff had earlier listed the price of the car at a higher amount than the actual sales price. *Don Jenkins & Son v. Catlette*, 482.

UTILITIES COMMISSION

§ 22. Power to Change Rates

A general rate hearing was not required in order for a final rate order to be amended. *State ex rel. Utilities Comm. v. Public Service Co.*, 448.

The Utilities Commission had authority under G.S. 62-80 to amend a prior rate order by reducing a gas company's rates to take into account the amortization of investment tax credit. *Ibid.*

A Utilities Commission order lowering a gas company's rates for future service because it had improperly calculated federal income tax expense in its prior rate order did not constitute retroactive rate making. *Ibid.*

§ 24. Rate Making in General; Just and Reasonable Return

It was not reversible error for the Utilities Commission to incorporate the increase it allowed in a fuel cost adjustment proceeding in the final order in a general rate proceeding. *State ex rel. Utilities Commission v. N.C. Textile Mfrs. Assoc.*, 240.

There is nothing in either G.S. 62-133(b)(1) or G.S. 62-133(c) which requires a finding that expenditures for construction work in progress will be used and useful within a reasonable time. *Ibid.*

The statute dealing with CWIP is constitutional. *Ibid.*

The Commission's adoption of the "peak and average" methodology for the allocation of production facility costs was not error. *Ibid.*

§ 38. Current and Operating Expenses

The Court's examination of the evidence led to the conclusion that a real effort was made by the Commission to properly match all items in a cost of service study

UTILITIES COMMISSION — Continued

associated with a coal fired unit by considering the revenues which the new unit would produce with the increased expenses caused by the unit. *State ex rel. Utilities Comm. v. N.C. Textile Mfrs. Assoc.*, 240.

§ 39. Taxes

The Commission's findings and conclusions that normalization, rather than the alternative rate making policy of flow-through, of the income tax effect of certain expenses is proper was supported by competent, material and substantial evidence. *State ex rel. Utilities Comm. v. N.C. Textile Mfrs. Assoc.*, 240.

WILLS

§ 1.1. Particular Types of Instruments Distinguished

Where a contract for the sale of realty provided that the seller would deed the property to plaintiff in case of the death of the buyer before execution of the deed, the fact that plaintiff's right to the property did not become fully vested until the buyer's death did not mean that the buyer had to execute an instrument which complied with requirements of a will in order to vest this right. *Marosites v. Proctor*, 353.

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§ 10. Attendance, Production of Documents, and Compensation

The trial court properly modified subpoenas duces tecum directing officials of television stations to produce copies and transcripts of certain videotaped news reports to require that only written transcripts be produced and to permit delivery of the transcripts without personal appearances by station officials. *S. v. Richardson*, 558.

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